COAG, DEMOCRACY AND THE AUSTRALIAN CONSTITUTION: YOU CAN CHOOSE TWO

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ABSTRACT

A ‘democratic deficit’ has been well identified in the operations of the Council of Australian Governments (COAG). This has previously been identified as a primarily political problem. However, perhaps there is more to the story. If COAG is fulfilling a constitutional role as well as a political role, the consequences of its democratic deficit could be far more wide-reaching, threatening the democratic integrity of the constitutional system. In order to determine whether this is the case, this thesis will do two things. First, it will establish whether COAG is a constitutional convention. If this is the case, COAG will be fulfilling a constitutional role and should be considered part of the constitutional framework. Second, this thesis will extrapolate what the consequences of the democratic deficit would be if COAG was a constitutional institution rather than a political one. Answers to these questions will be crucial in developing our system of government to accommodate both democracy and federalism. To do nothing would see democracy further sacrificed in the face of federalism.
ACKNOWLEDGEMENTS

The idea for this thesis began in 2007 and since that time, the idea that there may be a constitutional clash between two critical parts of the Constitution has grown into the work presented here. Special thanks in this effort go to my two supervisors, Professor John Williams and Associate Professor Alex Reilly. Both of your knowledge, experience, frank and fearless advice have been critical in turning an idea into the thesis it now is. I couldn’t have done it without you. Thanks also go to my external supervisor, employer, mentor and friend, Professor A.J Brown. Without your advice, patience, passion and knowledge of federalism this thesis would never have been. I would like to thank the Honourable Justice Tom Gray, the family of the late Doctor Howard Zelling AO CBE and the Faculty of the Professions at the University of Adelaide. The support of their scholarship programs is greatly appreciated. Finally, thanks go to my contemporaries in the Adelaide Law School PhD program: Gabrielle Appleby, Mark Giancaspro, Samaneh Hassanli, Adam Webster, Heath Evans, Renae Leverenz, Anna Olijnyk and Vanessa White. A supportive environment is crucial to the completion of a PhD and with all of you I couldn’t have asked for better colleagues.
DECLARATION

I certify that this work contains no material which has been accepted for the award of any other degree or diploma in my name, in any university or other tertiary institution and, to the best of my knowledge and belief, contains no material previously published or written by another person, except where due reference has been made in the text. In addition, I certify that no part of this work will, in the future, be used in a submission in my name, for any other degree or diploma in any university or other tertiary institution without the prior approval of the University of Adelaide and where applicable, any partner institution responsible for the joint-award of this degree.

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Mark Bruerton

Brisbane, January 2016
INTRODUCTION

A ‘democratic deficit’ occurs where the operations of an institution of government is undermining proper democratic practice. Such a deficit has been well identified in the operations of the Council of Australian Governments (COAG).\(^1\) To date, this has been identified as a primarily political problem. However, perhaps there is more to the story. If COAG is fulfilling a constitutional role, as well as a political role, the consequences of its democratic deficit could be far more wide reaching, compromising the democratic integrity of the constitutional system.

Democracy is one of the most cherished Australian values. For 144 years all Australian Parliaments have had at least one elected house. Yet it is possible that our system of government is not as democratic as we would like to believe. Perhaps other values, like federalism, are undermining democracy. In October 2005, an event occurred which exposed a fundamental clash of values within the Australian Constitution.

It began with a Council of Australian Governments (COAG) meeting in the previous month, ordinary in almost every way. The leaders of the States and Territories arrived in Canberra to meet with the Prime Minister to discuss a matter of cross-jurisdictional importance. In that case, that matter was a proposed array of anti-terror laws. As with every other the COAG meeting, the leaders met in private and, ultimately, a communiqué on the results of the meeting was released outlining actions to be taken as a result of the meeting.\(^2\) At this point events took an unexpected turn. One of the members of the meeting, the Chief Minister of the Australian Capital Territory (ACT) Jon Stanhope, began expressing concerns that far reaching decisions were being made at COAG without public debate. In particular he criticised the Prime Minister John Howard for expecting the State and Territory leaders to agree to the Commonwealth’s terrorism proposals before consulting the opinions of the public in their jurisdictions. Stanhope said:

I find it simply unacceptable for anybody to suggest that I should put my signature on this draft bill, send it back to the prime minister and say ‘yes, prime minister, I agree to this bill, I haven’t consulted with the people of the ACT … but I’m prepared to sign off on it’ … Now that’s just an extraordinary suggestion and it’s clear to me that the prime minister doesn’t want debate, he doesn’t want to have to respond to the critics, he doesn’t want to have to explain some of the detail.\(^3\)

In support of his views, Mr Stanhope then released a draft copy of the Prime Minister’s proposed anti-terror laws onto the ACT government website. The Prime Minister was not impressed. He said ‘It’s important that governments, no matter what political stances you might take, should have the


capacity to talk to each other in confidence. And that legislation was given in confidence. This exchange brought to light a conflict between the necessity for confidential negotiations around intergovernmental issues and the values of representative democracy. Confidential intergovernmental negotiations through COAG necessarily preclude public and parliamentary scrutiny, a phenomenon known in the literature as COAG’s ‘democratic deficit’. My thesis will investigate this conflict and establish how it may manifest within the Australian Constitution as a clash of constitutional conventions.

Australia’s system of governance has at its core a marriage between federalism and parliamentary democracy. Yet rather than being a happy marriage upon which a strong constitutional system stands, this is a union in constant tension. This tension was identified during the constitutional drafting process when Winthrop Hackett remarked that ‘responsible government will kill federation or federation ... will kill responsible government.’ Ultimately these concerns did not alter the determination of the founders to include both federalism and responsible government within the Constitution, and Hackett’s concerns have since been subject to criticism as being false and distracting since they were made while trying to describe the problem of balancing the powers of the House of Representatives with the Senate rather than marrying two theoretical concepts in the Constitution. Nevertheless, the statement does prove prophetic of the conflict between the operation of federalism and responsible government which would arise in Australia, albeit in a different setting to the one he originally identified. While federalism in Australia has evolved practically from a coordinate to a collaborative system, responsible government has remained largely the same. Instead of the death of either federalism or responsible government, both have continued to exist in constant tension as institutions of collaborative federalism interact with institutions of responsible government. COAG, the instrument for collaborative federalism, is the latest forum for this ongoing tension. Assuming it is desirable to retain both a system of responsible government and a federal government structure in Australia, a compromise between these two systems will need to be found which enables both to operate effectively. To do this, the true extent of the tension between the two systems will need to be established. That is the knowledge this thesis will provide.

Australia’s federal system is one of divided responsibility. Sections 51 and 52 of the Constitution provide for a series of powers, on which the Commonwealth (national) government can legislate, while all other powers remain with the States. Yet this neat division of power did not endure. Through an expansive interpretation of Commonwealth power taken by the High Court of Australia, the problem of vertical fiscal imbalance caused by the Commonwealth appropriating more and more sources of taxation revenue, and a series of voluntary surrenders of power by the States to the Commonwealth, the policy division between the Commonwealth and the States and Territories has been in flux. To manage this situation, Australia, like most countries, employs a system of

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5 See for example: Wilkins, above n 1, 12.


intergovernmental relations, which provide a process and institutional support for the constituent governments in the federation to interact. That system is one where the Prime Minister, the State Premiers and the Territory Chief Ministers meet at COAG to organise policy action across government. Over time, this organisation has become critical to the proper functioning of the governance system as established under the Constitution.

Democratic accountability is provided in the Australian context through the convention of Responsible Government. Under this system, ministers must be members of Parliament and can only serve with the confidence of Parliament. As such, Parliament has the right and the responsibility to scrutinise actions of ministers and, where necessary, hold them to account. COAG allows policies to be negotiated and decided at the leaders meeting without those policies being open to parliamentary, and by extension, to public scrutiny. This is because decisions are made collectively and in private, so no one parliament can attach the decision to any one leader and call them to account for it. This is the democratic deficit. In the past this has always been seen as something of a political inconvenience. This is true, but it is not the full story.

For a forum that only operates within a limited field of policy a democratic deficit would not be a large concern. However, COAG agreements now form the basis for such a wide field of policy from health and education to infrastructure planning, environmental policy and Indigenous affairs. COAG is an indispensable institution of governance. Understanding the extent and effect of COAG’s democratic deficit will be critical to ensuring that our system can continue to be both an efficient federal system and democratically accountable. The thesis will provide this understanding.

As identified above, COAG has been examined in the past, and the democratic deficit has featured in some of these studies. This literature will be examined in greater detail in Chapter One. However, I will demonstrate that these studies have all approached COAG from largely the same position: that it is a sub-constitutional, political, institution. Accordingly, solutions to problems in the operation of COAG, such as the democratic deficit, have been conceptualised as primarily political issues.

In this thesis I argue that in light of COAG’s increasingly central position within the policymaking process, it has a permanent place within the governance system. I will argue that an intergovernmental federal committee of leaders, currently in the guise of COAG, could be a convention of the Constitution and therefore the institution and its key flaw, the democratic deficit, would be a part of the Constitution. As such, I argue there could be a clash of conventions in the

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Australian Constitution between COAG (with the democratic deficit) and Responsible Government. This makes the democratic deficit a problem at the institutional and constitutional level, and not just at the level of practical politics. If this perspective is accepted, institutional reform is required to remedy the democratic deficit. As such, a central component of this thesis is to explain exactly how COAG fits within the constitutional system of government in Australia. I will argue that by facilitating cross-jurisdictional interaction, negotiation and joint-policy making, COAG fulfils a key role within the constitutional system rather than just in the political debate. This approach places COAG in a constitutional context and allows its operation to be directly compared to other constitutional institutions and conventions such as Responsible Government. This approach, it is argued, will provide an original perspective on COAG and will allow the systemic effects of the democratic deficit to be properly exposed.

A Why Study COAG?

COAG clearly merits examination at an institutional level. Despite only coming to existence under Prime Minister Paul Keating in 1992\(^\text{13}\) COAG is only the latest manifestation of a long history of Australian heads of government coming together in conference to sort out intergovernmental matters. As will be demonstrated in Chapter Two, these conferences have been a constant presence in the governance system, and as political circumstances have changed and necessitated greater intergovernmental interaction, the conferences have increased in both frequency and in the number of policy areas they cover. Today intergovernmental policy reforms are covering a huge number of policy areas, meaning COAG, already a fundamental practice and therefore, an institution to facilitate intergovernmental negotiations, is becoming increasingly critical to the functioning of government.

In an environment where COAG is an integral, enduring government institution and is the latest incarnation of a practice of heads of government conferences that existed before Federation, it can be seen as an assumed part of the federal system established under the Constitution. Therefore, despite not being written into the Constitution, this thesis argues that COAG could be a convention of the Constitution. Accepting this, studying COAG as a constitutional convention is the only way its operational effects on the governance system be fully appreciated since placing COAG in a constitutional context and analysing its effects on the constitutional system (in particular in light of its democratic deficit) will bring to light the potential of a fundamental clash of constitutional institutions (COAG and Responsible Government) that will need to be either accepted or remedied through reform.

B Chapter and Thesis Outline

The first chapter will focus on COAG’s democratic deficit. It will explain what has been said about it, what forms it takes, and how these forms amount to a lack of accountability for the members of COAG. This will analyse the previous, political studies of COAG and the democratic deficit. However I will argue in this chapter that these previous studies fail to realise the potential extent of the effects of the democratic deficit. To determine this, we need to analyse COAG from a starting point of it being a constitutional convention rather than a political institution.

The second chapter argues COAG has a more fundamental place within the governance system than previous studies have identified. To do this, the chapter outlines the history of all heads of government meetings, including COAG. It establishes how they began, how their role in Australian governance has changed with time, and how they have influenced the development of Australian governance. Through this historical study and a review of previous literature on COAG, the chapter demonstrates how previous studies of COAG, Premiers’ Conferences and Intercolonial Conferences underestimate the importance of these conferences to Australian governance and are inadequate to fully appreciate the role and effects these conferences have within our governance system. As such, within this historical context I will demonstrate how COAG merits constitutional analysis to reflect its fundamental place in the government system, rather than just political analysis.

Having made the case that COAG’s importance means it may be analysed from a constitutional point of view and examined previous literature on COAG, the third chapter will focus on constitutional conventions. The chapter posits that as an integral part of the governance system, but not a written part of the Constitution, COAG could have conventional status in the Australian Constitution. The chapter outlines that, based on literature on constitutional conventions, several institutional characteristics are indicative of an institution being a convention, establishes what those characteristics are and the extent to which an institution must satisfy those characteristics to be called a convention.

The fourth chapter explains that COAG satisfies the essential characteristics of a constitutional convention. The chapter does not establish definitively whether COAG is or is not a convention, since conventions only become conventions when declared and recognised publicly to be such. It does, however, establish that COAG either has the characteristics necessary to be considered a convention or at the very least it could be emerging as a convention, and could defensibly be declared to be one should the issue come before the High Court.

In the final chapter, I will establish exactly what it means to have an institution, so critical to the operation of the Constitution that it is potentially a convention-in-waiting, which has a democratic deficit like the one COAG has. It will focus on the consequences of such a democratic deficit on the efficacy of the part of the Constitution meant to form a system of democratic accountability, Responsible Government. From this analysis the thesis will provide, for the first time, a picture of how the federal system established within the constitution and its potentially conventional intergovernmental institution, COAG, could relate to the operation of parliamentary democracy and its conventional manifestation, Responsible Government. Through this, this thesis will expose the potential for a fundamental clash of conventions because of COAG’s democratic deficit, a clash which has not previously been identified.

This thesis represents a unique study. It goes beyond the political level analysis of COAG which has come before and places COAG in a constitutional context. In doing so, this thesis ascertains, for the first time, the true effect of COAG’s democratic deficit: that it is an integral part of the Constitution interfering with the operation of another integral part of the Constitution, Responsible Government. As such it is a feature which means that our system of government, unless reformed, is not as democratic as believed and that larger, more institutional reforms will be necessary to address the democratic deficit.
I COAG AND ITS ‘DEMOCRATIC DEFICIT’

Criticisms of COAG are not uncommon. Even as recently as 2013 the newly-elected Premier of Queensland Campbell Newman went so far as to describe the process of intergovernmental relations through COAG as a ‘dysfunctional farce’. But the most telling criticism made of COAG, which most affects its capacity to remain our mechanism for handling intergovernmental relations, is that it lacks compatibility with the underlying democratic values of our government system. This is referred to as a ‘democratic deficit.’ In this chapter I will explain what a democratic deficit is and describe how it applies to COAG.

As is well known, COAG operates by bringing together the leaders of government in each of the constituent jurisdictions within Australia. In this sense it operates as a forum for the executive branches of the various governments to interact. Practices like this have been described as being part of a system of ‘executive federalism’ in which intergovernmental interaction in a federation operates exclusively within the domain of the executive. A criticism of such systems has been their exclusion of democratic oversight in their intergovernmental relations institutions. Generally, a democratic deficit occurs when institutions of governance lack the democratic accountability mechanisms which they ought to have in a system of democratic government. As such, the concept of a democratic deficit has been associated with COAG. In this chapter I will be introducing literature on what a democratic deficit is, how COAG may be held to have one, and why this is considered an important problem for COAG’s ongoing role facilitating intergovernmental relations.

The Australian arguments fall into two groups. One group identifies the democratic deficit and holds that it is an important, albeit political, concern. The second group claims that, while a democratic deficit exists, it is countered by other practices in intergovernmental relations. I will demonstrate that both these arguments claim the democratic deficit is important but see it as more of a political issue of varying priority rather than a more fundamental structural one.

Overall I will agree with the literature in its identification of a democratic deficit, but go further and argue that the democratic deficit could potentially be undermining Australia’s system of democratic government at a Constitutional level and not just a political one. This argument will be developed in

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3 Ibid 6.
later chapters. The approach of focusing on the constitutional implications of the democratic deficit rather than the political aspects is unique to my thesis and is not an approach previously taken in democratic deficit literature. This is a new interpretative perspective provided by chapters four and five.

A What is a ‘Democratic Deficit’?

A democratic deficit arises where an institution of government, within a democratic governing environment, allows the members of the executive to avoid the democratic checks and balances on their power. This results in a diminution of the ability of the public, through democratic mechanisms, to maintain control over government. The origins of the idea of a ‘democratic deficit’ lie in an understanding of one of the intellectual underpinning of a system of democratic government: social contract theory.

John Locke argues that government originates from the necessity for the people of a nation state to have their interests and rights protected from infringements by others. He states that:

[G]overnment being for the Preservation of every man’s right and property, by preserving him from the violence or injury of others, is for the good of the governed.5

As such, the right to govern a population originates with an agreement by the population to be governed for the preservation of those rights and property. He continues:

Reason being plain on our side, that Men are naturally free, and the Examples of History shewing, that the Governments of the World, that were begun in Peace, had their beginning laid on the foundation, and were made by the Consent of the People; There can be little room for doubt, either where the Right is, or what has been the Opinion, or Practice of Mankind, about the first erecting of Governments.6

Following on from this is the idea that the government should be bound by law to avoid abuses of power being inflicted on the population. As Locke reasoned:

For all the power the Government has, being only for the good of the Society, as it ought not to be Arbitrary and at Pleasure, so it ought to be exercised by established and promulgated laws: that both the People may know their duty, and be safe and secure within the limits of the Law, and the Rulers too kept within their due bounds, and not to be tempted, by the power they have in their hands, to employ it to such purposes, and by such measures, as they would not have known, and own not willingly.7

From the foundational principle that government should be required to operate only according to law, different systems of government have been designed to ensure this remains the case. In the Australian context, this system holds that the population should be protected from arbitrary power by government through the requirement that ministers be members of Parliament and that they are to be responsible to Parliament for their actions and the other executive actions falling under their charge. This is the precondition of them being able to govern legitimately. It was a feature identified in the constitutional system of England by A.V Dicey, who contrasted it with the strict separation of powers in the United States of America. Dicey noted that:

5 John Locke, Two Treatises of Government (Awnfham and John Churchill, 1698) First Treatise, 92-93.
6 Ibid Second Treatise, 104.
7 Ibid 137.
We talk indeed of the English constitution as resting on a balance of powers, and as maintaining a division between the executive, the legislative, and the judicial bodies. These expressions have a real meaning. But they have quite a different significance as applied to England from the sense which they bear as applied to the United States. All the power of the English state is concentrated in the Imperial Parliament, and all departments of government are legally subject to Parliamentary despotism...A modern Cabinet would not hold power for a week if censured by a newly elected House of Commons.  

As such, the idea that Cabinet was responsible to Parliament became the central mechanism of government democratic accountability in a system of Westminster government. However, the efficacy of this mechanism has not gone unquestioned. In the 20th century, an argument arose that this was not an adequate check on the power of the government. This argument was articulated by Lord Hailsham when he argued that the method of election and the existence of parties in the British system of government ensured that a bare majority of elected officials, elected under a system which does not require a majority of votes to gain a majority of parliamentary seats, could exercise control over Parliament. Thus Parliament could no longer claim to be a representative assembly of the people capable of ensuring the social contract is upheld by the government. This allows the victorious party to institute whatever law or regulation they see fit without accountability. Hailsham called this situation ‘elective dictatorship.’

Elective dictatorship effectively involves two fundamental principles of parliamentary sovereignty and limited government being in conflict, with parliamentary sovereignty generally in ascendance. This creates a situation where the government, with a controlling majority in the lower house of Parliament, operates without restriction or proper accountability. This idea has been taken up by other commentators on the Westminster system of government since Hailsham, and this idea of an government organisation (in Hailsham’s case, the ministry and governing party itself) operating without checks on its power has resonated into the present day and in jurisdictions across the world.

As in Britain, the issue of elective dictatorship has also been identified in the system of Westminster government in Australia. Nicholas Aroney argues, like Lord Hailsham, that contemporary political practice has resulted in the legislative and executive power being controlled by a small group of senior ministers, which in turn is dominated by the relevant state Premier or the Prime Minister.

Despite concerns over the accountability of Parliamentary government, and different democratic countries using different mechanisms to ensure the democratic accountability of the government, Australia has retained this system and concerns over democratic accountability have remained present, being attached to the concept of ‘democratic deficit.’

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10 Ibid.
The first use of the term ‘democratic deficit’ was during a Young European Federalists (JEF) meeting in 1977 where it was used to describe a situation in which European institutions lacked the democratic credibility they ought to have theoretically in order to be closer to the people. However, the first academic use of the term was not until two years later by David Marquand.

Marquand argued that the then European Community lacked the liberal requirement of democratic accountability to legitimately impose rules upon member states. In doing so, he invokes the idea of a necessary democratic accountability mechanism for governance institutions and argues that there wasn’t one operating at a European level. Marquand argues that:

There can be no democracy without accountability. In a democratic system someone must always be in a position to use Harry Truman’s motto, ‘the buck stops here’; decision makers must be answerable to, and removable by, those in whose name the decisions are made. In the Community system, no one is unambiguously answerable for anything. The buck is never seen to stop; it is hidden from view, in an endless scrimmage of consultation and bargaining.

The reason for this lack of accountability, Marquand argued, comes from the lack of a democratically elected body (either at the national or European level) to oversee the operations and decisions of the key executive institutions of the European Community, the European Commission and the Council of Ministers.

While several studies have looked at different solutions to this problem; from an expansion of the oversight powers of the European Parliament, to elected presidencies of the European Commission, whether this goes far enough to fully address the democratic deficit is yet to be fully revealed.

Marquand’s idea of a democratic deficit in European institutions has been widely applied in academic and policy literature, but it has not been without dissent. Gianomeico Majone has criticised the basis of studies which have identified a democratic deficit in European institutions,

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15 Ibid 64.
16 Ibid 65.
17 See for example Michelle Cini, ‘European Governance and the Democratic deficit’ (2011) 2(1) Political Insight.
arguing that these analyses unfairly compare European institutions to those of national institutions and fail to appreciate the unique role and status of European institutions.\(^{20}\) He argues that claims based on comparisons to existing democratic national institutions, ideal theoretical examples of democratic institutions, majoritarian democratic principles or social justice principles are inapplicable to a supranational context.\(^{21}\) Instead he argued that European institutions were not national institutions and made no claim to supplant them. Therefore comparisons with such institutions are not applicable.\(^{22}\) Similarly, comparisons to ideal democratic institutions, such as parliaments, underpinned by assumptions of parliamentary supremacy in law making, were inapplicable to Europe due to the limited policy coverage of European institutions, as reflected in the treaties.\(^{23}\) Therefore the idea that majoritarian democracy is the only legitimate reflection of democracy were dismissed as not being appropriate for Europe with such a wide spectrum of regional and national diversity requiring representation.\(^{24}\) Also, concerns focused on the lack of social justice principles in the European institutional framework were unfounded given the fact the European institutions play very little role in the regulation of social policies.\(^{25}\) Despite such criticisms, endorsement of the European democratic deficit remains dominant in the literature and from its origins in European literature; the idea of a democratic deficit has now been applied more broadly.

The term ‘democratic deficit’ has also been used in relation to other international institutions. The essence of these studies is that international institutions, while assuming more and more of the responsibilities previously exercised by national governments, do not include the democratic accountability mechanisms that national institutions (in democratic countries) have, in a similar way European institutions were argued to lack these mechanisms. As such, there is an argument that a democratic deficit exists in the regulations they produce and the actions they take. Alfred C. Aman argues it arises from a lack of involvement of democratic institutions in the decision making process. While international regulations have to go through a process of national ratification, the legislative process is often fast tracked, allowing for little democratic input into the policy. Measures are agreed to at an international level and the democratic process merely acts to endorse this decision.\(^{26}\)

Robert Dahl also identifies a democratic deficit at the international level but takes a different path than Aman. He argues that international institutions are inherently undemocratic because of the specialist nature of their work. Due to the lack of knowledge ordinary citizens have on international issues, the process is dominated by elite officials. By extension, the ability of ordinary citizens to keep these officials accountable is severely limited by this lack of specialist knowledge.\(^{27}\) It is not only at the level of the ordinary citizen that the democratic deficit has been argued to occur. John Langmore and Shaun Fitzgerald argue that international economic institutions are dominated by large, western countries and, as such, aren’t representative of the broad range of nations for whom

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\(^{21}\) Ibid 6-7.

\(^{22}\) Ibid 8.

\(^{23}\) Ibid 9.

\(^{24}\) Ibid, 10.

\(^{25}\) Ibid 13-14.


they create regulations.\textsuperscript{28} Whatever the underpinning of their arguments, the position that international institutions have a democratic deficit has become so widespread and unequivocal that Andrew Moravcsik argues literature has become more focused on remedying the situation rather than assessing whether it exists.\textsuperscript{29}

Despite the strong endorsement of the idea that a democratic deficit exists in international institutions, some have argued that it is not the huge problem it is made out to be. Anupam Chander argues that while international institutions do lack the democratic elements of national institutions, the regulations they produce, like human rights declarations and environmental regulations, reinforce the representation of individual rights to national governments and, as such, serve to support democratic values.\textsuperscript{30} Also, former Australian High Court Justice Michael Kirby has argued that since international regulations have to be incorporated into law via a legislative process, or only serve as an indicator in the interpretation of the common law rather than a determinant, the democratic deficit is effectively countered by democratic safeguards at the national level.\textsuperscript{31} Moravcsik goes further and argues that the identification of the democratic deficit relies on utopian democratic ideals that are not fully applied in practice even at the national level.\textsuperscript{32} The debate is ongoing and forms another body of literature related to the idea of democratic deficit.

Democratic deficits have also been identified in the phenomenon of public disengagement from the process of government.\textsuperscript{33} A large body of literature has been devoted to the disengagement of, in particular, young people in the political process,\textsuperscript{34} producing a democratic deficit. However, others have also noted a general disengagement with politics (particularly in the United States\textsuperscript{35}) and a lack of responsiveness of the political process to peoples’ concerns\textsuperscript{36} also causing a democratic deficit. There have been arguments against the position that citizen disengagement is causing a democratic deficit. For example, Ian Fyfe argues that despite the identification of a politically disengaged youth, the truth is that younger people simply engage in politics in different ways than those measured previously, citing both his own research and similar studies both in the United States and the United

\begin{itemize}
\item \textsuperscript{30} Anupam Chander, ‘Globalisation and Distrust’ (2005) 114(6) Yale Law Journal 1193, 1226-1236.
\item \textsuperscript{31} Michael Kirby, ‘Constitutional Law and International Law: National Exceptionalism and the Democratic Deficit?’ (2009) 98 Georgetown Law Journal 433
\item \textsuperscript{32} Dahl, above n 27, 337.
\item \textsuperscript{34} See for example, Henry Milner, The Internet Generation: Engaged Citizens or Political Dropouts (Tufts University Press/University Press of New England, 2010); Paul Howl, Citizens Adrift: The Democratic Disengagement of Young Canadians (University of British Columbia Press, 2010).
\item \textsuperscript{35} See for example, Robert F Durant, ‘The Democratic Deficit in America’ (2012) 110(1) Political Science Quarterly 25.
\item \textsuperscript{36} See for example, Andrew Dobson, ‘Listening: The New Democratic Deficit’ (2012) 60 Political Studies 843.
\end{itemize}
Kingdom. This continues to be a matter of public discussion, forming a third body of literature identifying a democratic deficit.

Each of these bodies of literature identifies a democratic deficit in different circumstances and forms part of an important debate regarding democratic accountability. Each of these circumstances illustrates how institutions of governance are identified as having attributes that undermine the ability of democratic institutions to maintain the accountability of the government. While each of these situations refers to influences outside national government architecture, situations have been identified where institutions within the government system undermine the democratic accountability of the government, in particular through the operation of executive federalism.

**C Executive Federalism and the Democratic Deficit in Intergovernmental Relations**

The rise of arguments of a democratic deficit in intergovernmental relations coincides with the rise of ‘executive federalism’. Under a system of executive federalism, intergovernmental negotiations are undertaken exclusively between members of the executive of each level of government applicable. No role for the legislative bodies exists until such time as a particular agreement requires legislative change at any level of government. Even then, the role of the legislature is confined exclusively to that change and not the wider agreement. This has the virtue of efficiency but lacks accountability. It is in this lack of accountability is where the democratic deficit lies. This phenomenon was first identified in intergovernmental relations in Canada. Douglas Brown describes the situation:

> Executive federalism as practiced in Canada and elsewhere is, by definition and structure, executive-dominated. It tends to be secretive and bureaucratic, and as an extension of executive government, keeps the legislatures at bay. As a result, the politics of intergovernmental relations, especially the most visible relations amongst first ministers, suffer from defective accountability and representation. Where complicated intergovernmental agreements result in shared responsibility, direct responsibility is blurred.  

As intergovernmental negotiations have become more frequent on a wider array of policy areas, studies looking at the impacts of executive federalism have become more prevalent. One Canadian study has asserted that the involvement of the provincial premiers in national policy issues is an assertion of power without responsibility. It is in a similar fashion that the democratic deficit arises in Australia with regard to COAG.

Like the Canadian federation, the Australian governance system does not provide for a body to facilitate intergovernmental relations in the formal constitutional structure beyond establishing the High Court as a legal dispute-resolution institution. Intergovernmental relations take place outside of

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37 Ian Fyfe, ‘Researching youth political participation in Australia: Arguments for an expanded focus’ (2009) 28(1) *Youth Studies Australia* 37, 39.

38 Brown, above n 2, 5-6 (citations omitted).


the written constitutional framework. Also, as in the Canadian federation, the democratic deficit of executive federalism has been a recurrent theme in literature. Recently, in Australia, much of the responsibility for this democratic deficit has been characterised as a flaw of COAG rather than a side-effect of executive or collaborative federalism more generally. For instance, former Director-General of the New South Wales Cabinet Office Roger Wilkins describes this phenomenon:

[C]ooperative federalism has involved agreements among Ministers, typically through Ministerial Councils [including COAG]. The problem with this style of cooperative federalism is that it sidesteps, more or less completely, any sort of democratic scrutiny.\(^\text{41}\)

Wilkins refers to the process whereby COAG (and other Ministerial Councils) negotiations occur in closed meetings with no parliamentary oversight or, in terms of enforceable rules, any requirement to publicise either negotiation minutes or outcomes. Essentially this means that the mechanism we use for executive/collaborative federalism results in a democratic deficit just as the similar ‘executive federalism’ approach in Canada does.

Leading research into the democratic deficit in COAG has been undertaken by Andrew Lynch and Paul Kildea. In particular while making the case for legislative recognition of COAG, their study on the evolution of COAG focuses on the institutional movements undertaken in the federalism area (like the development of COAG) and whether further reform is necessary.\(^\text{42}\) While they argue a lack of formal legal status and the centralising trend accompanies COAG’s operation, the primary issue noted by their work has been COAG’s ‘democratic deficit’ and explaining how it works in practice.

The first opportunity for parliamentary scrutiny may not occur until an intergovernmental agreement is presented to parliament in the form of template legislation that has already been agreed to by heads of government. Parliaments of course retain the capacity to amend or reject such legislation but … an Opposition’s critique will necessarily be diluted by the fact that responsibility for a COAG decision cannot be sheeted home to any one government, but instead resides by the composite body itself.\(^\text{43}\)

This problem of an intergovernmental democratic deficit in Australia was first identified as early as the 1970s. Geoffrey Sawyer identified that cooperative federalism (exercised by heads of government in a way similar to how executive federalism operates in Canada) undermined the operation Responsible Government. However, he continued that efficient intergovernmental relations required high level negotiations between small groups of leaders which, by extension, excluded a role for parliaments and create uncertain lines of accountability for the public.\(^\text{44}\) Thus, Sawyer identified the key trade-off inherent within intergovernmental relations facilitated by COAG and earlier Premiers’ Conferences. The conferences allow leaders to organise intergovernmental arrangements efficiently but in order to achieve this efficiency, normal accountability mechanisms through parliaments are circumvented, creating a democratic deficit. Such concerns with the

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\(^\text{42}\) Kildea and Lynch, above n 4, 103 (citations omitted).

\(^\text{43}\) Ibid, 117.

relationship between cooperative federalism arrangements and ministerial accountability were also acknowledged in the 1977 Coombs Royal Commission on Australian Government Administration. 45

Cheryl Saunders has examined exactly how parliaments are ill-equipped to provide oversight to intergovernmental relations negotiations and agreements. Saunders posited that while parliaments retain the formal ability to make alterations to government bills, in relation to intergovernmental agreements there is no practical opportunity for a parliament to have input. The government has already agreed to enact a law in a particular form. 46 Saunders also noted that the capacity for Cabinet input is also limited due to agreements generally not going to Cabinet before they are agreed to (at least with regard to the States and Territories), 47 and there is a difficulty in applying administrative review mechanisms to intergovernmental agreements due to their limited capacity as described by their legislation. 48

Other writers have argued, however, that the lack of involvement of parliaments in intergovernmental relations has been due to their unwillingness to be involved, not their sidelining by government. Campbell Sharman, for example, argued that parliaments had three main institutional capacities to influence the legislative process:

(i) Withhold legislative authority from executive governments: this ‘potential of legislative veto’ being ‘the most powerful weapon of the legislature’;
(ii) Question ministers and debate policy and practices of intergovernmental agreements;
(iii) Establish investigative committees to probe into the details of implementation of intergovernmental relations. 49

Yet the possibility of a parliamentary veto only manifests itself if an agreement requires legislation. Where no legislation is required, the unclear lines of authority can provide an easy way to avoid public accountability. Also, questions to ministers and investigative committees can only occur after the fact. In essence, they are shutting the stable door after the horse has bolted. In their work Australia: The State of Democracy, Marian Sawer, Norman Abjorensen and Phil Larkin noted that the avoidance of public accountability was becoming increasingly evident, especially as the process of intergovernmental relations became more formalised through COAG.

The tendency has been for the members of COAG and the ministerial councils to commit their governments to particular courses of action or expenditure on particular programs without recourse to parliamentary approval. Such agreement-making pre-empts both public consultation and deliberative processes within parliament. When legislation is required to implement these

48 Ibid 51.
agreements, parliaments are confronted by template legislation already agreed by all governments, pre-empting rights of legislative review. In the face of such infringements there have been occasional revolts by the Senate or by State upper houses, particularly in Western Australia. Intergovernmental decision-making can also blur responsibility: it is by its very nature collaborative and it can be difficult for citizens to know which government to hold responsible.\(^{50}\)

The consequences of this are essentially three fold. First, there is no parliamentary oversight to the agreements being made by the leaders. Second, beyond what is let out by the participants themselves, there is limited scope to gain information on what was discussed at these meetings from the outside. Finally, the agreements are announced collectively, meaning responsibility for the agreement can only be attached to the leaders as a group and not to any individual participant.

Some of these consequences have been previously addressed. The ability to gain information involved in the COAG negotiation process was addressed through amendments to the *Freedom of Information Act 1982* (Cth) in 2010. These require, subject to consultation with the States involved and assuming it is not against the public interest, documents relating to Commonwealth-State relations be disclosed by the relevant minister.\(^{51}\) Secondly, an oversight body, the COAG Reform Council was established. As former Council Deputy Chairman Geoff Gallop states, the role of the Council was to:

> [A]ssist it [COAG] to drive the national reform agenda by strengthening accountability through independent and evidence-based monitoring, assessment and public reporting on the performance of governments.\(^{52}\)

These go some way to enable public access to documents associated with intergovernmental relations and enable information to be collected and evaluated on how well intergovernmental agreements are being implemented. However, they still leave substantial gaps in the accountability mechanisms for COAG. These mechanisms still do not mandate what sort of information should be put together in the negotiation processes (meeting minutes for example) and the COAG Reform Council had no oversight function of the negotiations process itself. In any case, the COAG Reform Council was abolished in the 2014 Federal Budget. As such one of the few mechanisms addressing the democratic deficit was removed.

The structure of COAG and its characteristics also contributes to COAG’s democratic deficit. The membership profile of COAG consists solely of government representatives from each jurisdiction. This means, in practice, that no non-government representatives take part in the agreement formulation process and there is no general political party policy to change this. As a result of all of these factors, the democratic deficit persists and COAG, an otherwise efficient and comprehensive body to facilitate intergovernmental relations, remains flawed.

\[^{51}\text{*Freedom of Information Act 1982* (Cth) ss11A, 11B, 26A, 47B.}\]
While a democratic deficit in COAG has been firmly identified in previous literature, the question becomes whether this position has, in fact, been challenged. Studies cited above have argued that it is real, albeit confined to a political setting. However, it has been argued that the democratic deficit is not a fatal flaw in the operation of COAG, due to it being countered by other, more accountable governance practices. In a presentation to the COAG Reform Council in 2012, Jennifer Menzies acknowledged concerns over the democratic accountability of COAG, but argued that there were enough safeguards already built in to the decision-making process of COAG. She argues that policy issues discussed at COAG can fall into three broad categories: policy issues that are part of the wider public debate, policy issues that are submitted to States and Territories for approval before being actioned, and issues that require urgent action. In each of these areas, she argues that there are several entry points for the public to influence the debate in COAG. She argues that:

On these and most issues, by the time a proposal goes to COAG there has usually been:
- A level of public policy debate and agenda setting by either special interest groups, the relevant policy community and the states and territories.
- Extensive development of policy options. For example, the National Health Reform came at the end of an extensive public consultation process including resulting in a comprehensive expert report from the National Health and Hospitals Reform Commission.
- Line and central agency input using the policy capacity of all jurisdictions and including their knowledge of the wider issues of their policy communities.
- A series of refining processes through Senior officials, State and Territory leader, Cabinets, and,
- Political negotiation and consensus.

While each of Menzies’ points are correct, they do not counter the argument related to the democratic oversight of the decision making process in COAG. Menzies argues that involvement of the wider public service as well as, potentially, the public in the formulation of policy placed before COAG counters the democratic deficit. Similarly she argues that the political negotiation and consensus ensures that a representative sample of political views is involved in the decision making process. However, the key issue of the democratic deficit is the lack of outside, democratic oversight of this decision making process. While public consultation and wide involvement of the public service at both levels of government is desirable, there is still no oversight of the actual negotiation process which leads to the final decision, or an effective ability to hold COAG members account for the agreement once made. Also, while different political parties are usually represented at COAG, they all have an interest in maintaining the confidentiality of COAG in spite of political difference. With the legislature excluded from the process, this leads to a conscious maintenance of the situation where outside democratic oversight is avoided unless a member deliberately breaks ranks. Thus, in spite of the practices identified by Menzies, the more structural exclusion of democratic oversight remains, and those arguments that identify it still stand.

In either case, despite arriving at differing conclusions on the existence of the democratic deficit, all studies on COAG’s democratic deficit see the issue as a political problem confined to the practical

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54 Ibid 4.
operation of the executive. However, what this thesis argues is that it is a more serious problem. The
democratic deficit is not just a problem for the political system; it also has the potential to
undermine the constitutional system as well.

Under a system of parliamentary democracy, the ministry hold their positions within the executive
by virtue of the confidence of the lower house of Parliament. To ensure that confidence is
maintained, Parliament must have the ability to hold the ministry to account through questioning
them, scrutinising their actions and, if necessary, withdrawing confidence from them. By maintaining
the confidence of the democratically representative house of Parliament, the ministry is said to have
a democratic mandate to govern. COAG’s democratic deficit partially undermines Parliament’s
ability to hold the executive to account and therefore undermines the democratic basis for the
ministry’s mandate, a mandate which can only be enforced in full if legislation is required. This
means that an essential mechanism for the functioning of the federal system (a core value of the
constitutional system) is undermining the system which ensures the functioning of the democratic
parliamentary system (another core value of the constitutional system).

This potential constitutional problem is beyond the scope of any political study of COAG and, as
such, has not been dealt with previously. What is needed is a constitutional analysis of COAG to be
undertaken to expose how deep this fundamental clash of constitutional values goes. This is what I
will determine in the following chapters.

E Conclusion

A democratic deficit occurs when an institution, within a democratic system of government,
undermines the democratic aspects of that system through its operation. In its earliest example, the
term was applied to the lack of accountability in Europe’s institutions. Later it came to be applied to
international institutions, public disengagement and, most relevant for this thesis, to
intergovernmental relations.

Democratic deficits in intergovernmental relations have been identified as arising from the
operation of executive federalism. First identified in Canada, executive federalism describes a
system of intergovernmental relations dominated by the members of the executive in the
constituent units of a federation. Like in Canada, a democratic deficit has been identified in
intergovernmental relations in Australia and has associated with the operations of COAG.

In particular, literature on the democratic deficit in COAG has identified three main aspects of the
problem. First, parliamentary oversight of the agreements entered into by leaders is virtually non-
existent. Second, the ability to gain information from the negotiation is extremely limited. Finally,
responsibility for the agreement is taken collectively; meaning the ability to attach responsibility to
any one participant is extremely difficult. No institutional mechanisms exist to counter these
tendencies at a political or administrative level, especially given the COAG Reform Council was
recently abolished.

The concerns about COAG discussed in this chapter fall into the category of political institutional
discussion, reflecting the fact that few intergovernmental institutions like COAG have status under
law. If it is the case that COAG remains merely an administrative institution, solutions to its flaws
would be primarily political in nature. However, the democratic deficit has important constitutional consequences as well since it has the potential to undermine the very mechanism that enables the ministry to govern legitimately.

To assess how serious this problem is, a constitutional analysis of COAG’s place in the governance system will need to be undertaken. As such, in the following chapters I will be arguing that it is possible to investigate the constitutional status to COAG. In doing so I will be assessing whether COAG could be a constitutional convention (this being the status afforded to institutions which are part of the constitutional system but are not provided for explicitly in the text of the Constitution). Understanding this will be essential to appreciate the true extent of the democratic deficit, and inform any reform proposals to redress its effects.
II WHAT DO WE KNOW ABOUT COAG?

In the previous chapter, I raised the possibility that COAG’s democratic deficit, identified in previous literature, may be having a greater effect on the constitutional system than previously thought. In order for this to be the case, COAG would need to be occupying a more central structural place than had been currently identified. In this chapter I will be analysing how COAG and the Premiers’ Conference have been seen in previous literature and whether, based on its historical characteristics and evolution, it merits being thought of as more of a permanent institution of governance rather than an ad hoc political occurrence.

Since COAG, and the precursor Premiers’ Conference, is a political creation rather than an institution provided for by the Constitution or by legislation, academic analysis of it has been primarily in a political context. Broadly speaking, two approaches have emerged. First, there are those that use, what I have termed, a “player-centric” focus. These studies see COAG as a case study of a wider approach towards intergovernmental relations taken by a particular political leader, usually the Prime Minister. Second, there are those that use, what I have termed, a “rule-centric” focus. These studies see COAG’s operation in a particular period of time as an example of the contemporary federalism environment. This environment is usually said to have been shaped by the constitutional rules as interpreted by the High Court or by external domestic or international realities.

These approaches share one thing. They both see COAG as an institution whose existence and importance is dependent on wider political and legal forces rather than seeing COAG as a permanent, integral, part of the governance system that contributes to the federalism environment rather than just existing within it. This mirrors how the studies on COAG’s democratic deficit, which I reviewed in the previous chapter, view the institution and its effects. However, COAG’s history and statistical characteristics indicate that it and the earlier Premiers’ Conferences are more a permanent institution rather than simply a political event. Such a finding would indicate that a new approach is necessary for analysing COAG’s place in the governance system. That is what this chapter will demonstrate.

This chapter will lay the foundation for the arguments to follow. If we accept that COAG should be analysed as a central institutional actor, the question becomes how we do this. As this chapter will demonstrate, the question cannot be answered through a player centric analysis or a rule based analysis. We will need to see COAG in a new way, one which places it in an institutional and constitutional context. Pioneering this analysis will be the task of the chapters to follow.

A Australian Federalism and the Division of Power

Australia has been described as a ‘dual federation in the common law mould.’¹ In essence, this means Australia has a federal system where legislative responsibilities are divided between two levels of government. This allows, theoretically, each jurisdiction to implement its own policies and resolve its own disputes independently within its specified sphere of influence, with the Australian Constitution establishing the division of policy responsibilities. The powers placed within the

Responsibility of the Commonwealth Parliament are contained in section 51 and section 52 of the Australian Constitution. Most of these powers, contained in section 51, operated alongside existing State powers at the time of federation. Some of these include responsibility for trade, taxation, quarantine, currency, corporations, marriage, pensions and external affairs. However, Commonwealth legislation in these areas overrides State legislation in the event of an inconsistency. The other powers invested in the Commonwealth, contained in section 52, are exercised exclusively by that jurisdiction. These include matters concerning the seat of government of the Commonwealth and any other places acquired by the Commonwealth for public purposes, matters related to the Commonwealth public service departments, and any other matters declared to be in the exclusive power of the Commonwealth elsewhere in the Constitution. Remaining powers are retained by the State governments, but they have the ability to transfer powers to the Commonwealth should they choose to do so.

Another description of this type of federal system is one of ‘legislative federalism’, which stands in distinction to ‘administrative federalism,’ where administrative functions, rather than legislative responsibilities, are divided between the levels of government. Based on an administrative model being favoured in nations such as Germany, this model of federalism has also been referred to as a ‘civilian’ model, a name reflecting that nation’s use of a civil code as the basis for their legal system (as distinct from common law). Generally speaking, the division of power is fixed and a question of policy division is one of the extents of the enumerated powers of the Commonwealth. How rigid or flexible this system is, or has been, in Australia is a matter of debate.

Dividing specific powers between the levels of government has, in many cases, led to an assumption that the federation as created and envisaged by the founders is one in which each of the jurisdictions in the federation operate independently of one another within their own spheres of responsibility. Within this assumption is the belief that the division would remain rigid and unchanged to ensure the policy integrity of each level of government and avoid clash and overlap. This type of federalism is called ‘coordinate federalism.’ As Brian Galligan describes, this term has been used extensively to describe the type of federation envisioned by the founders, featuring in particular in the works of K.C Wheare, Russell Mathews, Kenneth Wiltshire and as being prevalent in the ideas of policymakers during the ‘New Federalism’ reform process of the late 1980s and early 1990s. However, this conception of Australia’s early federalism environment has not universally acknowledged. Galligan rejects the conception of Australia’s federation, even in its

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2 Australian Constitution, s 51(i), (ii), (ix), (xii), (xx), (xxi), (xxiii) & (xxix) respectively for each power.
3 Ibid s 109.
4 Ibid s 52.
5 Ibid s 107.
6 Ibid s 51(xxxvii).
8 Saunders, above n 1, 70.
original state, as coordinate. Instead, he argues that the system as created by the Constitution follows a ‘concurrent’ model.

Galligan argues that since most of the powers assigned to the Commonwealth under the Constitution are concurrent with those of the States, rather than exclusively invested in the Commonwealth, and taxation and revenue powers are shared, it was never the case that the coordinate ideal of levels of government operating independently of one another was achieved. Under a concurrent federal system, where a lower government is shown to not be able to achieve a desired policy outcome, a higher one can take over given they both have a legislative policy powers in a wide variety of areas. Furthermore, both levels of governments can, where necessary, collaborate to achieve better policy outcomes. As such, the division of power between the levels of government is flexible rather than rigid. Galligan sees this as one of the greatest advantages of the federal system. Galligan argued that:

The advantages of concurrency might be summed up in the adage ‘Two governments are better than one’. This holds in two key respects: one is dealing with complex policy areas and the other is through enhancing democratic participation. Two governments are likely to be better than one for dealing with complex policy areas, such as environment and public health, for example, because of imperfect knowledge and limited institutional capacity. There is no obviously right solution that encompasses every aspect of a policy area and, even if there were, any particular government or agency of a government is limited in what it can do. It is more likely, therefore, that multiple governments rather than one with sole responsibility will produce better public policy.

However, just as Galligan challenged the previously prevailing view of Australia’s original federal design as coordinate; Galligan’s own view has not gone unchallenged. Alan Fenna argues that there is no basis for an argument that Australia’s federal system was intended to be concurrent or that it started out that way, regardless of whether that has turned out to be the result. He argues that since the powers assigned to the Commonwealth were restricted to those of a ‘national character, and internal domestic responsibilities were largely to continue to be controlled at the sub-national level, the founders were still operating under the impression that the roles of the two levels of government were separate and that they would continue to operate in their own ‘discrete policy realms.’ Ultimately, whether the Australian federal system started out with a rigid division of power or a flexible one, the system has evolved over time to become flexible. This is due primarily to two factors: the abandonment of the original High Court’s implied immunity of instrumentalities doctrine and reserve state powers doctrine; and the emergence of vertical fiscal imbalance.

Under the leadership of Chief Justice Sir Samuel Griffith, the High Court recognised a reserved state powers doctrine and an implied immunity of instrumentalities as being part of the Constitution. The Griffith Court, whose members (Griffith CJ, Barton and O’Connor JJ) were all involved in the drafting process of the Constitution, reasoned that the essence of the Constitution was the maintenance of the virtually sovereign and independent States while also creating a Commonwealth with limited powers. Within this lay a necessity for the two, independent, levels of government to be able to operate without interference from one another, and that the States were to remain sovereign in their own fields. With these ideas in mind, they maintained two doctrines of constitutional

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13 Galligan, above n 9, 199-200.
15 Fenna, above n 7, 304.
construction, a reserve State powers doctrine, and an implied immunity of instrumentalities. Under the reserve state powers doctrine, the High Court recognised that certain constitutional powers and responsibilities were assumed to be reserved for the States alone based on the restriction of Commonwealth powers to certain policy areas. Similarly, under the implied immunity of instrumentalities, operations of the States and the Commonwealth could not be interfered with by impeding the organisations or ‘instruments’ those governments were using in their operations. These implied doctrines continued to be maintained until they were rejected in favour of ordinary rules of statutory constructions by the High Court in the Engineers case.

The result of their abandonment has been a series of interpretations of Commonwealth power by the High Court that has allowed the extent of Commonwealth powers to expand well beyond the narrow restraints of the policy areas previously enforced. While more recently, the High Court has been willing to impose some limits on the extent of Commonwealth power with regard to spending, the scope of Commonwealth power remains far greater than was assumed under the implied immunity of instrumentalities and the reserve state powers doctrine, and has the potential to continue to expand should the High Court interpret a power widely in the future.

As the High Court expanded the extent of Commonwealth legislative power, its interpretations in one particular area, taxation, created another phenomenon expanding the practical scope of Commonwealth policy influence: the notion of a vertical fiscal imbalance. Since 1915 both the Commonwealth and the States raised income taxes. This left untapped pockets of taxation due to differing taxation rates and income cut-offs in the different States. In an effort to close these gaps in the taxation system, the Commonwealth introduced a comprehensive, uniform taxation system through four acts of parliament: the Income Tax Act 1942, the Income Tax Assessment Act 1942, the States Grants (Income Tax Reimbursement) Act 1942, & the Income Tax (War-time Arrangements) Act 1942. Over time, the Commonwealth has appropriated more and more forms of taxation for itself. By 2008 the Commonwealth was receiving 80% of taxation revenue despite only being

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17 See for example Peterswald v Bartley (1904) 1 CLR 91; Federated Amalgamated Governmental Railway and Tramway Service Association v New South Wales Traffic Employees Association (1906) 4 CLR 488; Attorney-General (NSW) v Brewery Employees’ Union of New South Wales (1908) 6 CLR 469; R v Barger (1908) 6 CLR 41; Huddart, Parker & Co Pty Ltd v Moorhead (1908) 8 CLR 330.

18 See for example D’Emden v Pedder (1904) 1 CLR 497; Attorney-General (NSW) v Brewery Employees’ Union of New South Wales (1908) 6 CLR 469; R v Barger (1908) 6 CLR 41; Huddart, Parker & Co Pty Ltd v Moorhead (1908) 8 CLR 330.

19 Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (‘Engineers Case’) (1920) 28 CLR 129.


responsible for 40% of the government spending.\textsuperscript{24} This situation has given the Commonwealth unprecedented power over the decision making processes of the States as the States now have to depend on the Commonwealth grants for funds, funds which have often involved conditions imposed by the Commonwealth on how the money is spent.

Both of the High Court interpretations of the constitutional powers of the Commonwealth, and the increasingly dominant financial positions that the Commonwealth holds over the States, has contributed to a situation where the division of power between the Commonwealth and the States has been flexible rather than rigid. The process of, and reason for, powers moving between the levels of government (usually in favour of the Commonwealth) is a matter of debate amongst federalism scholars. In particular, the process has been seen as collaborative, coercive and opportunistic, depending on the author’s view of the desirability of the resulting historical trend of power away from the States and towards the Commonwealth. This in turn colours their attitudes towards COAG and its role in that process.

One view sees the slow but steady flow of policy powers towards the Commonwealth as a cynical attempt at political advantage. This view has been termed ‘opportunistic’ federalism and was advanced in Australia by authors such as Anne Twomey and Glenn Withers in 2007.\textsuperscript{25}

The term ‘opportunistic federalism’ was first used to describe dynamics in American federalism by Tim Conlon. He argued that several ad-hoc United States federal programs in policy areas which were nominally State-controlled were attempts by the federal administration gain political advantage without regard for the structural consequences of such programs.\textsuperscript{26} He cites several examples in recent American politics. Conlon argued that:

\begin{quote}
It was evident in many policies of the Clinton administration ... such that the political appeal of federal intervention in symbolic issues (such as school uniforms) and local responsibilities (such as funding "100,000 new cops") overwhelmed the normative constraints of traditional responsibilities. Finally, opportunistic federalism has been abundantly demonstrated in the Bush administration. One would be hard pressed to develop an intergovernmental agenda that was more dismissive of cooperative norms and traditional responsibilities than the recent hallmarks of the current Republican administration and Congress: the rigorous accountability framework of the No Child Left Behind Act; the Help America Vote Act, which mandates standards for provisional voting, identification requirements, and voting system standards for states; and the Real ID Act of 2005, which establishes federal standards and timetables for enhancing the security of state driver's licenses.\textsuperscript{27}
\end{quote}

Twomey and Withers argued similar trends existed in Australian governance in the policies of the Howard government. They argued:

\begin{quote}
As in the United States, it can be seen in funding for core State functions becoming dependent on politically symbolic matters, such as making school funding dependent upon the existence of functioning flagpoles. The Commonwealth funding for school chaplains in competition with school counsellors is another example. Neither flagpoles nor chaplains are self-evidently matters that require
\end{quote}

\textsuperscript{24} Anne Twomey, ‘Australian Federalism Reform’ (2008) 20(1), Legaldate 4, 5.
\textsuperscript{25} Anne Twomey and Glenn Withers, ‘Australia’s Federal Future’ (Federalist Paper, No 1, Council for the Australian Federation, April 2007).
\textsuperscript{27} Ibid.
the involvement of a national government. Under the principle of subsidiarity, such issues should be allocated to a level of government closer to the people.²⁸

Given that opportunistic federalism identified Commonwealth involvement in policies that do not inherently require the involvement of the Commonwealth, Twomey and Withers argue an opportunistic federalist has resulted in an aggressive and undesirable expansion of Commonwealth power, causing long-term structural damage to policy choice and diversity.²⁹ It follows that, under such a conception, COAG is a forum for the Commonwealth to exploit the States’ financial weakness for its own political ends.

Other studies agree with this more critical view of the process of centralisation. However, some studies, favouring a ‘coercive federalism’ model, argue that the process of centralisation has now gone so far that the Commonwealth can actively control State actions through the allocation of Commonwealth funds. As with opportunistic federalism, coercive federalism has its intellectual roots in discussions of American federalism. John Kincaid first used the term to describe a policy program of defunding of State programs by the Reagan administration in the 1980s in order to encourage, or ‘coerce’, the States into adopting a more restrained, less activist (read high spending), policy agenda.³⁰ The use of national government power under such a system can allow the national government to exert undue influence over the lower levels of government, undermining their ability to make decisions based on their own perceived policy needs. While the above observations were made about the dynamics of American federalism, similar examples of the central government exerting undue influence over the States has also been remarked upon in Australia. Iain McLean, writing in 2004, noted how the use of special purpose payments (SPP’s) had been a mechanism for the exercise of coercive power in Australia. McLean describes that:

As the welfare state developed, the Commonwealth wished more and more to intervene in policy areas that were constitutionally reserved to the States. The scope to do so by constitutional amendment being extremely restricted, it did so by tied grants, known in Australia as special purpose payments (SPPs). An SPP offers a grant to a State in a policy area that is constitutionally in the State’s domain, but with Commonwealth conditions attached. By financial year 2002/3, SPPs constituted AUD22bn of the total AUD54bn (that is, 40 per cent) of the volume of Commonwealth grants.³¹

Therefore, under a coercive view of federalism, COAG would be a forum for the Commonwealth to coerce the States into a policy action according with its own position on a particular issue.

A final interpretation of the federalism environment is more benign. Rather than a situation of Commonwealth dominance developing as a result of the High Court’s expansive interpretation of Commonwealth power and their increasing financial dominance, another position holds that the situation has contributed to prevailing environment of collaboration and cooperation between the levels of government. This is called ‘collaborative’ or ‘cooperative’ federalism. In an environment where the power division between the levels of government is unclear and where the States often do not have the resources to undertake a specific policy function, collaboration between the levels of government has been the result. This process may take the form of policy coordination, legislative

²⁸ Twomey and Withers, above n 25, 33.
²⁹ Ibid.
harmonisation or purely through financial assistance. Thus, under a collaborative federal system, COAG would be a forum to forge agreements to undertake collaborative action and the form that action would take. In terms of explaining the growing centralisation of power towards the Commonwealth, writers disagree on the level of influence cooperative or collaborative federalism has had on that process. Robyn Hollander and Haig Patapan argue that our federal system has allowed for a pragmatic federalism to emerge, where agreements between the levels of government were determined based on the needs of the day rather than any overriding, inbuilt momentum of centralisation. On the other hand Alan Fenna argues that the processes of cooperative federalism itself, which lead to the harmonisation of laws across a federation, contribute to the ‘de-federalisation’ of that nation by removing difference, and the capacity for there to be difference, between the federal units.

Overall, a particular view of federalism is influenced by a writer’s opinion on the desirability of movement of power and responsibility from the States to the Commonwealth, this being the prevailing trend in power distribution over time. Yet within these conceptions of the contemporary state of federalism in Australia are assumptions on what forces have had the most impact on making federalism the way it is. These forces could be the prevailing rules of the federalism environment or the approaches of particular political players at a given time. By extension, their view of COAG’s role in the evolution of Australia’s federal system could be described as “rule-based” or “player-centric.”

B Studies of COAG

A number of federalism studies have involved discussion on COAG and Premiers’ Conferences. Overall, these studies can be categorising as following one of two, basic approaches. One I have termed a “player-centric” approach, the other I have termed the “rule-centric” approach.

32 Saunders, above no 1, 71-72.
1 The Player-Centric Focus

The first approach adopted by previous studies of COAG and Premiers Conferences is one I have termed a “player-centric” approach. A player-centric study on federalism is one that examines federalism as a policy area forming a part of a wider policy platform of an incumbent or aspirational government, with any realignment of policy responsibility being a result of that platform. In this way, COAG and Premiers’ Conferences are seen as a tool to pursue these goals rather than a key institutional factor in their development. A leader does not design a policy purely because they think they can get COAG to agree to it, they decide on a policy and use COAG as an option to implement it if possible. As such, discussions on the realignment of policy responsibility in Australia focus on the player’s approach and attitude. These are more matters of ideology of a particular leader or party than questions of structure and institution.

Federalism studies with this focus categorise different historical periods under general headings of the federalism, like those discussed above. This categorisation is based on the approach of certain players and the operations of institutions are seen as manifestations of this wider theme. Therefore conclusions and assumptions made about COAG revolve around how COAG and its operations are a result of wider themes and evolutions of federalism, resulting from the personal approaches of the leaders involved.

Analysis of federalism in this area is generally chronologically based and divided along the lines of different Commonwealth governments, emphasising the role of the Prime Minister in leading federalism reform. Although in many situations, the supportive, or in some situations unsupportive, roles of the State and Territory leaders in a particular policy stance are acknowledged, the general focus of player-centric studies of federalism is the leadership role of the Prime Minister.36

Based on this division, political analysis has assigned certain labels to the approach undertaken by a Prime Minister to federalism in each period. Geoff Anderson and Andrew Parkin’s description of the approach of Prime Minister Kevin Rudd as a mix of collaborative and coercive is an example of this approach.

The Rudd government, led by its prime minister, was seemingly intent on fabricating a collaborative approach that could be characterised as being in the national interest but respecting the role of the states and not especially aggrandising the role of the Commonwealth. At other times, especially near the end, the Rudd government was more inclined to lambast the states as impediments to the national achievement of a more efficient, consistent and effective policy reform as Rudd saw a greater direct role for the Commonwealth.37

Focusing on the federalism approach of leaders, especially Prime Ministers, has meant a particular attitude towards the operation of COAG and Premiers’ Conferences was seen as reflections of their

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36 See for example: Brian Galligan and Cliff Walsh, ‘Australian Federalism: Developments and Prospects,’ (1990) 20 Publius 1, 1-2. The role of the Premiers of South Australia and New South Wales were acknowledged in the development of ‘new federalism’ in the late 1980s but the focus is on the leadership of Prime Minister Bob Hawke in that process.

wider attitudes to federalism. Kenneth Wiltshire, again writing on the Rudd approach to federalism, used the COAG agenda during the Rudd government as an example of the mixed approach of Prime Minister Rudd towards federalism. He argued the federalism developments during that period were due to Rudd’s approach of convincing the States and Territories to implement his policy initiatives in return for a large increase in funds.  

COAG has also been used as an example of the contrasting approaches of different leaders. Robyn Hollander and Haig Patapan do this when comparing the federalism approaches of Prime Ministers Keating and Howard. Of Keating, they argued, COAG was at the centre of intergovernmental negotiations (albeit while these discussions were more minimalist than the States and Territories would have preferred). Under Howard, they argued, that interest in COAG declined as discussions were confined to particular interests of the Commonwealth.

Underlying player-centric analyses is a primary assumption about COAG and Premiers’ Conferences: that the direction the conferences take policy is primarily dictated by the approach of politicians. By extension, the operation and utilisation of COAG is subject to the political bent of the leaders towards federalism. COAG is, essentially, what a politician makes of it, with institutional characteristics the result of politicians design and utilisation rather than inherent to its function and role. Ultimately, this approach does not see COAG as an independent variable in Australian federalism. It is a tool to be used by politicians, not a mechanism within they must operate. However, as will be made clear later in this chapter, this has not been the true pattern of history. COAG and its predecessors have been a constant institutional presence in Australian federalism, with its structure being relatively consistent. Politicians have taken different approaches to intergovernmental relations, but these approaches have always remained within a COAG context.

2 The Rule-Centric Focus

Not all studies of COAG have followed a player-centric approach. Some have taken another approach which I have termed ‘rule-centric.’ If player-centric analysis focuses on the participants, then by contrast the rule-based studies focus on the laws and theories of federalism. In this way, rule-based analyses look beyond the dynamic between the governments that participate in intergovernmental relations and the strategies they use when interacting with one another. Instead these studies examine the legal environment in which these interactions are take place. Under such studies, realignments in policy responsibility are the result of the rules of a prevailing federalism environment imposed from an outside forces or an organisation like the High Court and labelled with categories like those discussed above. As such, outcomes of COAG meetings are seen as examples of this environment. Studies like these analyse the basis of federalism and how the rules, as established by the Constitution and interpreted by the High Court, reflect one type of theoretical understanding of federalism in the Australian context, and see outcomes from COAG as an example of this.

In Australian federalism, the High Court acts as an arbitrator in intergovernmental disputes. It interprets the rules of the constitutional system and ensures the players operate within them. As

39 Hollander and Patapan, above no 33, 286-287.
such, when one player believes the other is not operating within the law, it can seek a determination from the High Court to resolve the situation. As a field primarily focused on the rules of Australian federalism, it makes sense that rule-based studies would place a high degree of importance on the role of the High Court in developing those rules. Melissa Perry’s work on the role of the High Court in the development of federalism is an example of this. She argues that certain decisions of the High Court have determined the course of federalism in Australia. She cites High Court Chief Justice Robert French in his explanation of how the High Court has contributed to a trend of centralisation in the federation through or by grants made under section 96 of the Constitution. French reasoned that:

Additional grants by the Commonwealth to the States under s 96 of the Constitution have been seen as part of a mechanism sanctioned by the High Court, to allow the Commonwealth to enter, through the conditions it imposes, into fields of regulation otherwise beyond its legislative powers. In this way, the Commonwealth has been able to play an important role in areas such as secondary and tertiary education, hospitals, roads, and many others. It has also been able to use its grant powers to cause the States to vacate particular taxation fields.  

With the key role in developing the rules of the federation being exercised by the High Court, COAG’s operation is more akin to an implementer of a wider rule change or evolution rather than an active force in the development of Australian federalism. Perry uses the environment as an example of how COAG has actioned a policy delineation laid down by the High Court. She argues that:

[T]he expansive construction of the external affairs power in cases such as *Tasmanian Dams* in part underpins the delineation of responsibilities regarding the environment in the Heads of Agreement on Commonwealth State Roles and Responsibilities for the Environment, concluded through the Council of Australian Government (‘COAG’) in November 1997.  

Rule-based studies like Perry’s see COAG as a mechanism for deciding and implementing policy, but has its general direction determined by rules and their interpretation from other institutions like the High Court, these latter institutions forming the studies focus rather than COAG.

The rules determining the federalism environment need not always be a specific legal rule declared by the High Court. In some studies, the rules come from the practical governing environment, with COAG outcomes seen as a reflection of these practical circumstances. An example of a practical governing circumstance to which COAG has adapted is the trend of centralisation mentioned above. Centralisation has been argued to have changed the federalism environment from a ‘legislative’ dominated federal system to an ‘administration’ dominated federalism environment. Alan Fenna describes the difference between the two models:

The American, Canadian and Australian approach to federal design was the approach of ‘legislative’, as distinct from ‘administrative’, federalism. That is to say, powers were divided by assigning full responsibility for specific policy areas to one level of government or another (though sometimes both). By contrast, the German approach to federal design was to divide powers by assigning an

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42 Perry, above n 40, 187.
overarching responsibility for establishing the policy framework to the national government with responsibility for implementation and administration being assigned to the sub-national governments. Administrative federalism entails a strong representation of the sub-national units in the national policy-making process...

He goes on to describe the process moving from a legislative model to an administrative model. He argues COAG’s changing role is a result of this process.

... Australia has lost the defining qualities of the legislative model but not acquired the full requisites of the administrative model – for no equivalent evolution has occurred in the institutions of representation and decision making. Some appearance, and even perhaps some reality, of evolution can be read into the advent of the Council of Australian Governments (COAG). However, COAG is something that may more accurately be said to occur (and even that not very often and not for very long) rather than to exist and is not an institution where the states wield any sort of veto power.

In this study, COAG is seen as an example of how a wider rule change within Australian federalism is manifesting. While the studies noted above see the rules of federalism as originating from some domestic circumstances, trends can imposed from wider global or regional economic and social circumstances.

Governance challenges have changed enormously since the Australian Constitution came into operation in 1901. Globalisation has caused nations to become more integrated with one another and at the same time regional differentiations have become more relevant. In such an environment, significant policy reform is necessary and COAG has been noted to be a vehicle which would allow a process of harmonisation to respond to these outside trends. Galligan argues this case.

[T]here needs to be an adequate system of intergovernmental arrangements and procedures for coordinating policy action when that is required or achieving agreement on national standards. This was the major thrust of the Hawke New Federalism and is the continuing purpose of COAG.

Overall, rule-based studies see forces other than COAG driving federalism change and contributing to the rule based environment for Australian federalism. As such COAG, like in player-centric analyses, is seen as an example of the impact of wider forces on the federal system, with both its existence and trends in its operation dependent on suitable outside forces being present to necessitate it. In this, both of the rule-based and player-centric approaches fail to appreciate the enduring and institutional nature of COAG and Premiers’ Conferences.

Under player centric studies, the approach of major political leaders is seen as the primary driver of federalism change. Similarly, under rule-based studies, the approach of the High Court in interpreting the laws of federalism or outside environmental factors are seen as the drivers for change in federalism. Thus, a common assumption between the two approaches is that neither sees COAG as a systemic part of the process, it is simply an event which occurs if the approach of a leader demands it or the outside environment necessitates it. However, as will be demonstrated below,

43 Fenna, above n 7, 303.
44 Ibid 304.
the truth is that COAG, and before it Premiers’ Conferences and Inter-colonial Conferences, have always been present in the process of federalism’s evolution. In this way they are more akin to a governance institution, whose presence can influence the approach of a politician, or be formative of rules. This is demonstrated by their history and general enduring characteristics of the conferences.

COAG, Premiers’ Conferences and Inter-colonial Conferences in History

As introduced earlier in this thesis, COAG, and before it Premiers Conferences and Inter-colonial conferences, have been constant part of our governance system. They have always been present, but adapted and intensified with time, reflecting the changing contemporary challenges in intergovernmental relations. This indicates COAG should be seen as an integral part of the governance system as a constant, enduring institution for facilitating intergovernmental relations.

1 1856-1900: Forming the federation

At a dinner in Tenterfield, New South Wales, Sir Henry Parkes, Premier of that colony, spoke in a long, smoke-filled room of the people from the six Australian colonies as being one people with one destiny bound together by that crimson thread of kinship. That statement may have indicated that in 1889 the idea of Australians joining together in one nation was inevitable. However, the previous thirty-three years since the first of the Australian colonies became self-governing (New South Wales, Victoria and Tasmania) had proved that the federation of these six separate colonies would be achieved through political calculation rather than through appeal to the high-minded principles of joint destiny and kinship. In fact, as moves toward federation gained momentum in the form of a constitutional convention in Melbourne in 1890, the speeches in favour of federation explicitly concentrated on four practical advantages of federation rather than principles of common destiny and kinship.

These were common defence; the elimination of border customs duties; the establishment of a final court of appeal; and immigration. It is around these governance challenges (and in the federation movement itself) where the central role of heads of government meetings (then called inter-colonial conferences) began.

The journey of the Australian colonies towards federation began in 1850. In that year the Imperial Parliament passed the Australian Constitutions Act. This act provided for three reforms. First, the Act provided for the reform (and in the case of South Australia and Van Diemen’s Land, the establishment) of Legislative Councils which were two-thirds elected. Secondly, upon separation of the New South Wales District of Port Philip into the Colony of Victoria, it provided for the establishment of its own, two-thirds elected Legislative Council.

46 Sir Henry Parkes, ‘Tenterfield Oration’ (Speech delivered at the Tenterfield Banquet to the Premier, Tenterfield, New South Wales, 24 October 1889).
47 See for example Debates of the Australasian Federation Conference 1890, Melbourne, 6-14 February 1890, 34-35, (Sir Henry Parkes).
48 1850 (Imp)
49 Ibid s 1 (NSW) & s 7 (SA & Van Diemen’s Land).
50 Ibid s 2.
Finally, this Act empowered the Governors, acting on the advice of the Legislative Councils, with authority to legislate for the independent governance of the colonies. The result of this empowerment was the enactment of the Constitution Act 1854 (Tas), Constitution Act 1855 (NSW), Constitution Act 1855 (Vic) & Constitution Act 1856 (SA) which provided for each colony to become legally self-governing. The Australian Constitution Act also gave the option to the people of Western Australia to petition for the establishment of a Legislative Council there for the same purpose as those in the eastern colonies (requiring one third of householders in Western Australia to be signatories). However, this right was not exercised until 1870, resulting ultimately in the Constitution Act 1889 (WA). Queensland, unlike the other colonies, was only in its infancy as the other eastern colonies were gaining self-government. Yet by 1859, with the impracticalities of governing a colony so distant from Sydney, an Order-in-Council of the Privy Council enabled the establishment of a Legislative Council in Queensland which enacted the Constitution Act 1867 (Qld).

Australia was, by virtue of these laws, divided between six self-governing colonies, each legally independent from one another, but sharing a continent. It is this sharing that mandated cooperation in order for these colonies to prosper, and inter-colonial conferences facilitated this cooperation.

During the 19th century, the Australian continent was still relatively underdeveloped in terms of economic infrastructure. Even within the colonies, yet alone between the colonies, a viable infrastructure framework was lacking and efforts were focused towards the securing of the essentials of life. However, by the time of self-government in the 1850s, efforts began focusing on developing these infrastructure and economic networks beyond colonial boarders, and it was due to a number of successful inter-colonial conferences, that institutional and infrastructure networks between the colonies were developed. The first meeting between two colonial Premiers following colonial self-government was focused on this task. It took place in Sydney in 1869 and involved the Premiers of New South Wales and Queensland meeting with representatives from New Zealand in the hope of establishing a telegraph cable between Sydney and New Zealand. Over the next thirty years there were seven conferences between the Premiers (in varying combinations) which established rules for a postal union, a network of telegraph cables linking Australia to the world, and interlinking railways (although not uniform gauges). While these conferences allowed for infrastructure and institutional development across the Australian continent, some conferences on

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51 Ibid s 14.
52 Ibid s 9.
56 Rules for the postal service were established at the inter-colonial conferences of 18 September 1871, 22 January 1873 and May 1883. Coverage of these conferences were reported in: ‘The Intercolonial conference’, The Argus (Melbourne) 7 October 1871, 5-6; ‘The Conference’, The Sydney Morning Herald (Sydney), 21 January 1873, 7; ‘The Postal Conference’, The Argus (Melbourne), 4 May 1883, 6 respectively.
57 The development of the telegraph network was organised at the inter-colonial conferences of January 1877, 9 May 1878, and January 1888. Coverage of these conferences were reported in: ‘Telegraphic’, The Brisbane Courier (Brisbane), 30 May 1876, 3; ‘Summary for Europe’, The Queenslander (Brisbane), 23 February 1878, 6; ‘Return of the Premier’, The South Australian Advertiser (Adelaide), 6 February 1888, 5 respectively.
58 Railway linkages were discussed and decided upon at the November 1880 inter-colonial conference. Coverage was provided in ‘The Intercolonial Conference, Clarence and Richmond Examiner and New England Advertiser (Grafton), 14 December 1880, pg unknown.
other issues were not as successful. In fact, it was the failure of these conferences that invited the first Australian-based arguments towards federation.

Access to money markets was an issue that hit the colonies with a vengeance when recession came in the early 1890s. Yet an inter-colonial conference on the issue in 1893 aimed at reforms to the financial system failed to achieve its desired results.\(^{59}\) Defence discussions were no more successful. Over the 44 years between self-government and Federation, defence issues largely related to the potential threat of Pacific islands being taken by foreign powers, especially France.\(^{60}\)

In response to this, several inter-colonial conferences relating to the defence of South Pacific islands, in particular New Guinea and Fiji, were held. Yet each of these failed to produce a unified defensive position or provide for a level of coordination required for an adequate defensive force to be maintained without imperial coordination.\(^{61}\)

On customs and tariffs, inter-colonial conferences were regularly called over a period of 15 years, yet an agreement of tariffs remained elusive.\(^{62}\) It was because of these failures that the conferences took on a new role, facilitating governance change at a federal level.

In an atmosphere of frustration over customs duties, arguments began to circulate that a unified customs union, and ultimately a federal authority to govern it, would be necessary to solve the tariffs problem. The idea of a federal union between the colonies had been circulated previously, but always met with a lukewarm response.\(^{63}\) Even the first attempt at federation, the Federal Council of Australiasia, was composed without either New South Wales or South Australia (initially) as members. It was not practical for this situation to continue and as such, a new push by Henry Parkes to establish a federal union composing all colonies ensued and it was in inter-colonial conferences that this push was manifest. The inter-colonial conference of 6 February 1890 drew up a plan for a

\(^{59}\) International finance was discussed at the intercolonial conference of 27 May 1893. Coverage of this conference was reported in: ‘The Intercolonial Conference’, The Barrier Miner (Broken Hill), 26 May 1893, 2; ‘The Intercolonial Banking Conference’, The South Australian Register (Adelaide), 30 May 1893, 4.

\(^{60}\) An example of this is concerns relating to French expansion in the New Hebrides: ‘France and the New Hebrides’, The South Australian Register (Adelaide), 25 August 1887, 5.

\(^{61}\) Defense was discussed at the intercolonial conferences of 20 June 1870, November 1883, 12 September 1887 and 19 February 1890. Coverage of these conferences was reported in: ‘Saturday, July 16 1870’, The Argus (Melbourne), 16 July 1870, 4-5; ‘The Intercolonial Conference on Annexation’, The Sydney Morning Herald (Sydney), 2 August 1883, 5; ‘Intercolonial Conference’, Launceston Examiner (Launceston), 13 September 1887, 3; ‘The Australian Defense Question’, The Brisbane Courier (Brisbane), 25 February 1890, 6 respectively.

\(^{62}\) Intercolonial conferences involving discussions on tariffs were held on 20 June 1870, September 1871, 22 January 1873, November 1880 and 15 January 1885. Coverage of these conferences were reported in: ‘Saturday, July 16 1870’, The Argus (Melbourne), 16 July 1870, 4-5; ‘The Intercolonial Conference’, The Argus (Melbourne), 7 October 1871, 5-6; ‘Intercolonial conference’, The Brisbane Courier (Brisbane), 19 February 1873, 3; ‘The Intercolonial Conference, Clarence and Richmond Examiner and New England Advertiser (Grafton), 14 December 1880, pg unknown; ‘The Intercolonial Conference’, The Sydney Morning Herald (Sydney), 16 January 1885, 7 respectively.

\(^{63}\) An idea for federal union was present at the time the imperial parliament granted self-government to the colonies and the idea had been circulated in response to difficulties arising through mail and telegraph negotiations. Each time an alternative, more practicable, solution was found via negotiation and so the federal idea was sidelined. W.G McMinn, National and Federalism in Australia, Oxford University Press, 1994, 81-93.
number of federal conventions, and, when the momentum of these conventions began to stall, it was a ‘secret’ conference on 30 January 1895 which renewed the push for the federal idea to be realised.

Overall, in this period, inter-colonial conferences became more regular, and had wider focus as the subject of intergovernmental relations changed from ad-hoc policy coordination associated with development, to establishing the rules for forming the federation. Federation would bring new challenges and focuses for intergovernmental relations, but inter-colonial conferences, soon to be re-named Premiers’ Conferences, would still be the method of conducting intergovernmental relations.

2 1901-1942: Co-ordinate and Co-ordinated Federalism

Following Federation in 1901, both the State governments and the Commonwealth government had their own taxation powers and, based on the provisions of the Constitution, their own unique areas of responsibility. Thus the State governments and the Commonwealth government could operate largely independently of one another. As discussed above, this was a situation supported by the High Court at the time until the divisions of power became more fluid after 1920 when the implied immunity of instrumentalities and reserve state powers doctrines were abandoned.

Mirroring the change in approach of the High Court, the movement from a strict separation of jurisdictions between both levels of government to a more fluid division of responsibility, separation gave way to cooperation made necessary by wider political events. Over the period between federation and the Second World War, this transition which was both facilitated and fostered by the now-renamed Premiers’ Conferences.

In the first 14 years after Federation, there were eleven conferences. To a large extent these conferences dealt with practical challenges associated with establishing the new Commonwealth institutions and beginning to develop national market conditions. For example conferences were convened to deal with the transfer of property to the Commonwealth, the harmonising of infrastructure and services; and the extent and nature of the newly created Commonwealth powers. Following 1914, global events mandated a greater role for intergovernmental relations.

64 ‘The Intercolonial conference’, The Mercury (Hobart), 17 February 1890, 3.
65 G H Reid, ‘The Conference of Premiers in Hobart,’ (1895) 6(2) Review of Reviews 149.
66 Conferences were held on 8 January 1901, 2 November 1901, 15 May 1902, 15 April 1903, 6 February 1905, 6 April 1906, 27 May 1907, 28 April 1908, 5 March 1909, 17 January 1912 and 31 March 1914.
68 See for example the Premiers Conferences of 15 May 1902, 15 April 1903 and 17 January 1912. Each were reported in: ‘The Premiers Conference’, The Advertiser (Adelaide), 17 May 1902, 8; ‘The Premiers Conference’, The Register (Adelaide), 23 April 1903, 6; Victoria, Report of the Resolutions, Proceedings and Debates of the Interstate Conference held at Melbourne, January 1912, together with Appendices, Parl Paper No 4 (1912) respectively.
69 See for example the Conferences of Commonwealth and State Ministers on 6 April 1906 and 27 May 1907. Each was reported in: New South Wales, Conference of Commonwealth and State Premiers and Ministers, Report of Debates together with Agenda Papers, Minutes of Proceedings and Appendices, Parl Paper No 34 (1906); Commonwealth, Premiers Conference held at Brisbane, May 1907. Report of the Resolutions, Proceedings, and Debates, Parl Paper No 13 (1907) respectively.
On the 28 June 1914 Archduke Francis Ferdinand, heir to the throne of Austria, was assassinated in Sarajevo, Bosnia. While relegated to page 17 of The Advertiser at the time, this event set in progress a series of events that began the First World War, a war in which 58,132 Australians were casualties. War-time governance at home required a renewed energy. Soldiers needed to be enlisted, industries and prices required new regulation and the Commonwealth was required to raise additional funds via taxation to meet the new costs associated with the war. This required unprecedented cooperation between the States and the Commonwealth, facilitated by Premiers’ Conferences. Between the declaration of war and the armistice there were five Premiers’ Conferences dealing with a diverse array of policy areas including industry regulation, payment of soldiers, repatriation of returned soldiers, recruitment and other war matters, and taxation. Outcomes of these conferences allowed for a cooperative war-time governance which would become, due to the events of the next two decades, more permanent.

Following a brief resurgence of the post-Federation pattern of limited engagement between the levels of government during the 1920s, Australian governance was once again besieged by a monumental challenge imposed from the rest of the world. On 24 October 1929, the value of stocks on the Wall Street stock exchange collapsed. The economic effects of this event, which began the Great Depression, were felt worldwide and Australia was no exception. General national expenditure declined by 25% and unemployment peaked at 28.1% in 1932, causing widespread poverty and massively reduced government income. This mandated, once again, a reinvigorated collaborative government response. Ultimately, the national response to this crisis was the Premiers’ Plan. This plan had five main provisions aimed at reducing government debt to avoid defaulting on debt obligations; and also to promote a return to growth in the private sector. These provisions were: A reduction in government expenditure of 20%; conversion of government debt to ensure a

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73 See for example the Premiers Conference, 5 May 1915, reported in: Victoria, Report of the Resolutions, Proceedings and Debates of the Premiers Conference held in Sydney, May 1915, together with Appendicies, Parl Paper No 24 (1915).
74 See for example the Premiers’ Conferences of 12 December 1916, 5 January 1917 and 8 May 1918. Each were reported in Victoria, Report of the Resolutions, Proceedings, and Debates of the Premiers’ Conference held at Melbourne, December, 1916, Parl Paper No 6 (1916); Victoria, Report of the Resolutions, Proceedings, and Debates of the Premiers’ Conference (with Ministers of Lands) held at Melbourne, January, 1917, Parl Paper No 7 (1917); and Victoria, Report of the Resolutions, Proceedings, and Debates of the Premiers’ Conference held at Sydney, May, 1918, Parl Paper No 18 (1918) respectively.
75 See for example the Premiers’ Conferences of 22 May 1916, 12 December 1916 and 8 May 1918. Each were reported in ‘The Premiers’ Conference’ The Advertiser (Adelaide), 30 May 1916, 6; Victoria, Report of the Resolutions, Proceedings, and Debates of the Premiers’ Conference held at Melbourne, December, 1916, Parl Paper No 6 (1916); Victoria, Report of the Resolutions, Proceedings, and Debates of the Premiers’ Conference held at Sydney, May, 1918, Parl Paper No 18 (1918) respectively.
22.5% reduction in interest; increased taxation; a reduction in interest rates; and relief for holders of private mortgages.\textsuperscript{78}

The formulation of this plan was led by Premiers’ Conferences. The process began when the Premiers’ Conference of 18 August 1930 when members were addressed by Sir Otto Niemeyer and Sir Robert Gibson from the Bank of England. Their advice was to impose reductions in interest rates and government spending as the most appropriate response to the depression, advice ultimately reflected in the Premiers’ Plan despite the opposition of the Premier of New South Wales, Jack Lang.\textsuperscript{79} Following this meeting, six conferences were held over the next two years in which the governments coordinated their efforts in implementing this plan and updating each other on their progress.\textsuperscript{80} The Premiers’ Plan, and Depression responses more generally, caused unprecedented political instability including a split in the Australian Labor Party (caused by Lang’s supporters in Canberra) and a change of Commonwealth government in 1932.\textsuperscript{81} Despite this, cooperation through the process continued through the Great Depression and into the Second World War. Thus, this period continued to see Premiers’ Conferences occurring. In fact, they intensified in both frequency and policy load as the political environment necessitated.

3 1942-1990: Vertical Fiscal Imbalance

The collaborative effort of the Second World War occurred in an unprecedented environment of Commonwealth fiscal dominance. Although intergovernmental relations had become increasingly collaborative in nature, the power relationship between the States and the Commonwealth remained relatively equitable up until the Second World War. This was largely due to the fact that the States and the Commonwealth retained an ability to raise their own funds. This situation changed with uniform taxation. As described above, this system entrenched State dependence on Commonwealth funding and ensured the dominance of Commonwealth power over the States following the 1940s. As such, vertical fiscal imbalance necessitated negotiations between the Commonwealth and the States over what conditions payments would be made. Premiers’ Conferences were the central forum where these negotiations took place.


\textsuperscript{79} ‘Report of Proceedings’, \textit{(Conference of Commonwealth and State Ministers, Melbourne, 18-21 August 1930) 1}.

\textsuperscript{80} Conferences were held on 6 February 1931, 26 May 1931, 10 August 1931, 28 January 1932, 14 April 1932 and 28 June 1932. These conferences were reported in Commonwealth, \textit{Conference of Commonwealth and State Ministers held at Canberra, 6\textsuperscript{th}, 7\textsuperscript{th}, 9\textsuperscript{th}, 10\textsuperscript{th} and 13\textsuperscript{th} February 1931, Melbourne, 25\textsuperscript{th} and 26\textsuperscript{th} February 1931. Proceedings and Decisions of Conference, Parl Paper No 193, (1931); Commonwealth, Conference of Commonwealth and State Ministers held at Melbourne, 25\textsuperscript{th} May to 11\textsuperscript{th} June 1931. Proceedings and Decisions of Conference, Parl Paper No 286, (1931); Commonwealth, Record of the Conference of Commonwealth and State Ministers held at Melbourne from the 10\textsuperscript{th} to the 14\textsuperscript{th} August, 1931, and from 1\textsuperscript{st} to the 12\textsuperscript{th} September, 1931, Parl Paper No 269 (1931); Commonwealth, Record of the Conference of Commonwealth and State Ministers held in Melbourne from the 28\textsuperscript{th} January to the 5\textsuperscript{th} February, 1932, Parl Paper No 12 (1932); ‘Record of the Conference of Commonwealth and State Ministers held in Melbourne from the 14\textsuperscript{th} April to the 21\textsuperscript{st} April, 1932’, (Conference of Commonwealth and State Ministers, Melbourne, 14-21 April 1932); Commonwealth, ‘Conference of Commonwealth and State Ministers held at Canberra, 28\textsuperscript{th}, 29\textsuperscript{th}, 30\textsuperscript{th} June, and 1\textsuperscript{st} July, 1932, and at Sydney, 4\textsuperscript{th}, 5\textsuperscript{th}, 6\textsuperscript{th}, 7\textsuperscript{th} and 8\textsuperscript{th} July 1932’, (Conference of Commonwealth and State Ministers, Canberra and Sydney, 1932).

\textsuperscript{81} Cook, above n 78, 100-110.
During this period the procedure of the conferences was also fairly predictable and attained a regularity that had been absent previously. As explained by Campbell Sharman, conferences would open with a statement by the Commonwealth on the general economic position. This would be followed by a statement by the States on the necessity for an increase in funding. The Commonwealth would then attack this request and, during a recess in the conference, would deliver an offer to the States. Each State would then spend the following day of the conference making statements attacking inadequacy of the Commonwealth offer, usually speaking in order of size. A Commonwealth statement would follow which attacks the States parochial concerns and reasserts the Commonwealth’s overall economic position. This is followed by a revised offer by the Commonwealth which supposedly takes into account the States’ concerns. While usually not being fully acceptable to the States, it is later adopted in the Commonwealth budget. Over the period between 1942 and 1991 these conferences were held on a largely annual basis, with conferences being held usually in August during the 1940s, June during the 1950s, 1960s and 1970s and May during the 1980s. Thus, in this period, Premiers’ Conferences were regular negotiations dominated by financial discussions, although the politics surrounding them would shift over time.

Immediately following the end of the Second World War, intergovernmental relations under the Chifley government was focused on post-war reconstruction. As such, financial conditions established during war-time remained in place and other grants which were made to the States focused on reconstruction, while any further Commonwealth interference in the management of the State budgets was largely absent. Later, the focus turned to the repayment of war debts. This, coupled with high Commonwealth revenue during the 1960s, allowed for the Commonwealth to provide financial support to the States over and above standard grants (should this become necessary) and contribute to State loan repayments. What this meant was that the States had little interest in altering the method of allocation, merely the quantum of funds provided in any given year. This led to a relatively congenial atmosphere at Premiers’ Conferences. Later however, this focused changed. Following the election of the Whitlam Government in 1972, the Commonwealth increased the use of Specific Purpose Payments (SPP’s) to provide funds to the States with the ultimate aim of forcing the States to implement service delivery programs in accordance with the policies of the Commonwealth. This interference was not well received by the States, with Premiers’ Conferences regularly featuring statements like ‘Commonwealth-State financial relations are once again at crisis point’. Attempts were made by the Fraser Government to defuse this atmosphere of conflict, by returning to a system of general purpose grants but, due to the tight

86 Russell Mathews, ‘Revenue sharing and Australian Federalism’ in Dean Jaensch (ed), The Politics of “New Federalism” (Australian Political Studies Association, 1977) 43, 46.
budgetary conditions of the late 1970s, these grants were lower than previously and didn’t assuage the concerns of the States. Predictably, Premiers’ Conferences reflected this with South Australian Premier Don Dunstan describing the 1978 allocation as having the potential to lead to a ‘holocaust’ in unemployment. Such a dynamic would continue into the Hawke Government with State grants suffering while Commonwealth finances remain depressed, much to the displeasure of the States. Despite a conflicted environment, agreements at Premiers’ Conferences remained the basis of intergovernmental engagement. However, during this period the focus of intergovernmental relations moved to financial issues above all else. The conferences became more regular as well, reflecting the constant and recurring need to establish the financial position each jurisdiction each year. This regularity was something which would become a feature of the conferences from this point onward, but the focus widened considerably.

4 1990-Present: Whole-of-Government Reform

Between 1983 and 1990 the Commonwealth had engaged in the most comprehensive economic reform process since Federation. However, by 1990 the ‘unfinished business’ of economic deregulation largely rested with the States. For the first time since the transfer of taxation power to the Commonwealth during the 1940s, the States had the power to contribute to, or if necessary derail, a Commonwealth policy initiative. Each of the Prime Ministers approached the necessity of State cooperation differently, and each of them used Premiers’ Conferences and their successor, COAG meetings as the vehicle to achieve whole-of-government reform. In many ways, identifying changes in the approach of each leader is a similar approach to the previously mentioned player-centric approach. Nevertheless it still indicates the enduring nature of Premiers’ Conferences and later COAG. It remained each leader’s preferred mechanism to engage in intergovernmental relations. No other alternative was ever proposed.

The Commonwealth’s first response to the necessity of state-involvement in the reform process was a policy called ‘new federalism’, launched by Prime Minister Bob Hawke in July 1990. While the same title had been used by the previous Prime Minister Malcolm Fraser to describe his ultimately unsuccessful attempt to reform the Commonwealth-State financial arrangements, this policy was aimed at providing a framework for a cooperative relationship with the States to work on microeconomic reform. Now both the States and the Commonwealth would be negotiating agreements to progress joint policy goals with funding arrangements built in, rather than solely negotiating a share of total government revenue needed to progress individual policy goals. However, as with previous federal negotiations the central institution to this new cooperative process was a series of Special Premiers Conferences. These conferences were to take place in Brisbane on 30 October 1990, Sydney on 30 July 1991, and in Perth in November 1991. Each of these conferences was convened to provide new national uniform service charges and regulatory schemes.

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88 Mathews, above n 86, 50.
90 See for example Mathew Moore and Tom Burton, ‘Keating’s bitter pill for Greiner’, *The Sydney Morning Herald* (Sydney), 12 May 1988, 1.
across a number of areas. Some of these included vehicle registration and road rules, disability support, goods and service standards, city planning and financial regulation. While not achieving all the goals they were aimed to achieve, these conferences were largely successful and supported by both the Commonwealth and State leaders. The States wished to maintain the cooperative arrangements established under ‘new federalism’ proposing a Council of Australian Federation (essentially a regular Premiers’ Conference) to monitor State and Commonwealth financial transfers at the meeting of the Premiers in Adelaide, called after the Perth conference was cancelled in the wake of the change of Prime Minister from Hawke to Paul Keating. The final piece of the puzzle, however, was to ensure Commonwealth involvement and support.

Keating had, in his time as Treasurer, been a less-than-enthusiastic supporter of ‘new federalism.’ His last Premiers’ Conference as Treasurer showed a more confrontational attitude towards federal relations, presenting a ‘take it or leave it’ funding offer to the States. This attitude softened somewhat following his elevation to Prime Minister. His response to the States’ suggestion of a Council of Australian Federation was the Council of Australian Governments (COAG). Keating and the States kept COAG at the centre of collaborative policy formation throughout Keating’s leadership. Initially this was through providing for a negotiated response to the High Court’s Mabo decision, and then later continuing the microeconomic reform program.

Keating’s successor, Prime Minister John Howard argued that policy decisions should be taken in the national, rather than parochial interest. This attitude would permeate his approach to federal relations, making it clear that within a collaborative federalism model, Commonwealth leadership was expected. He made it clear he would retain the option of proceeding without State involvement if necessary. This was a harsher approach to federal relations than was taken by his predecessors, where State involvement in policy-making was seen as a favour to the States rather than an intrinsic necessity for positive policy outcomes. Nevertheless, COAG meetings still occurred as the States exercised the opportunity to engage with a number of federal policy initiatives.

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93 Ibid.

94 Carroll and Painter, above no 91, 9.


98 Hollander and Patapan, above no 33, 289.
Amongst these were uniform gun laws,\(^9\) native title,\(^10\) drug regulation,\(^10\) counter-terrorism,\(^10\) and water reform.\(^10\) Some of these conferences produced constructive outcomes, but the domineering attitude of the Commonwealth during these negotiations produced a tense dynamic between the Commonwealth and the States, in some cases resulting in a game of brinkmanship with both the States and the Commonwealth using the powers at their disposal to actively undermine the possibility of agreements seen to be non-beneficial to one party or another.\(^10\) COAG meetings were the front line of these tense negotiations and their outcomes came to be characterised by a ‘blame-game’ between the Commonwealth and the States. Ending this ‘blame-game’ was a key factor in the change of government in 2007.

In 2005 Kevin Rudd, then Leader of the Opposition, described himself as a committed federalist with a difference. He was not interested in the ‘mindless mantra of States rights’, his focus was on addressing the dysfunction of the federation as expressed through what he characterised as the ‘blame-game’ between the Commonwealth and the States.\(^10\) This approach was reflected in Rudd’s renewed focus on COAG, turning it into the ‘workhorse of the nation’\(^10\) During the Rudd government, COAG meetings established a reformed payment system between the Commonwealth and the States,\(^10\) new institutional working groups focusing on key cooperative policy areas,\(^10\) and

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\(^14\) One example of this was Premier John Brumby of Victoria refusing to refer power to the Commonwealth to progress management reform of the Murray-Darling basin. See for example: Australian Broadcasting Corporation, *Appeal to Brumby as Murray water shortage worsens* (20 September 2007) ABC Online <http://www.abc.net.au/news/2007-09-20/appeal-to-brumby-as-murray-water-shortage-worsens/676128>.


formed the basis for cooperative action on key policy focus areas like the global financial crisis\textsuperscript{109} and climate change.\textsuperscript{110} Below the surface, however, Rudd retained a willingness to proceed without universal State cooperation and was prepared to exclude non-conforming States from the funding benefits established as part of an agreement. The primary example of this was the COAG agreement to establish the National Health and Hospitals network. This health policy program was agreed by all States except Western Australia at the COAG meeting on 9 April 2010. The response taken by the federal government to Western Australia’s refusal to enter the agreement was to exclude Western Australia from the funding increases in the agreement until they joined the network.\textsuperscript{111} However, Rudd’s successor, Prime Minister Julia Gillard, was prepared to compromise to a greater extent to reach agreement and once again, COAG meetings were the vehicle used to reach such an agreement. In health, for example, the COAG meeting of 13 February 2011 forged a new funding agreement for the National Health and Hospitals network\textsuperscript{112} and ultimately resulted in the inclusion of all States and Territories, including Western Australia.\textsuperscript{113} The recent election of Prime Minister Tony Abbott had the potential to end the focus on collaborative engagement in intergovernmental relations, given that his suspicion of that approach expressed in his book, \textit{Battlelines}.\textsuperscript{114} However, during his first COAG meeting, he described COAG as a ‘meeting of equals’ and embarked on an ambitious COAG agenda.\textsuperscript{115} COAG meetings will, it seems, continue to be the primary institution for the delivery of whole-of-government intergovernmental reform.

Over the history of COAG, presented above, three things are constant. First, Inter-colonial Conferences, Premiers’ Conferences and COAG have always existed. Second, they have always been at the centre of intergovernmental relations activity and third, the conferences have adapted and changed their focus with the demands of contemporary intergovernmental relations in any given time period. In these ways they are a part of the institutional makeup of the governance system. They are what leaders use to achieve intergovernmental relations successes, and they are the forum for intergovernmental relations failures. But regardless of the outcome, the institutional architecture used has remained the same. What this indicates is that these conferences are far more than an ad-hoc meeting to be used or discarded according to the approach of a politician or changing rules of federalism prevailing at any given time. They are a constant presence. Furthermore certain other characteristics of the conferences indicate they should be analysed as an institution rather than just a political event.

\textsuperscript{111} Australian Broadcasting Corporation, ‘Nicola Roxon discusses ‘historic’ health deal’, \textit{Lateline}, 20 April 2010 (Nicola Roxon).
\textsuperscript{114} Tony Abbott, \textit{Battlelines} (Melbourne University Press, 2009) 113.
**D Characteristics of COAG and Premiers’ Conferences**

COAG and Premiers’ Conferences have two primary characteristics that indicate they operate more as permanent institutions of governance rather than as simple political events to be used as a tool for certain policy makers and rejected by others as circumstances dictate. First, COAG has a level of policy flexibility which allows it to deal with an unlimited array of policy issues and allows those focus issues to change over time. If it was simply a political occurrence, the meetings would be designed to be fit-for-purpose for a specific policy challenge rather than established as an ongoing meeting process capable of constant evolution. Second, COAG has had its importance recognised by governments from both political party-blocs forming government in Australia, ensuring its enduring existence and use. If it was simply a political occurrence, it would likely be the favoured mechanism by one side of politics while being rejected in favour of an alternative mechanism by the other. As will be demonstrated below this is not the case, and both characteristics of bi-partisan use and policy flexibility indicates it is an accepted, permanent institution to deal with intergovernmental issues.

1 **Policy flexibility**

A division of legislative or executive responsibility between the levels of government could, conceivably be in any policy area. As such, an organisation like COAG that facilitates intergovernmental agreements cannot have any limitation on its policy jurisdiction to allow the full ambit of policy negotiations to take place. An examination of the historical operation of COAG (and before it, Premiers’ Conferences) indicates that COAG has no restrictions on its policy focus and, as such, has had no impediment to taking a position as a universal policy discussion forum.

When COAG was first established in 1992, there was no policy restriction placed upon it in an explicit sense and no implicit policy restriction can be discerned from the operation of Premiers’ Conferences before 1992. As such, the policy focus of the conferences has changed with the requirements of the time.

Figure 1 shows the number of policy areas that have been discussed at conferences in each decade from 1901 onwards.
As shown above, the number of policy areas that have been the subject of conferences is changeable. They have been as few as eight in the 1980s and they have climbed as high as 19 in the 2000s. This supports the historical evidence presented in the previous sections that Premiers’ Conferences and COAG have adapted and changed in their focus to reflect the contemporary intergovernmental challenges facing governments. For example, when the intergovernmental challenges covered numerous policy areas during the Great Depression and the two World Wars, the number of policy areas discussed at Premiers’ Conferences was high. Similarly, when intergovernmental challenges were limited to financial transfers during the 1960s, 1970s and 1980s, the number of policy areas discussed at conferences was less. The data also appears to largely show that there is no upper limit on the number of policy areas that could be discussed. Although the highest amount of policy areas was 19 in the 2000s, there is no indication that it could not go higher. The decades with the highest number of policy areas discussed all have different totals rather than a consistent ceiling quantum of policies discussed that no year exceeded. This indicates that there is no arbitrary limit on the number of policy areas which can be discussed. This is further underlined by Figure 2, which presents data on the range of policy areas which have been the subject of conferences.
As is clear from figure 2, the range of policy areas discussed is numerous. This supports the data from the previous chart that the conferences are versatile enough to discuss a wide variety of policy areas. Second, no policy areas dominate discussions. Economic matters and Commonwealth-state finances have large representations in the policy profile of the conferences, but they do not dominate all other policies in the profile. This also supports the idea that the policy profile of the conference is flexible and not specifically focused any one area as a matter of priority. This provides an overall picture of policy versatility, a characteristic of a generalist governance institution.

2 Consistent bi-partisan acceptance and use

In Australia, two major political party blocs have formed government at both the Commonwealth and the States and Territories: the Australian Labor Party (ALP) and their non-Labor, conservative
For COAG to facilitate intergovernmental negotiations effectively, it cannot be the preferred method for conducting intergovernmental relations for only one side of politics. It needs to be used by governments of both political persuasions. From statistics alone, it is impossible to get inside the mind of every government leader since Federation to determine whether they either liked or were particularly engaged by COAG meetings or Premiers’ Conferences. However, if there is a trend toward a greater attendance of one party bloc or the other it would indicate that these conferences were only prioritised by one side of politics. In the absence of such a trend, whether the leaders liked the institution or not, it can be assumed that leaders from both sides of politics accepted the importance of the conferences for intergovernmental negotiations. In order to determine whether such a trend exists in conference attendance, a rate was calculated at which each leader of each jurisdiction since Federation attended COAG meetings or Premiers’ Conferences per year in office. I then divided the leaders’ rates into Labor and Non-Labor (Coalition) categories and determined an average rate of attendance for both Labor leaders and Non-Labor leaders in each jurisdiction for comparison. The results are shown below.

These results show two things. First, the average attendance in all jurisdictions is relatively constant. Both the Labor and non-Labor averages largely fall between one and two conferences per year. The only jurisdictions that have averages outside the one-to-two conference range are the Australian Capital Territory (ACT), the Northern Territory and the Commonwealth. Both the Northern Territory and the ACT have non-Labor averages just below one conference per year, the Northern Territory’s Labor average breaks through the two conferences per year mark, and the non-Labor Commonwealth average sits below the one-conference per year threshold. This indicates that any.

116 Over time these parties have included the Free Trade Party, the Protectionist Party, the Ministerial Party (Qld), the Ministerialist Party (WA), the Liberal Party (Vic, WA, Tas & Qld- distinct from the Liberal Party of Australia), the Conservative Party (Vic, SA & Tas), the Liberalism Party (SA), the Liberal Union/Federation (SA), the Reform Party (Vic), the ‘Fusion’ Party (also called the Commonwealth Liberal Party), the Nationalist Party (originally called the National Labor Party), the Liberal Country League (SA), the Liberal National Party (Qld), the National Party (originally the Country Party) and the Liberal Party of Australia.
trend towards one side of politics over another in attendance is a relatively insignificant one in real terms.

The second determination that can be made from Figure 3 is that the difference between Labor and non-Labor attendance differs from jurisdiction to jurisdiction. New South Wales, Victoria, Queensland and Western Australia all have higher average attendance rates for non-Labor leaders compared to Labor leaders (although the difference is quite small), while the Commonwealth, South Australia, Tasmania and the Territories all have higher Labor attendance rates. In the case of the Commonwealth, Tasmania and the Territories, this difference is significant, but can be explained when examined in context.

In the Territories, the difference is largely due to the fact that during the time Territories were regularly attending conferences (they only attended on an infrequent basis until the 1990s), there was a dominance of Labor administrations in those jurisdictions. What this means is that Labor Territory leaders recorded high conference attendance numbers while non-Labor leaders recorded very low rates. However, there is no such statistical anomaly in the Tasmanian or Commonwealth rates. These jurisdictions show a distinct dominance of Labor in attending conferences.

Despite this, what is clear is, in the case of the States and Territories no general claim of higher prioritisation of COAG meetings or Premiers’ Conferences by one side of politics compared to the other can be sustained. Occasionally Labor is dominant in meeting-attendance, occasionally the non-Labor parties are, with only Tasmania’s attendance picture forming an outlier outside of contextual considerations. This indicates a general bi-partisan acceptance of the importance of attending the conferences. With regard to the Commonwealth, however, a distinction can be made. Labor has a significantly higher rate of attendance at conferences than their Conservative counterparts.

The Commonwealth presents a different challenge in determining whether a partisan trend in the acceptance of the utility of the conferences exists compared to that of the States and Territories. The Commonwealth has a special role in these conferences as the jurisdiction that calls the meetings. As such, any manifestation of partisanship in Commonwealth attendance (and by extension, the calling of conferences) is highly significant to determining whether there is bi-partisan acceptance of the utility of the conferences. While Figure 3 seems to indicate that a trend towards Labor exists, to determine whether this is really the case, one must compare the rates of attendance of all Commonwealth leaders to see if there is a clear bias towards Labor leaders calling higher amounts of conferences compared to their federal Coalition counterparts. This comparison is presented below.
Figure 4 clarifies the Commonwealth position with regards to the apparent preference of Labor administrations for the calling of conferences represented in Figure 3. The vast bulk of Prime Ministers, whether Labor or Non-Labor, have an attendance rate of between one and two conferences per year. Within this range, six leaders were Labor leaders, eight were non-Labor Coalition leaders. This would seem to indicate that, in general, Labor and Coalition leaders call conferences at similar rates. A statistical trend towards Labor manifests itself in the two leaders who had the highest rates: Prime Ministers Kevin Rudd and James Scullin.

Both Rudd and Scullin represent outliers amongst their contemporaries for calling the conferences. Prime Minister Kevin Rudd was a particular enthusiast for COAG meetings. Keeping with his vision of COAG as a central organisation in policy development and implementation, he embarked on an ambitious agenda for COAG led to there being up to four conferences being held each year of his period of leadership. This was a departure from his predecessor, John Howard, who called conferences on a more infrequent basis, settling on two a year by the end of his term in office. Rudd’s high meeting intensity was also not continued under his successor, Prime Minister Julia Gillard. Following her accession to Prime Minister in 2010, she returned to the late-Howard average of two meetings per year. As such, the Rudd average of 3.8 conferences per year was an anomaly in the conference history.

Prime Minister James Scullin also represented an anomaly in the calling of Premiers’ Conferences, but unlike Rudd his intensity resulted from policy challenge rather than inherent enthusiasm. Scullin had the unfortunate circumstance of being sworn in as Prime Minister just two days before the Wall Street stock market crash which began the Great Depression. As discussed earlier, the response to this challenge involved coordination of Commonwealth action with the States and Territories,
leading to an abnormally high number of Premiers’ Conferences during his period of leadership. Such intensity was continued only for the first two years of the leadership of his successor Prime Minister Joseph Lyons and was not present at all in the period of his predecessor, Prime Minister Stanley Bruce. As such, Scullin again represented an anomaly in the history of the calling of Premiers’ Conferences.

Ultimately, the history of the conference indicates a level of priority recognition on behalf of both sides of Australian politics sufficient enough for COAG to maintain prominence in intergovernmental negotiations. Figures 3 and 4 indicate any statistical trend towards Labor governments either attending or calling COAG meetings and Premiers’ Conferences can be attributed to anomalies based on certain historical events. Overall therefore, no real and systemic trend in the attendance towards one side of politics or the other can be identified. From this it can be inferred that governments of both political persuasions have recognised the utility of these conferences throughout history, underlining its institutional rather than ad-hoc position within the governance system.

E Conclusion

Based on their constant presence in Australian governance, their policy versatility and bi-partisan acceptance, COAG and Premiers’ Conferences merit proper institutional analysis. This is an analysis lacking in previous academic literature. COAG, and before it Premiers’ Conferences, arose out of the political necessity to facilitate movements in policy responsibility between the Commonwealth and the States. As such, it has been the subject of academic study surrounding federalism focused on a political context, leading their significance being underestimated.

Studies in my first category of analysis use a ‘player-centric’ focus. These analyses see the evolution of federalism over time as influenced primarily by the attitudes and approaches of contemporary political leaders and, in particular, the Prime Minister. COAG meetings and Premiers’ conferences in these studies are seen as an example of those attitudes and approaches. Therefore conferences are not seen as an institution whose constant place within the governance architecture can be a determinant of those approaches.

My second category of federalism studies to mention COAG use a ‘rule-centric’ focus. These works see the wider practical realities (made up of external social and economic realities, both domestic and international) and legal rules (as interpreted by the High Court) of contemporary federalism as the primary forces in its evolution. Just as player-centric studies did, these analyses see COAG and Premiers’ conference outcomes as reflections of this contemporary environment. This once again relegates these conferences to being occurrences second to other practical and legal outcomes rather an institutional part of the governance system contributing to the federalism environment.

While both of these approaches make legitimate arguments about federalism and its evolution, the history of Premiers’ conferences and COAG meetings demonstrate that they are a much more systemic part of the governance system than had been acknowledged previously.

First, they have been a constant feature of the federal system and one which should be analysed institutionally rather than simply as a case study. Inter-colonial conferences were a both a primary vehicle of the pre-Federation cross-border governance and one of the key vehicles for the creation of the federation in the first place. These conferences facilitated early communications and
infrastructure developments and their struggles to deal with issues such as defence, border customs and access to overseas money markets spurned the move towards Federation. Furthermore, it was at inter-colonial conferences that many important discussions on Federation took place. While each of their outcomes could be argued to be a reflection of the attitudes of certain leaders or as a manifestation of contemporary circumstances, the conferences themselves were constant features of intergovernmental relations across this time period.

In the period immediately following Federation, the changing circumstances from the establishment of the national government, the First World War, the Great Depression, and the Second World War all necessitated different types of intergovernmental activity. Policy responses during these periods can again be put down to contemporary challenges and the personal influence of leaders but the outcomes were always reached through Premiers’ Conferences.

In the post-War period, where Commonwealth funding superiority necessitated an intergovernmental focus on finance, changes in Australian federalism can again be argued as being dictated by the influence of leaders or by the contemporary economic environment. But the institutional mechanism for the outcomes that forced this evolution was always Premiers’ Conferences.

In the latest governing period between 1990 and the present, which has been focused on whole-of-government reforms, Premiers’ Conferences and later COAG meetings have become even more important as national policy priorities have increasingly required intergovernmental collaboration.

In each of these time periods, Inter-colonial Conferences, Premiers’ Conferences and COAG meetings have been critical to the functioning of the federation. Yet this reality has been largely ignored by studies that have mentioned COAG and its predecessors. The constant, critical, presence of these conferences means that they are more akin to a permanent governance institution rather than just a political occurrence in a wider group of federalism actions based on the actions of a player or determined by a set of rules. This is underlined by two key characteristics of these conferences.

First, COAG and Premiers’ Conferences are flexible in their policy focus. In order to be a permanent institution of intergovernmental relations generally, as their history demonstrates they are, they would require the ability to flexibly adapt their focus to match the contemporary intergovernmental conditions. Given that there appears to be no numerical limit on the number of policy areas the conferences can discuss, and there is no policy area which has come to dominate the conferences over their history, policy flexibility can see considered a characteristic of these conferences.

Second, COAG and Premiers’ Conferences need to be considered the favoured institution to facilitate intergovernmental relations by both sides of politics in Australia. If the conferences were only favoured by one side of politics, they could be considered simply a political tool for policy development and implementation which could be abandoned based on political preference. The statistics in attendance tell a different story. Both at the State and Commonwealth level (taking into account statistical aberrations), leaders have attended at similar rates. This indicates that leaders are inclined to be represented at a conference, and in the Commonwealth’s case, are inclined to call meetings, regardless of political persuasion. This shows the conferences are, at least, accepted as
the primary mechanism for intergovernmental cooperation, again indicating the conferences are a permanent, accepted institution of governance.

As such, the history of the conferences, their policy versatility and their bi-partisan acceptance all indicate these conferences are more than simple political occurrences. They have been a permanent, central and adapting part of the governance system and therefore, they will need to be analysed as such to fully appreciate the effects this institution is having on the wider governance system in light of its democratic deficit. In the following chapters, I will be analysing COAG in a constitutional context in order to provide this insight.
III WHAT MAKES A CONSTITUTIONAL CONVENTION?

As discussed in the previous chapter, first ministers’ conferences have been an enduring feature of Australian governance since before Federation. This indicates COAG is an integral part of the Australian federation and not just a convenient mechanism for achieving political outcomes. If this is the case, the next question is what place COAG occupies in the constitutional system. My thesis is that it could occupy the status of a convention. Therefore, the focus of this chapter will be to analyse literature on constitutional conventions and determine their characteristics and place in a constitutional system. Ultimately, this will form a set of criteria to determine whether COAG meetings and Premiers’ Conferences form a constitutional convention, allowing COAG to be placed in a proper constitutional context and the extent of the effects of its democratic deficit to be determined. The next chapter will discuss whether COAG satisfies these criteria.

Constitutional conventions have had many names since their earliest identification in the British constitutional system in the 19th century. Early British constitutional theorists including John Stuart Mill, 1 A.V Dicey 2 and Walter Bagehot 3 all identified unwritten mechanisms within the British constitutional system. These ‘unwritten maxims’, ‘conventions’ or ‘efficient institutions’ were identified as being imported into the constitutional system in order to support its operation and have been the subject of study ever since. Writers like Geoffrey Marshall 4 and Sir Ivor Jennings 5 continued the work of Mill, Dicey and Bagehot on conventions into the 20th century. In Britain, conventions like the institution of Cabinet or the rules surrounding ministerial resignation following an election defeat, all ensure otherwise unworkable constitutional mechanisms become workable and did not remain confined to Britain.

While British constitutional theorists have acknowledged the presence of conventions in their constitutional system, whether constitutional conventions have carried over into former British colonial constitutional systems is a different matter. Commentators like Andrew Heard 6 and Ian Killey 7 carry on the work of their British colleagues and clarify the role of constitutional conventions in both Canada and Australia. Just as in the British context, where conventions have evolved to operate between the several written documents and common law rules which make up the British Constitution and make it work in a practical setting, constitutional conventions in Australia and Canada are governance practices assumed to operate in the gaps of the written constitution to make it more practicable. 8 Given constitutional conventions have been recognised to operate in the

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1 John Stuart Mill, Considerations on Representative Government (Longman, Green, Longman, Roberts and Green, 1865).
7 Ian Killey, Constitutional Conventions in Australia (Australian Scholarly Publishing, 2009).
8 Heard, above n 6, 1; Killey, ibid 10.
context of a single, written constitution like Australia’s, this would allow for the possibility that practices like COAG meetings and Premiers’ Conferences could have a constitutional status through convention. The question is what features do institutions need to take this status? This chapter will answer that question.

**A Historical Development of the Idea of a ‘Constitutional Convention’**

Constitutional conventions are a type of constitutional institution that was first identified in the United Kingdom and one which continues within other common law constitutional systems. Unlike Australia, Canada, the United States and most other nations around the world, the United Kingdom’s Constitution is not contained in one basic document. Instead, the British Constitution is the product of several statutes and common law rules. It is one of a handful of “unwritten” constitutional systems. The absence of a unified constitution document has always meant that customs form an important part of the British constitutional framework, and in the 19th century, several theorists began to identify this.

The earliest identification of constitutional conventions was provided by John Stuart Mill. Writing in 1865, Mill set out to define the theoretical underpinnings of an ideal British parliamentary system. It was his hope that might go some way to identify how Britain could turn around what he had identified was a loss of confidence in the British governance system at the time. In his explanation of the operation of representative government in Britain, Mill described the workings of the governance arrangements and, in particular, how the relationship between Parliament and the Crown worked. In doing so, he acknowledged a key impasse in the way these components of government in Britain relate to one another. As he stated:

> In the British Constitution, each of the three co-ordinate members of the sovereignty is invested with powers which, if fully exercised, would enable it to stop all the machinery of government. Nominally, therefore, each is invested with equal power of thwarting and obstructing the others: and if, by exerting that power, any of the three could hope to better its position, ordinary course of human affairs forbids us to doubt that the power would be exercised.

Mill argued, therefore, that political practice needed to be such that the people who dominated the various components of government (in particular the Parliament and the Crown) were not tempted to aggrandise themselves by disrupting the operation of the government system, as was their legal capacity. The rules of practice that ensure this is the case are contained in the ‘unwritten maxims’ or the ‘constitutional morality’ of government operation. This was the first time unwritten practices were identified to be part of the British constitution, practices that would later be called conventions. He goes on to provide examples of how these maxims work to facilitate the operation of government in this environment. Mill states that:

> By constitutional law, the Crown can refuse its assent to any Act of Parliament, and can appoint to office and maintain in it any Minister, in opposition to the remonstrances of Parliament. But the

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9 Only three liberal democracies have unwritten constitutions (Israel, New Zealand and the United Kingdom).


10 Mill, above n 1, preface.

11 Ibid 35.

12 Ibid.
So Mill highlighted for the first time how unwritten maxims fill gaps and create practical adaptations to the British Constitution. This idea of unwritten maxims supplementing the constitutional system to make it workable became part of the accepted knowledge in the British constitutional system and was ultimately taken up and expanded on by later theorists.

Twenty years following Mill’s work, A.V Dicey provided the first edition of his Introduction to the Study of the Law of the Constitution. Rather than provide a theoretical basis for the British constitutional system, Dicey looked more to the governance system’s legal structure. His stated reason for this project was to provide students with a manual to principles of the constitutional law of England. Although not directly responding to Mill, Dicey also identified a role for unwritten constitutional provisions to explain the interplay between the actual power of the Crown and its technical legal power. He also pioneered the term ‘constitutional convention.’

Dicey draws a distinction between two essential sources of constitutional law and power: laws and conventions. The basis for this distinction is one of origin and enforcement mechanism. As he stated:

Constitutional law, as the term is used in England, appears to include all rules which directly or indirectly affect the distribution or the exercise of the sovereign power in the state … The one set of rules are in the strictest sense ‘laws,’ since they are rules which (whether written or unwritten, whether enacted by statute or derived from the mass of custom, tradition, or judge-made maxims known as the Common Law) are enforced by the Courts … The other set of rules consist of conventions, understandings, habits, or practices which, though they may regulate the conduct of several members of the sovereign power, of the Ministry, or other officials, are not in reality laws at all since they are not enforced by the courts.

Dicey argued that the role of these conventions was to ensure the constitutional institutions can operate to fulfil ‘the wants of a new time.’ The ‘want of the time’ he referred to, was to ensure that a constitution that legally gives sovereignty to the Crown, could be made to give effect to the political sovereignty of the people. He stated that:

Having ascertained that the conventions of the constitution are (in the main) rules for determining the exercise of the prerogative, we may carry our analysis of their character one step farther. They have all one ultimate object. Their end is to secure that Parliament, or the Cabinet which is indirectly appointed by Parliament, shall in the long run give effect to the will of that power which in modern England is the true political sovereign of the State - the majority of the electors or (to use popular though not quite accurate language) the nation.

While Dicey was restricted in the constitutional conventions he identified to those governing the relationship between Parliament and the Crown by ensuring Crown prerogatives are exercised in

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13 Ibid.
14 Dicey, above n 2, 1st edition preface.
15 Ibid 22-23.
16 Ibid, xlix (citations omitted).
deference to the will of the people, later theorists did not impose the same restriction. Instead they argued the duality of constitutional provisions, express and conventional, permeated the entire British constitutional system. In the late 19th century, Walter Bagehot analysed the place of unwritten rules in the British constitutional system from a legal point of view. Unlike Mill, who focused on the theoretical basis of good government, Bagehot focused on the legal extent of the British constitutional powers and their practical operation. In doing so, Bagehot divided the constitutional institutions in Britain into two groups. He stated that:

No one can approach to an understanding of the English institutions, or of others, which, being the growth of many centuries, exercise a wide sway over mixed populations, unless he divide them into two classes. In such constitutions there are two parts (not indeed separable with microscopic accuracy, for the genius of great affairs abhors nicety of division: first, those which excite and preserve the reverence of the population – the dignified parts, if I may so call them; and next, the efficient parts- those by which it, in fact, works and rules ... The dignified parts of government are those which bring it force- which attract its motive power. The efficient parts only employ that power.\(^\text{18}\)

These ‘efficient’ parts of the constitution can be characterised to be akin to the ‘unwritten maxims’ of Mill and the ‘constitutional conventions’ of Dicey in that they provide an unwritten rule for how legal power is exercised to facilitate the practical operation of a governance system where the Crown and the Parliament can frustrate each other’s actions. He sees these efficient parts of the constitutional system as so necessary to the Constitution that the wider Constitution is defective without them. Bagehot states:

We have made, or rather stumbled upon, a constitution which – though full of every species of incidental defect, though of the worst workmanship in all out-of-the-way matters of any constitution in the world ... it contains a simple efficient part which, on occasion, and when wanted, can work more simply and easily, and better, than any instrument of government that has yet been tried ...\(^\text{19}\)

Mill, Dicey and Bagehot saw their task to be to bring clarity to the British constitutional system which, in the words of Bagehot, was disguised by ‘an undergrowth of irrelevant ideas’.\(^\text{20}\) It was their aim to identify different institutions of the British constitution, like specific constitutional conventions, and analyse the role and place of these institutions. It was later writers who established the objective role of constitutional conventions in general. In so doing, they articulated how and when constitutional conventions would manifest themselves in circumstances other than those identified by the early writers.

In Britain, the theories on constitutional conventions pioneered by Mill, Dicey and Bagehot have been taken up by modern constitutional commentators Sir W. Ivor Jennings and Geoffrey Marshall. Both of their analyses develop the initial ideas of constitutional conventions and provide further insight into how they operate in the British context.

\(^{18}\) Bagehot, above n 3, 4-5.

\(^{19}\) Ibid 10-12.

\(^{20}\) Ibid 1. Mill and Dicey also saw their role to describe the British constitution, Mill from a theoretical standpoint and Dicey from a legal one. See Dicey, above no 2, 7; Mill, above no 1, 18.
Jennings contribution to the constitutional analysis of Britain dates back to the 1930s when he wrote his first edition of *The Law of the Constitution*.\(^{21}\) His analysis, said to be ‘outrageous’ at the time of its writing for its criticisms of Dicey’s work,\(^{22}\) developed an understanding of the British constitutional system for the 20\(^{th}\) century and his analysis extended to constitutional conventions.

Jennings drew on the work of Dicey in his understanding of constitutional conventions, but argued that the true nature of constitutional conventions was beyond his classification. He reasons that:

> The short explanation of the constitutional conventions is that they provide the flesh which clothes the dry bones of the law; they make the legal constitution work; they keep it in touch with the growth of ideas. A constitution does not work itself; it has to be worked by men. It is an instrument of national co-operation, and the spirit of co-operation is as necessary as the instrument.\(^{23}\)

Jennings also argued conventions had greater penetration in the British constitutional system than Dicey identified. Dicey, as explained earlier in this chapter, argued that conventions were restricted to providing the rules of how the powers of the crown ought to be exercised. Jennings, however, argued they were governing how other institutions of government should operate as well. He cited how, by constitutional convention, powers legally assigned to the Crown are conventionally exercised by Cabinet, this being necessary to ensure that the government maintains a working majority in Parliament.\(^{24}\)

Twenty-five years after Jennings wrote his fifth edition of *The Law of the Constitution*, Geoffrey Marshall developed the analysis of constitutional conventions even further. Marshall, like Jennings, identified constitutional conventions beyond the Royal Prerogatives. However, Marshall also expands on Jennings and attempts to define a more general role for constitutional conventions in the constitutional system, rather than just identifying specific conventions that were evidently present.

Marshall argues that the true role of conventions is to govern the relationships between the institutions of government across the Constitution, not just the relations of the Crown and the Parliament. This could mean that unwritten rules that govern other relationships between governance institutions could also be constitutional conventions. Marshall argued that:

> Besides the conventional rules that govern the powers of the Crown there are many other constitutional relationships between governmental persons or institutions that illustrate the existence of rules of a conventional character. Examples are:

- Relations between the Cabinet and the Prime Minister
- Relations between the Government as a whole and Parliament
- Relations between the two Houses of Parliament
- Relations between Ministers and the Civil Service
- Relations Between Ministers and the machinery of justice
- Relations between the United Kingdom and the member countries of the Commonwealth.\(^{25}\)


\(^{22}\) Jennings, above no 5, 1-2.

\(^{23}\) Ibid, 81-82.

\(^{24}\) Ibid, 87.

\(^{25}\) Marshall, above n 4, 4.
Given their arguments that constitutional conventions could exist in a broad range of constitutional relationships, Marshall and Jennings both found certain objective characteristics that identify constitutional conventions. These were continued by later writers and will be discussed later in this chapter.

At the time that Britain was discussing constitutional conventions, British colonies were drafting constitutions for their new nations. Australia and Canada both created constitutions along the lines of the British governance institutions but married to with concepts such as federalism and input them into a single written document, rather than maintaining an assembly of individual laws as is the case in Britain. Despite a different form of constitutional instrument, constitutional conventions have been brought into the respective constitutional systems of Australia and Canada and, as such, Canadian and Australian analyses have provided guidance on how constitutional conventions operate in nations with written constitutions.

Canada is a nation with a written constitution. This means that, unlike Britain where constitutional rules are drawn from a wide array of sources, the role that conventions play in a system where the institutions are set out in a single, fundamental law is more ambiguous. However, conventions have been identified as being part of written constitutional systems, including Canada. Peter Hogg argues that the statement that the Constitution Act 1867 was to create “a constitution similar in principle to that of the United Kingdom” has been seen to include Responsible Government into the Constitution of Canada as a constitutional convention. What this indicates is that written constitutions, like Canada’s, were established assuming certain pre-existing practices of government would continue. These practices would be acknowledged as part of the constitutional system as conventions. Canadian constitutional analyst Andrew Heard also identified a role for conventions in the Canadian context, stating that even in the presence of a basic written Constitution; the entire constitutional system draws from other sources as well.

The whole [Canadian] constitution is actually composed of three elements: the formal Constitution; the legal rules relating to the three branches of government; and, in addition, vitally important informal rules, called conventions that have arisen through political practice.

As in the British constitutional context, the role for conventions in Canada is also to allow the Constitution to evolve in line with contemporary requirements and values and complete the governance picture sketched in the written Constitution. Peter Hogg describes this role as being to prescribe the way legal rules and legal powers are to be exercised. Heard, while agreeing with Hogg’s conception, also emphasises the role for conventions to evolve and progress the way legal powers are exercised in line with contemporary public expectations.

Even the ‘supreme law’ of the Constitution is often remoulded by the force of conventions, which both complete the constitution and allow it to evolve with changes in prevailing values.

27 Heard, above n 6, 1.
28 Hogg, above n 28, 21.
29 Heard, above n 6, 1.
This dual role of filling constitutional gaps and allowing the Constitution to evolve has also been evident in the Australian context. Anne Twomey, citing statements by Sir Henry Jenkyns, explains how this dual role is necessary in colonial constitutions in the British tradition.

Constitutions established by the British traditionally concentrate on colonial legislatures and were usually ‘silent, or almost silent, as to the relations between the legislature and the executive’ ... The ‘genius’ of this (conventions) approach was the allowance of ‘the possibility of silent constitutional growth.’ It permitted a more flexible Constitution which was able to adapt to changes in the relationship between Britain and its colonies.\(^{30}\)

Ian Killey, also writing in the Australian context, draws on a similar logical position to Marshall. Conventions, he says, exist primarily to provide rules for the relationships between the institutions of the Constitution. He develops this to argue that conventions exist in a written-constitutional context to govern these relationships where the written constitution is silent. He states that:

Indeed, that is the primary function of conventions: to provide ‘the rules of the game’ where the law is not clear concerning the balance between the potentially competing elements in the constitution ... conventions, therefore play and essential part in the operation of constitutions as they fill the important vacuums left between the words and phrases in the text of constitutions.\(^{31}\)

In the Australian context, the presence and operation of constitutional conventions has been a relatively settled one, so much so that there had been little major Australian writing on the constitutional status of conventions prior to the events of the Whitlam dismissal in 1975.\(^{32}\) That event, however, saw a renewed concern about the operation of conventions in Australia, leading to calls for the conventions to be incorporated into a written document. This was proposed to resolve some of the inherent ambiguity to their existence, force and content.\(^{33}\) This option was ultimately not adopted outside of the report of the Australian Constitutional Convention 1976-1985. Furthermore, constitutional conventions gained only an acknowledgement of their existence in the 1988 Constitutional Commission,\(^{34}\) with that document primarily focusing on how certain conventions operate individually.\(^{35}\) The question was revisited again in the 1998 Constitutional Convention, but it was resolved not to codify the conventions of the Constitution beyond making reference to the fact the Heads of State exercise their powers on the advice of the Ministry.\(^{36}\)

Despite concerns over their content and implementation, and the relatively superficial discussion they have gained in policy documents, constitutional conventions have continued to be recognised as serving an important role in academic discussion in Australia. Drawing on the work of Jennings, L.J.M Cooray emphasised the role that conventions play in the interpretation of how the legal


\(^{31}\) Killey, above n 7, 10.

\(^{32}\) L.J.M Cooray, *Conventions, the Australian Constitution and the future* (Legal Books Pty Ltd, 1979) 76.


\(^{35}\) For example, the Commission recommended that the convention degrading the Governor-General acting on the advice of ministers be incorporated into the text of the Constitution. Ibid 341.

powers of the Constitution are to be exercised. Similarly, Charles Sampford also recognised their importance and went on to describe different conceptions of their nature, being ‘social rules for officials,’ principles linked to constitutional rules, and implied rules of the Constitution.

In some cases, the courts have provided recognition and definition to constitutional conventions. This has been the case both in Canada and Australia and underscores the role of constitutional conventions in both adapting and enhancing the efficiency of constitutional systems.

In Australia, the role of constitutional conventions was considered by the New South Wales Court of Appeal in *Egan v Willis and Cahill.* In that case, the New South Wales Legislative Council had directed the Leader of the Government in the Upper House, Michael Egan, to produce certain state papers and table them in the Council. When Egan refused, he was temporarily suspended in order to coerce him into producing the papers. In doing so he was removed from the New South Wales Parliament and escorted onto Macquarie Street. Egan sought a declaration that the resolution suspending him was invalid and the removal onto the street constituted a trespass on his person.

In presenting his judgement, Gleeson CJ explained that several aspects of the Constitution of New South Wales, like ‘representation’ and ‘Responsible Government’ were based on ‘convention and political practice’. This was developed by Gleeson CJ (by that time on the High Court of Australia) in *Re Patterson; Ex Parte Taylor.* In that case, the Minister for Immigration cancelled the visa of a British Citizen convicted of sexual offenses and sentenced to prison for three and a half years. The Minister claimed he had failed the ‘character test,’ and that decision was challenged. In his judgement, Gleeson CJ underscored the flexible nature of conventions and their role in updating and evolving the governance system over time. Gleeson CJ stated:

> The practices and conventions which promote efficient and effective government administration alter over time, and need to respond to changes in circumstances and theory.

In Canada, a similar role for constitutional conventions has been recognised by the Supreme Court. Like Gleeson in *Egan v Willis and Cahill,* the Supreme Court of Canada recognise the legitimate role of constitutional conventions within the constitutional system in *Reference re Amendment of the Constitution of Canada.* That case dealt with a reference to the Supreme Court from various provincial Supreme Courts for clarification on, amongst other things, whether it was a constitution convention that the Canadian House of Commons and Senate should not request the Queen to place a measure to amend the Constitution of Canada before the Parliament of the United Kingdom without obtaining agreement to do so from the Provinces. In that case, the Court stated ‘constitutional conventions plus constitutional law equal the total constitution of the country.’ While not going so far in articulating the role of constitutional conventions as Gleeson had, the Supreme Court of Canada did recognise conventions as political supplements to the constitutional

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37 Cooray, above n 34, 68-69.
40 Ibid 650.
41 Ibid 660-1.
43 Ibid [15].
system; stating that conventions are ‘political in inception as depending on a consistent course of political recognition.’

Each of these analyses, from Britain, Canada and Australia alike, acknowledge a central role for constitutional conventions. In the British context their role is to both facilitate the practical operations of governance systems and to evolve political practices in the application of the legal powers of governance institutions to be in line with contemporary public expectation. This is similar in nations with written constitutions like Australia and Canada, where they exist to fill in the gaps of the written constitution and evolve its operation in a practical sense. The question is, what does it take for an institution to be assigned convention status, and therefore take an appropriately prestigious position alongside the wider, legally based, constitutional institutions?

**B Qualifications for Convention Status**

As described above, in written constitutional systems, conventions operate as pre-existing governance practices guiding the use of legal constitutional powers. Some have conceived of this as a form of ‘positive morality’ in the operation of the Constitution, while others see them as a set of ‘implied constitutional rules.’ As described in the previous chapter, heads of government meetings in the form of inter-colonial conferences were a pre-existing governance practice as the time of Federation, favoured as the method of intergovernmental decision making and the practice has continued to this day. The question is, what factors would indicate that this practice is a constitutional convention rather than just a political practice? Several key characteristics indicating whether a practice should be considered a convention have been identified previously. While not every account of constitutional conventions will prioritise every one of these characteristics, each of them is agreed to by several sources as will be described below. The characteristics are:

1/ Conventions are not laws;
2/ Convention rules are binding on the parties;
3/ Parties agree to be bound by convention rules; and
4/ There is constitutional necessity for the convention to exist.

In this section, I will examine each of these criteria, explaining how they indicate convention status and how each of them may be tested.

1 *Conventions are not laws*

The idea of unwritten conventions forming part of a constitutional system began with the need to find a place for practices that lay outside of the body of constitutional law. This differentiation began with Dicey who noted the lack of a role for the courts in enforcing conventions, as described above. This, in Dicey’s account, was an indicator of a lack of legal status.

This characteristic was endorsed in later work on constitutional conventions. Jennings, Marshall, Heard and Killey all noted a lack of legal status as a criterion for convention status. However,

46 Ibid 22.
47 Jennings, above n 5, 132-133.
there has been disagreement between writers over the role of the courts in regards to conventions. Dicey, as stated above, used the inability of courts to enforce conventions as proof of their non-legal status. However, later writers disagreed with this test.

Jennings considered the simple court-enforcement test for legal status to be too limited. He noted there are laws that are not enforced by courts, such as those enforced by administrative bodies like the police. He argues that the difference between laws and conventions is one of creation process and recognition instead. He proposed three differences between laws and conventions that showed that conventions weren’t laws. First, courts declare when a law is breached, but do not declare when a convention has been broken. Second, laws are passed by Parliament or declared by the courts while conventions are declared and recognised by the participants. Finally, laws are formally enunciated as laws.

Marshall agreed with Dicey that courts did not take part in the enforcement of conventions, but took issue with another statement by Dicey that conventions are not recognised by the courts. He noted that courts do recognise conventions where they have been enacted in statutes, imported into constitutions, where they can assist in statutory construction, or have an indirect legal effect.

He noted, however, that courts only take part in enforcement of conventions after they have been codified into law, at which point they are no longer conventions and instead form part of the body of constitutional law. He reasoned that:

It might be said ... that the courts were applying law not convention and that the notice taken of the convention merely helped to clarify what the existing law was in various ways. For example:

1. By being a part of the material that was enacted into law.
2. By helping to elucidate the background against which legislation took place, thus providing guidance as to the intention of the legislature where the meaning of a statute had come into question.
3. By constituting a practice or set of facts that fell under an existing legal doctrine.

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49 Heard, above n 6, 5.
50 Killey, above n 7, 11.
51 Jennings, above n 5, 104-105.
52 Jennings, above n 5, 133.
53 Dicey, above n 2, 413.
54 Marshall uses the example of the Parliament Act 1911 (UK) which enacted the rules of the relationship between the two Houses of Parliament, see no 21, 13.
55 Marshall uses the examples of the British North America Act incorporating conventions by declaring Canada should be united federally ‘with a Constitution similar in principle to that of the United Kingdom’ and the linking of holding the Prime Minister’s office to the confidence of Parliament in the Nigerian constitution. See Marshall, above n 4, 14.
56 Marshall uses the example of the court recognising in the case of British Coal Corporation v the King [1935] A.C 500 that it was the Parliament’s intention in the Judicial Committee Act 1833 (UK) to recognise the judicial committee as a judicial body based on the conventional rules on how its advice was accepted by the crown. See Marshall, above n 4, 14.
57 Marshall uses the example of an indirect legal effect being attributed to the principles of collective responsibilities of ministers by including the confidentiality of cabinet proceedings within the ambit of wider breach-of-confidence law in Attorney-General v Jonathan Cape Ltd [1976] Q.B 752. See Marshall, above n 4, 14-15.
A distinction can be seen, therefore, between using conventions in this way and directly applying them or enforcing them as law.\(^{58}\)

Ultimately this indicates that while there is not a neat division between laws and conventions as Dicey conceived, Courts do not enforce conventions unless they have some legal status. This indicates they are no longer conventions, but legal duties. As such, whether a court enforces a practice can be an indicator of whether it is a convention or not.

Colin Munro has also criticised the neat division between laws and conventions based on a test of court recognition. He still endorses the division between law and convention but does not base it on a test of court involvement. Instead he argues that a key characteristic of a law is that is part of a coherent legal system. Conventions operate independently of one another and therefore cannot be said to possess this characteristic systemic coherency.\(^{59}\) Thus, by not being part of the system of law, conventions are not laws.

Despite strong support for the idea that laws and conventions are separate, this characteristic has not been universally acknowledged. For example, William Maley argued conventions could be considered laws, depending on an individual conception of what a law is in a given society. He draws on the work of Hans Kelsen\(^ {60}\) and argues that the defining feature of law is that it has been through a recognised, law-making process. If a society, and, in turn, a court, were to recognise that customs were part of the legal system, then conventions could be considered laws.\(^ {61}\) Maley also draws on the work of H.L.A Hart,\(^ {62}\) and argues that if a custom is recognised as law by the legal system, there is no reason why that custom should not be considered a law.\(^ {63}\) Thus, a convention could be a law if the society recognises it as a law. The division, in Maley’s mind, was really just one of societal conception of what a law is. A similar view was expressed by Cooray.\(^ {64}\) Jeremy Waldron also endorsed the argument that certain social practices can be recognised as laws under Hart’s conception of Law.\(^ {65}\) However, it should be noted that Hart himself did not endorse such a view, instead applying Dicey’s distinction between law and convention.\(^ {66}\)

Léonid Sirota draws on the work of F.A Hayek and argues that since ‘rules of just conduct’ can have a spontaneous, social origin, there is nothing to prevent a court recognising a convention as a law and enforcing it accordingly. All that would be required would be for the prevailing ‘rule of recognition’ (as conceived by Hart) to include recognising such an origin as evidence of legal status.\(^ {67}\) In both Canada and Australia there have been arguments that such a recognition by the Court has taken place. J.R Mallory in Canada and Geoffrey Lindell in Australia have both argued that courts can and do recognise conventions and assimilate them into law.\(^ {68}\) Lindell went so far as to argue *obiter dicta*

\(^ {58}\) Marshall, above n 4, 15.


\(^ {63}\) Maley, above n 63, 131-133.

\(^ {64}\) Cooray, above n 34, 84.


\(^ {66}\) See Hart in Heard, above n 6, 156.

\(^ {67}\) Léonid Sirota, ‘Toward a jurisprudence of constitutional conventions,’ 11(1) Oxford University Commonwealth Law Journal 29, 48-51.

statements by the High Court in *Australian Capital Television Pty Ltd v Commonwealth*, 69 *Nationwide News Pty Ltd v Willis*, 70 and *Lang v Australian Broadcasting Corporation* 71 that indicated a willingness to derive implications from general doctrines of government which underlie the Constitution as a sign that these doctrines have been transformed into law. 72 Other writers, however, have rejected Lindell’s view. Heard agreed with the Marshall argument that when recognising conventions, courts were merely interpreting the meaning of a law or considering a question of fact rather than recognising and enforcing the convention as if it were law. 73 Killey also agrees with this characterisation of the role of courts with regards to conventions. He argues that if courts could transform conventions into law, it would mean the courts were the primary determiners of a convention’s content. This runs contrary to the nature of conventions, which have content determined by participants rather than courts. 74 Killey, however, agrees with the Marshall conception that courts can recognise conventions, and can make rulings on them should they be incorporated into legislation by Parliament. However conventions that have not been through that process are not law. 75 All of these arguments identify that some event of recognition must happen that transforms a convention into a law. Therefore, before such an event, a convention still exists outside the law.

Despite criticisms of a neat division between law and convention, the idea that conventions are not laws, remains a recurring theme in the literature on constitutional conventions. Disagreement exists about what test is used to determine whether a convention is a law or not, and the role of the courts in determining this. However, it logically follows under any conception of law presented above that if a convention is recognised as a law; it is then no longer a convention. It is a law with a conventional origin. As such, a key characteristic of an institution that is a convention is whether it has some other, recognised legal status.

2 Convention Rules are Binding on Participants

As discussed above, laws have a clear authoritative basis by being formally promulgated by the legislature or declared to exist by the judiciary, and are then enforced through judicial process. Conventions do not possess the formal enunciation of the legislative process and are not enforced judicially (although, as described above, can occasionally be recognised by the courts). Despite this, one of their distinctive features is that they have enjoyed a level of adherence similar to that of laws. Why is this the case? Writers on constitutional conventions have attempted to investigate this question. Their answers provide further evidence of what a practice requires to be considered a convention. Jennings, writing in 1959, first observed that conventions contained a normative aspect. He stated that:

It is clear, in the first place, that mere practice is insufficient. The fact that an authority has always behaved in a certain way is no warrant for saying that it ought to behave in that way. But if the

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69 (1992) 177 CLR 106 (‘ACTV case’).
70 (1992) 177 CLR 1 (‘Nationwide News case’).
71 (1997) 189 CLR 520.
73 Heard, above n 6, 8-9.
74 Killey, above n 7, 14-15.
75 Killey, above n 7, 15-17.
authority itself and those connected with it believe that they ought to do so, then the convention does exist. This is the ordinary rule applied to customary law. Practice alone is not enough. It must be normative.\textsuperscript{76}

The belief on the part of the participants in a convention that they ought to abide by the rules of it is an essential characteristic of a convention. This does not, however, explain why the belief is instilled in participants. To answer this, consequences for the breach of the convention must be examined. Dicey acknowledge the need for a consequence for acting contrary to a practice is necessary for a practice to be a convention. However, we know from the discussion above by Dicey that this consequence cannot be a legal one. Therefore he argued the source of this sanction is political, but rooted in the fear of being in breach of a law.

The dread of impeachment may have established, and public opinion certainly adds influence to, the prevailing dogmas of political ethics. But the sanction which constrains the boldest political adventurer to obey the fundamental principles of the constitution and the conventions in which these principles are expressed, is the fact that the breach of these principles and of these conventions will almost immediately bring the offender into conflict with the Courts and the law of the land.\textsuperscript{77}

However, this view has been considered too restrictive. Jennings argues that the coercive impression of a convention goes further than the potential for a breach of law and stems from a position that conventions are obeyed because of the political difficulties which follow if they are not.\textsuperscript{78} Marshall agrees with this position, arguing that a prudent evaluation of the potential political consequences of disobeying a convention is enough for the actors to consider it binding. He states that:

Those who obey moral or other non-legal rules they believe to be obligatory, characteristically, so it because of their belief that they are obligatory, or else from some motive of prudence or expected advantage.\textsuperscript{79}

Killey agrees with this assessment and suggests that political sanctions such as dismissal from office, damage to reputation and risk of reduction in the relevant actors powers are examples of some potential political consequences.\textsuperscript{80} However, the idea of the necessity of a sanction has been rejected by Joseph Jaconelli. He argues that while sanctions may be relevant in determining whether a rule is binding or not, the key consequence he identifies is the potential for a breach to set a precedent for failing to follow that convention which would lead to detrimental outcomes in the future.\textsuperscript{81} Therefore, the political threat raised by non-compliance is that others will do the same in the future, and on that occasion it could lead to disadvantage to you. As such the consequence need not be a sanction, just an expectation that a negative precedent for action could result from a breach.

What these arguments indicate is that the participants in a convention fear a political consequence grave enough for the participants to consider it in their best interests to acquiesce. Whatever these

\textsuperscript{76} Jennings, above n 5, 134-135.
\textsuperscript{77} Dicey, above n 2, 441-442.
\textsuperscript{78} Jennings, above n 5, 134.
\textsuperscript{79} Marshall, above n 4, 6.
\textsuperscript{80} Killey, above n 7, 22-23.
consequences might be, they must be enough for the participants to consider the directive as binding and, as such, to be a convention.

3 Acceptance as a Binding Convention

Conventions, as noted above, do not have an objective legal basis. As such, the source of their binding nature must come from another source. This idea has been one engaged by theorists examining constitutional conventions since Dicey and each has reached the same conclusion: that the binding nature of conventions arises from an agreement from all parties to be bound by that convention, thus accepting a rule’s conventional status.

Dicey was the first to acknowledge the presence of an agreement at the heart of constitutional conventions. He argued that conventions are essentially rules that the participants in the government process believe they ought to follow.

The result follows, that the conventions of the constitution, looked at as a whole, are customs, or understandings, as to the mode in which the several members of the sovereign legislative body, which, as it will be remembered, is “King in Parliament,” should exercise their discretionary authority, whether it be termed the prerogative of the Crown or the privileges of Parliament.  

Through this, Dicey concluded conventions consist of mutually accepted rules of conduct. Jennings went one step further and argued that the idea of agreement and authoritative acceptance is something not only basic to conventions, but to constitutions in general.

Marshall more explicitly noted the necessity of agreement in providing a maxim with the authority of a constitutional convention and looked to potential reasons for that agreement. He noted historical precedent as a basis for such an agreement, but also concurred with, and quoted Sir Kenneth Wheare in his assertion that agreement may be more explicit for conventions without such a long history.

Frequently they [conventions] arise from a series of precedents that are agreed to have given rise to a binding rule of behaviour. On the other hand ‘a convention may arise much more quickly than this. There may be an agreement among the people concerned to work in a particular way and to adopt a particular rule of conduct. This rule has not arisen from custom; it has not previous history as a usage.’

Beyond the British context, this requirement of agreement to be bound by convention has been acknowledged in the Canadian and Australian context. In Canada, Heard agreed with the Marshall and Wheare about the potential for acceptance to arise from historical support, but could also arise

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82 Dicey, above n 2, 424.
83 Ibid.
84 Jennings, above n 5, 117.
85 Kenneth Wheare, Modern Constitutions (Oxford University Press, 1951), 180.
86 Marshall, above n 4, 8-9 (citations omitted).
from an agreement that future practice will be conducted in a certain way even in the absence of an implicit acceptance based on past practice.

There is general agreement that conventions may arise in at least two ways: through some practice acquiring a strong obligatory character over time, or through the explicit agreement of the relevant actors.\(^{87}\)

This has also been the prevailing wisdom in Australia, with Killey arguing that an acceptance of binding nature (whether historically based or based on agreement between the parties) is fundamental to a convention.

What is particular about conventions is that their existence does not depend on the views of any adjudicator or third party with the function of determining whether a practice is a convention or not. That function is one for the participants themselves - for them to determine whether or not to acknowledge or accept a practice as a binding convention.\(^{88}\)

The above statements indicate than an acceptance by parties to be bound by a practice, sometimes based on an acceptance of the historical authority of past practice and other times by direct agreement between the parties, is fundamental for to a constitutional convention. Thus, such an implicit acceptance or an agreement to be bound to continue with meetings like COAG would be necessary for it to be a convention.

4 A Valid Necessity for the Convention to Exist

Having identified the various characteristics a custom or practice needs to have to become a convention, a final criterion must be considered. Just because a custom or practice is not a law, has the capacity to bind the parties, and is accepted as a convention by the parties does not necessarily mean a custom will become a convention. This has led theorists to propose one final requirement for a custom to become a convention: a valid reason for its elevation to convention status.

This requirement is a more recent addition to the body of theory surrounding constitutional conventions. The first requirement of a valid justification for a convention was provided by Jennings. He argues that in a situation where a prevailing political philosophy that is unable to be fulfilled within the current constitutional framework, a convention will then arise to facilitate the fulfilment of that philosophy within established constitutional limits. As Jennings argues

> For neither precedents nor dicta are conclusive. Something more must be added. As in the creation of law, the creation of a convention must be due to the reason of the thing because it accords with the prevailing political philosophy. It helps to make the democratic system operate; it enables the machinery of State to run more smoothly; and if it were not there friction would result.\(^{89}\)

This idea was taken up by Marshall. He also argued that some desirable political end must form the basis for a convention, one which is not ensured by the constitutional system operating without such a convention. While the custom need not have been formulated for the purpose of being a constitutional convention, as long as the purpose it serves is constitutional, it can still be a convention. Marshall argues that:

\(^{87}\) Heard, above n 6, 10.  
\(^{88}\) Killey, above n 7, 24.  
\(^{89}\) Jennings, above n 5, 136.
... a convention may be formulated on the basis of some acknowledged principle of government which provides a reason or justification for it. Though it is rarely formulated as a conventional rule the most obvious and undisputed convention of the British constitutional system is that Parliament does not use its unlimited sovereign power of legislation in an oppressive or tyrannical way. That is a vague but clearly accepted constitutional rule resting on the principle of constitutionalism and the rule of law. (It illustrates incidentally the fact that many conventions are negative in form and rest upon a practice of refraining from some course of action).90

In the Canadian context, Heard adhered closely to the Jennings conception of constitutional necessity. He argues that reason can be a crucial factor in determining whether a practice is a convention or merely a custom.

The principle behind a rule appears to be one of the most crucial factors that vary among the informal rules of the constitution. A distinction between usage and convention can be made on this ground alone: usages have no particular reason for existence beyond ceremony, habit, or convenience, while conventions may be supporting principles that define the essential characteristics of our constitution.91

In the Australian context, the idea of a constitutional reason was a key distinction between a ‘convention of the constitution’ and a ‘convention of government’ for Cooray.92 He argued that a ‘convention of the constitution’ was required to regulate a rule of the Constitution. Otherwise, they were merely a practice of government (a ‘convention of government’). Thus, a constitutional convention has a special role in regulating an aspect of the Constitution otherwise unworkable without it. This implied the necessity of a direct link between the Constitution and the convention. Without such a link, a convention is really just a custom of government practice. In that circumstance it would improve the efficiency of government, but has no bearing on the operation of the Constitution and thus not be a convention. Killey has confirmed constitutional necessity in the Australian context. Following a discussion of how Professor Michael Coper,93 Heard and Richard McGarvie94 identified constitutional necessity in several conventions, Killey concludes that for a practice to be a convention, the reason for its existence must be to resolve uncertainty in the Constitution.

... if constitutional reasons are necessary for a practice to be convention, those reasons are related to the function of conventions, which is to resolve uncertain issues in the constitutional structure by providing accepted and binding practices or procedures. That is, to ‘fill in the gaps’.95

As such, each of these commentators identifies a valid constitutional necessity as an important characteristic when considering whether a practice is a convention and not merely a custom. Thus if COAG were fulfilling some constitutional, as well as political role, it would be strong evidence of it being a convention. This gives us four criteria to test whether COAG has convention status or not.

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90 Marshall, above n 4, 9.
91 Heard, n 6, 142.
92 Cooray, above n 32, 68-71.
95 Killey, above n 7, 44.
Whether it is a law or not; whether it has the capacity to be binding; whether the participants accept it as binding and whether there is a valid constitutional necessity for it to exist.

**C Conclusion**

The earliest commentaries on the British constitutional system have acknowledged two sets of constitutional provisions within the governance structure. The first is the express, legal, areas of the constitutional system or the ‘dignified’ part of the system. The second is hidden, unwritten, ‘efficient’ and based in custom and practice. Constitutional conventions are located within this second set of provisions. The early commentaries, advanced by John Stuart Mill, A.V Dicey and Walter Bagehot, have all identified this divide. Furthermore, their works have provided the basis for later discussions of constitutional conventions, and constitutional law more generally, both in Britain and in jurisdictions with constitutions based in the British tradition such as Canada and, importantly for this thesis, Australia.

Between Mill, Dicey and Bagehot, a system where the constitutional system could be supplemented by unwritten rules of practice to facilitate the effective and efficient running of the constitutional system became a settled concept. Later British writers like Sir Ivor Jennings and Geoffrey Marshall developed this concept, providing guidance to where, when and how conventions manifest in the British constitution. This body of work on constitutional conventions has been contributed to by both Canadian and Australian writers to give guidance on how constitutional conventions fit into a system based in the British tradition but operating under a written constitution. Andrew Heard provides such a contribution from Canada while Ian Killey’s recent work both summarises and contributes to a body of work on constitutional conventions in Australia. Other sources have also contributed to this body of work, including the Supreme Court of Canada, the New South Wales Court of Appeal and the High Court of Australia. Also other constitutional writers such as Peter Hogg and Anne Twomey have contributed to this body of literature. From this wide body of work, a set of characteristics emerge that help identify when a convention is in place.

The first of these is a negative criterion: constitutional conventions lack a formal legal status. If they had a legal basis, whether this is in the common law, in a piece of legislation or a written constitution, the rules within a convention would form part of the standard constitutional law and, as such, would no longer be conventions. Therefore conventional rules are political, rather than legal in nature, and courts take no role in their enforcement.

The second characteristic of constitutional conventions is that they are binding on the participants. More specifically, the convention must have the capacity to bind the participants. This indicates the need for a convention to be made up of two parts: one, a directive that will guide the conduct of the parties; and two, a consequence for non-compliance. This consequence must, however, be political in nature due to the lack of a legal status and the inability of a court to enforce a convention.

The third characteristic is that the participants must be in agreement to be bound by convention. This is because a convention has no objective legal source, so for a convention to come into existence, the parties must accept it as a binding convention voluntarily. Whether this acceptance is based on a specific agreement or based in a reverence for a practices historical place in the system, the agreement is a necessary for a convention to be effectively binding.
The final characteristic is that a convention requires a valid constitutional reason for its existence. Different writers place a different level of importance on this characteristic. Some, like Jennings, argue it is essential, while others like Marshall argue it is merely a non-essential indicator. Whatever the level of importance, fulfilling a practical purpose within a constitutional framework will be an important indicator of convention status.

This gives us four characteristics to determine the convention status of COAG, and previously Premiers’ Conferences. If they exhibit these four characteristics, it would indicate that they do have convention status, placing them on an equal footing with all other conventions in the constitutional system. If not, the meetings will merely be a convenient custom for the execution of government policy and not an integral part of the constitutional system. The answer to this question will be critical in deciding the true governance implications of any shortcomings of the conferences have, and will be a guide to reform options.
IV COAG AS A CONSTITUTIONAL CONVENTION

In the previous chapter, I established a set of criteria for determining whether an institution can be considered to have constitutional convention status. These criteria will need to be satisfied if any institution, including COAG, could be considered a convention. Based on those findings, in this chapter, I will conclude whether COAG can be considered a convention. If COAG is arguably a convention, it would mean that the democratic deficit in COAG will not only be a political inconvenience, but an embedded constitutional issue.

As provided in the previous chapter, there are three positive criteria and one negative criterion indicating convention status. First, a convention needs to be necessary for a constitutional system to function. Second, the rules of the convention need to be binding on the participants. Third, the parties accept the institution as a convention, whether explicitly or implicitly. Finally, there is a negative criterion that a convention not be a law. In this chapter I will analyse COAG against each criteria. While none of the individual criteria alone prove conclusively whether an institution has convention status, taken together they indicate convention status.

As discussed in Chapter Two, COAG is the latest in a long line of first ministers’ conferences on cross-jurisdictional issues with the intention of coordinating intergovernmental action. These conferences have evolved from multi-lateral meetings between the self-governing colonies to intergovernmental meetings of each constituent unit in the federation, including the Commonwealth. Furthermore, over time these conferences have come to include discussions on almost every facet of policy.

Presently COAG meetings are held twice a year. The COAG meeting held on 13 December 2013 in Canberra is a typical example of how meetings operate and what they cover. The meeting was held for a single day and was attended by the Prime Minister, the State Premiers, the Territory Chief Ministers and the President of the Australian Local Government Association (who attends as a non-voting member). At the meeting the members discussed the contemporary intergovernmental issues including measures to improve productivity (including infrastructure and deregulation measures), indigenous affairs, the National Disability Insurance Scheme, industry assistance and disaster relief programs. This meeting stands as an example of how COAG meetings have become part of the administration of a wide variety of policy areas. But are these conferences such a critical feature of the Australian governance system as to be a potentially considered a constitutional convention? That is the central question this chapter will answer.

The first section of the chapter will focus attention on the first criteria mentioned above- whether there is a necessity for an organisation like COAG within the constitutional structure. In doing so, I will show where COAG’s role of facilitator of intergovernmental relations is manifest in the Constitution. Ultimately, this section will determine whether the central role COAG plays in the governance system is, in fact, a constitutional requirement. Without COAG being a necessity for the

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federal system to function, it is less likely convention status could be assigned to COAG. Whether this is the case or not is what will be determined in this section.

The next section will conclude whether the second criterion of being a convention is fulfilled - namely whether the actions of COAG can be considered binding on the participants. In particular, this section will determine whether there are enforcement options in place to ensure the adherence of the members to the agreements made at the meetings. Without enforcement options, the participants cannot reasonably be expected to consider the agreements of the institution binding upon them, undermining an argument that COAG is a conventional institution.

In the third section, the chapter will determine whether the participants accept COAG as a convention. This will involve determining the attitude of the participants towards COAG, either express or inferred through conduct. This will identify whether it is the intention of the parties, through the way they participate in COAG, to accept that COAG is an integral part of the governance system and, I would argue, as a convention.

As was explained in the previous chapter, the final test to ensure convention status is the question of whether the convention has, in fact, been codified in law. By their very nature, conventions cannot be laws. If a convention is codified into piece of legislation, or recognised as having a legal status by the courts, it becomes a law and is no longer a convention. Therefore the final section will assess whether a process of codification in law has happened to COAG.

Ultimately, this chapter will argue that COAG exhibits the characteristics of a crucial part of the Constitution and in so doing this chapter will establish whether COAG is a convention. This is important since inclusion as a convention means it is effectively part of the Constitution and, since it has a democratic deficit, this could be a concern. It could find itself clashing with other institutions and conventions meant to ensure democracy in the Constitution. As such, a determination that COAG is a convention would have great consequences for both COAG and the Constitution more widely.

A Convention Criteria: Constitutional Necessity

Perhaps the most important criterion for any institution to have convention status is that there is a reason for its existence within the constitutional system. Without such a necessity, even if an institution meets the other criteria, it is impossible to determine its status as a convention since a convention is, essentially, an unwritten part of the constitutional system. If that feature is not needed for the constitution to function, why would it be imported? So the challenge to determine constitutional need is to place the institution within the constitutional system and establish the role it plays in making the Constitution work. In COAG’s case, this is to be found in the structure and operation of the Australian federal system. In fact, COAG’s role is necessary across several areas of the Constitution.

1 The Need for COAG in the Constitution - Legislative Policy Responsibility

As discussed in Chapter Two, either by design or evolution, Australia’s federation involves primarily concurrent policy responsibility between the States and the Commonwealth. I argue this constitutional environment implies collaboration and coordination between the levels of government as a necessity for functionality. In order to demonstrate this it is necessary to examine
exactly how the powers allocated to the Commonwealth government relate to those of the States in Australia.

For their part, State legislative powers, as established by the colonial (and now State) constitutions, are plenary. Section two of the colonial constitution of Queensland\(^2\) stands as an example of this.\(^3\) It states that:

> Within the said Colony of Queensland Her Majesty shall have power by and with the advice and consent of the said Assembly to make laws for the peace welfare and good government of the colony in all cases whatsoever.\(^4\)

As in Queensland, each Colony/State had powers conferred on the Colonial/State Parliaments to enact laws for the ‘peace, welfare and good government’ within the said Colony or State by their individual constitutions.\(^5\) The only exceptions to this are South Australia and Tasmania.

In South Australia, the power to create laws for the ‘peace, welfare and good government’ of the Colony was originally placed in the hands of the Governor under the South Australian Colonisation Act 1834 (Imp).\(^6\) This power with respect to legislation was transferred to “three or more” residents of the Colony when the Act was amended in 1838,\(^7\) and ultimately came to rest with a Legislative Council, established under the South Australian Act 1842 (Imp).\(^8\) The Council retained those powers when it was reformed in line with the requirements of the Australian Constitutions Act 1850 (Imp).\(^9\)

The Constitution of South Australia 1934 (SA) currently empowers the State Parliament with the powers previously assigned to the Legislative Council under that Act.\(^10\)

In Tasmania, the power to make laws for the ‘peace, welfare and good government’ of the colony (then Van Diemen’s Land) can be traced back to the New South Wales Act 1823 (Imp). That Act empowered the creation of the first Legislative Council of New South Wales to make laws for the ‘peace, welfare and good government’ of that colony,\(^11\) and provided for the separation of Van Diemen’s Land into a separate colony with similar constitutional institutions.\(^12\) When this occurred by an Imperial Order in Council in 1825, a Legislative Council and Executive Council with powers equivalent to their New South Wales counterparts were established.\(^13\) As in South Australia, this Legislative Council was ultimately reformed in accordance with the Australian Constitutions Act 1850 (Imp).\(^14\)

\(^2\) Constitution Act 1867 (Qld).
\(^3\) This section has been incorporated into the current Queensland Constitution: Constitution of Queensland 2001 s8.
\(^4\) Constitution Act 1867 (Qld) s2.
\(^5\) See Constitution Act 1902 (NSW) s5; Constitution Act 1975 (Vic) s16. The words ‘peace, order and good government’ were used in Constitution Act 1889 (WA) s2(1).
\(^6\) s1 and 2.
\(^8\) s6.
\(^9\) s7.
\(^10\) Constitution Act 1934 (SA) s5.
\(^11\) New South Wales Act 1823 (Imp) s24.
\(^12\) Ibid s44.
\(^14\) s7.
Council be replaced by one Legislative Council and one House of Assembly exercising the existing powers of the Legislative Council. Part III of the Constitution of Tasmania 1934 (Tas) allows for the continuation of the Parliament in the form it had at the time of its enactment.

When the Colonies federated, powers of the Commonwealth needed to be either provided by the Colonies or newly invested in the national Parliament. This action was limited to specific policy areas. In a few cases, this power was given exclusively to the Commonwealth along with powers that had never been held by the Colonies. Beyond this, there are a number of policy areas that the Commonwealth can legislate on but are not exclusive to that level of government. Any remaining powers, by extension, remain with the States.

The way the powers of the States relate to the powers of the Commonwealth has been the discussion of academic commentary ever since the federation debates. It is clear the founders intended that the powers of the two levels of government remained separate. Edmund Barton made this clear in an address to the Adelaide convention debate in 1897. He stated that:

... the several colonies are not to be touched in any of their powers, privileges, and territories, except perhaps where a surrender is necessary to secure uniformity of law and administration in matters of general concern.

The idea of keeping State powers intact against a potential future expansion of federal powers was taken up by constitutional commentary as an indication of the intention to create a coordinate federal system. Kenneth Wheare argued that this intention exists in his post-war study of federalism. He stated that:

The Australian Constitution established a government for the whole of Australia which, within a sphere, was enabled to exercised powers independently of the governments of the states; while the latter within a sphere, were authorised to act independently of the government of the whole Commonwealth.

As discussed in Chapter Two, scholars such as Russell Mathews, Alan Fenna and Geoffrey Sawer support the idea that founders intended to create a coordinate federal system (one where there is a neat division of powers between the levels of government allowing them to operate largely independently of one another). Furthermore, they agree that changes in the way the federal system has evolved resulted from later developments like the High Court’s decision in the Engineers Case.

15 s1.
16 s9.
17 Australian Constitution s52.
18 Australian Constitution s51.
24 Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (Engineers’ Case) (1920) 28 CLR 129.
and the increasing vertical fiscal imbalance resulting from the extension of the Commonwealth’s financial base at the expense of the States. However, this view is not held universally. Brian Galligan argues that the Constitution was intended to be more flexible ‘concurrent’ federal system where the pool of legislative powers which were not exclusively given to the Commonwealth are shared by both levels of government. However, whether part of the original design or a later development due entirely to the interpretation of the division of power in Australia, the present reality is that the specific division of legislative power under the Constitution is less relevant due to the expansive interpretation the High Court has given to the Commonwealth’s policy jurisdiction.

Under the Constitution, the High Court has been provided jurisdiction to hear matters arising under the Constitution and its interpretation and matter arising under laws of the Parliament. Through this process, Commonwealth laws can be challenged by the States and Territories if they believe they are beyond the powers of the Commonwealth and, through this, the extent of a Commonwealth legislative power can be determined. In theory, this should provide enough legal certainty for the two levels of government to be confident enough in their own policy jurisdiction to operate independently. However, as discussed in Chapter Two, the decisions of the High Court since the Engineers Case have seen the powers of the Commonwealth interpreted without the limitations of any assumed policy jurisdiction as being reserved for the States, resulting in an effective expansion of Commonwealth power.

Therefore the historical effect of the High Court’s rulings has been to remove the jurisdictional boundaries between the levels of government virtually all together. Assuming the High Court maintains its enthusiasm for expansive Commonwealth powers then the Commonwealth would have plenary legislative competence at the same time as the States and Territories have (virtually) plenary legislative competence. The only constitutional limitations on the policy jurisdiction of either level of government would be the operation of section 109 of the Constitution which states that when a law of a State is inconsistent with a law of the Commonwealth, the Commonwealth law prevails to the extent of the inconsistency. This leaves the legal division of power unclear and creates the constitutional necessity for a political division of responsibility to be established in lieu of a legal one in order for the federation to continue to operate effectively. Without such a division, there is constant risk that a jurisdiction could be either (in the case of the Commonwealth) overstepping their legal jurisdiction or (in the case of a State) establishing a policy scheme inconsistent with a national scheme, both of which would be illegal acts.

In an environment where division of legislative responsibility division must be determined by political agreement, there is an important role for an institution to establish and maintain a practical, workable collaborative mechanism so that division of responsibility can occur by agreement. Despite a practical need for such an institution so that each government can determine the appropriate division of responsibility for contemporary circumstances, no organisation is provided for in the Constitution to facilitate these discussions and determinations. The High Court can determine conflicts but by its very nature it cannot deal with policy interactions. This is a role fulfilled by the pre-existing first ministers’ conferences like COAG and Premiers’ Conferences.

26 *Australian Constitutions* s76.
Another reason that a forum like COAG is a constitutional necessity is the division of executive responsibility within the Australian federation. Just as it is essential in the field of legislative competence, collaboration is also essential in executive competence since the same uncertainty which surrounds the legislative division of responsibility also surrounds the distribution of executive responsibility. The Commonwealth’s executive power is located in section 61 of the Constitution and roles within the leadership of the executive established in sections 62 and 64 of the Constitution. Section 61 provides the original vesting of executive power in the Commonwealth.

The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen’s representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.

Section 62 provides for a Federal Executive Council to advise the Governor-General in exercising their power.

There shall be a Federal Executive Council to advise the Governor-General in the government of the Commonwealth, and the members of the Council shall be chosen and summoned by the Governor-General and sworn as Executive Councillors, and shall hold office during his pleasure.

Finally, section 64 provides for the appointment of Ministers of State and ensures their positions within the Federal Executive Council.

The Governor-General may appoint officers to administer such departments of State of the Commonwealth as the Governor-General in Council may establish.

Such officers shall hold office during the pleasure of the Governor-General. They shall be members of the Federal Executive Council, and shall be the Queen’s Ministers of State for the Commonwealth.

In practice these sections combine to create a situation where the Ministers of State exercise the executive power of the Commonwealth in the name of the Governor-General, who acts as the representative of the Crown. The only exception to this is the prerogative powers of the Crown which continue to be exercised by the Monarch or Governor-General as representative of the Crown.28

The executive powers of the Constitution have been an under-analysed area of Constitutional law. George Winterton has argued this is because the exercise of executive power raises fewer judiciable issues than the exercise of legislative or judicial power, but also because it has always been an ambiguous power, making up the ‘residue’ of government powers after legislative and judicial power is allocated.29 Winterton has previously attempted to establish some definitions on the extent of executive power, but the legal limits remain unclear.30 Over time, the courts have gone some way clarifying this area of constitutional law. A broad conception of general executive power (not specific

30 Ibid; see also George Winterton, Parliament, the Executive and the Governor-General (Melbourne University Press, 1983).
to the Commonwealth) came in the case of *New South Wales v Bardolph*. In that case, Dixon J stated that:

The principles of responsible government do not disable the Executive from acting without the prior approval of Parliament, nor from contracting for the expenditure of moneys conditionally upon appropriation by Parliament and doing so before funds to answer the expenditure have actually been made legally available.

With regard to the Commonwealth’s executive power specifically, more limitations have been found. In the *AAP case* Gibbs J said that:

According to s 61 of the Constitution, the executive power of the Commonwealth ‘extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth’. Those words limit the power of the Executive and, in my opinion, make it clear that the Executive cannot act in respect of a matter which falls entirely outside the legislative competence of the Commonwealth.

Also in that case, Mason J discussed the extent of executive power influenced by the limited extent of Commonwealth legislative power and the general federal nature of the Constitution.

Although the ambit of the power is not otherwise defined by Ch II it is evident that in scope it is not unlimited and that its content does not reach beyond the area of responsibilities allocated to the Commonwealth by the Constitution, responsibilities which are ascertainable from the distribution of powers, more particularly the distribution of legislative powers, effected by the Constitution itself and the character and status of the Commonwealth as a national government. The provisions of s 61 taken in conjunction with the federal character of the Constitution and the distribution of powers between the Commonwealth and the States make any other conclusion unacceptable.

A more liberal interpretation was provided by Mason CJ, Dean and Gaudron JJ in *Davis v The Commonwealth*.

The ordinary existence of Commonwealth executive power in areas beyond the express grants of legislative power will ordinarily be clearest where Commonwealth executive or legislative action involves no real competition with State executive or legislative competence.

Brennan J conceived of the situation somewhat differently, drawing a requirement that the action be for the advancement of the nation. Taken together both of these interpretations in *Davis* indicate where a legislative action is not able to support an executive action, it needs to be an action which requires the actions of the national government, beyond the scope of the States (and by extension, the Territories) to accomplish alone.

A situation where the actions of the Commonwealth were brought into question over this idea of an executive action being for the advancement of the nation occurred in the case of *Pape v Federal*

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31 (1934) 52 CLR 455.
32 Ibid 509.
33 *Victoria v The Commonwealth and Hayden* (‘the AAP case’) (1975) 134 CLR 338.
34 Ibid 378-379.
37 Ibid 93-94
38 Ibid 110-111.
In that case, the validity of direct payments provided by the Commonwealth as part of their economic stimulus package in response to the Global Financial Crisis was challenged on the basis that the Commonwealth had no power to provide such a payment. Ultimately the payments were held to be valid, but French CJ held that executive power was still subject to considerations of the distribution of power between the Commonwealth and the States. Gummow, Crennan and Bell JJ reached the same conclusion using similar reasoning, as did Hayne and Kiefel JJ, although they did not find the payments in their current form as valid. Heydon J dissented, finding the payments invalid, although he also stated that the federal arrangements were relevant in determining the extent of the power of the Commonwealth executive. The implications of the *Pape* decision on executive power have been extensively remarked upon, and its reasoning was instrumental in the landmark decisions of *Williams v Commonwealth of Australia* and *Williams v Commonwealth of Australia* [no 2].

The High Court in *Williams* reasoned that executive power was more restricted than had been remarked upon previously. In that case, the Commonwealth’s School Chaplaincy Program, where the Commonwealth made payments to schools (including State schools) for the purposes of employing Chaplains, was challenged on the grounds that the Commonwealth had no power to conduct the program. In that case it was decided that an executive scheme that couldn’t be justified as being within Commonwealth executive power, either through legislation and or by some other executive action authorised by the Constitution, such as maintaining a department or by being an action peculiar to the role of the Commonwealth as a national government (as in *Pape*), was to be invalid. By majority, the Court rejected the arguments of the Commonwealth that the Constitution, through section 61, allowed for a general power to contract, and rejected arguments that the Constitution provided for the ability of the Commonwealth executive to operate in any policy field it was authorised to operate in legislatively under s51, although the latter argument was accepted by Heydon J in dissent as long as a valid appropriation was present. For the majority, where executive action is not supported by legislation, it must be authorised by some specific power under the

40 Ibid 60-63 (French CJ).
41 Ibid 83 (Gummow, Crennan and Bell JJ).
42 Ibid 124 (Hayne and Kiefel JJ).
43 Ibid 133 (Hayne and Kiefel JJ).
44 Ibid 193 (Heydon J).
49 *Williams* (2012) 248 CLR 156, 180 (French CJ), 233 (Gummow and Bell JJ), 253 (Hayne J), 353 (Crennan J)
50 Ibid 187 (French CJ), 232 (Gummow and Bell JJ), 249 (Hayne J), 358 (Crennan J), Kiefel J agreed with Gummow and Bell JJ.
51 Ibid 319.
Constitution. French CJ reasoned that such powers could be actions in the administration of a department, exercise of a prerogative attributable to the Commonwealth, or an action peculiar to the Commonwealth in its character as a national government. Of particular relevance was the distribution of powers between the Commonwealth and the States as an indicator to the extent of Commonwealth power. French CJ explained this.

Whatever the scope of that aspect of the executive power which derives from the character and status of the Commonwealth as a national government, it did not authorise the contract and the expenditure under it in this case. The field of activity in which the DHF Agreement and the expenditure was said, by the Commonwealth, to lie within areas of legislative competency of the Commonwealth Parliament under either s 51 (xxiiiA) or s 51 (xx) of the Constitution. Assuming it to be the case that the DHF Agreement and expenditure under it could be referred to one or other of those fields of legislative power, they are fields in which the Commonwealth and States have concurrent competencies subject to the paramountcy of Commonwealth laws effected by s 109 of the Constitution. The character of the Commonwealth Government as a national government does not entitle it, as a general proposition, to enter into such field of activity by executive action alone. Such an extension of Commonwealth executive powers would, in a practical sense, as Deakin predicted, correspondingly reduce those of the States and compromise what Inglis Clark described as the essential and distinctive feature of “a truly federal government”.

Gummow and Bell JJ also found that the position of the States in the federal structure and the division between the legislative, executive and judicial branches of government were relevant in determining the limits of Commonwealth executive power. Similarly Hayne J reasoned that the distribution of legislative powers was relevant in determining the extent of executive powers. Only Heydon J dissented, prepared to accept that executive could operate in areas where the Commonwealth had legislative power. As such, upon finding that the program could be supported by the Constitution under section 51(xxiiiA) (benefits to students), he found the program a valid exercise of executive power. However, by virtue of the majority decision, Commonwealth executive power is severely restricted unless supported by validly passed legislation.

Reaction to the Williams decision resulted in numerous academic works focusing on its implications regarding the extent of Commonwealth executive power, the legality of Commonwealth programs

52 Ibid 216-7 (French CJ),
53 Ibid 217(French CJ).
54 Ibid 218 (Gummow and Bell JJ), Crennan J and Kiefel J agreed.
55 Ibid 271.
56 Ibid 319.
57 Ibid 333 (Heydon J).
based on religion, and the interpretive methodology of the High Court. Reaction from the Commonwealth was also swift. The Commonwealth attempted to legislate capacity to continue the payments, and the program was challenged for a second time in Williams v Commonwealth of Australia (no 2). In that case the majority reaffirmed its view that some legislative head of power was required to support a Commonwealth executive action in the presence of legislative support. Overall this gives the impression of an executive power similarly limited by the federal nature of the constitution.

Assuming Commonwealth executive power is limited, the ability of the Commonwealth to undertake a multitude of activities is severely limited. Yet the demand for the Commonwealth to undertake such activities has not diminished. The issue of vertical fiscal imbalance has severely curtailed the ability of the States and Territories to undertake several functions which, under a more equitable fiscal environment consistent with the distribution of legislative powers, they would be able to provide. As such, it has fallen to the Commonwealth to support State and Territory action and step into policy areas where the fiscal constraints of the States and Territories have necessitated a retreat. The Constitution provides a mechanism to do this, through the operation of section 96 of the Constitution, allowing the Commonwealth to make financial grants to the States. However, the States and Territories still need to accept the grant and for the Commonwealth to avoid moving outside the limited ambit of their interpreted executive power (as occurred in the Chaplaincy Program), a mechanism is required to marshal the support of the executive authority of the States and Territories. Under our governance system, the only way that executive authority can be rallied is for intergovernmental agreements to establish agreed roles for both the States and Territories and the Commonwealth to be decided collaboratively on a policy by policy, and program by program basis. Once again, a forum to facilitate these agreements is lacking from the Constitution. This is, just as it is in the legislative field, a role which has fallen to COAG and before it, Premiers’ Conferences.

3 The Need for COAG in the Constitution- the Federal Balance

The final role for COAG within the constitutional system is to provide a voice for the States and Territories in Commonwealth decision-making. A key concern of the colonies during the federation process was that the new Commonwealth would become dominated by the larger States (New Commonwealth’, (2012) 23(3) Public Law Review 153; Daniel Stewart, ‘Williams v Commonwealth and the shift from responsible to representative government’, (2013) 72 AIAL forum 71; Anne Twomey, ‘Post-Williams’ expenditure - when can the commonwealth and states spend public money without parliamentary authorisation?, (2014) 33(1) University of Queensland Law Journal 9.


South Wales and Victoria) and its actions would be disproportionately harmful to smaller States. As a result, the smaller colonies sought that the equal legal and political status of all the colonies be represented in the Commonwealth law-making process. This acknowledgement led to the inclusion of an upper house in the Commonwealth Parliament where the States would have equality of representation. This, it was thought, would be a break on the majoritarian actions of the House of Representatives. John Quick and Robert Garran describe this.

Equality of representation, it is argued, is a natural corollary of State representation, because the colonies were, prior to federation, politically equal; equal in constitutional power and status, although not necessarily equal in territory or population ... Further, it was one of the terms of the federal bargain that, in consideration of the transfer of general powers to the Commonwealth, each colony represented in the Convention should, on becoming a State, maintain its original relative equality and individuality unimpaired. That could only be done by equality of representation in the Council of the States [the Senate]. Without the adoption of that principle the federation of the Australian colonies would not have been accomplished.61

The Senate was given (with only one exception)62 equal powers with the House of Representatives, whose members are elected by a roughly equal number of electors per member.63 By contrast, the Constitution provides that Senators are elected in equal number from each of the States.

The Senate shall be composed of senators for each State, directly chosen by the people of the State, voting, until the Parliament otherwise provides, as one electorate ... Until the Parliament provides otherwise there shall be six senators for each original state. The Parliament may make laws increasing or diminishing the number of senators for each State, but so that equal representation of the several Original States shall be maintained and that no Original State shall have less than six senators.64

What this meant was, in theory, Commonwealth policy would have to be approved by representatives of the people as a whole, and representatives of the communities of the States. However, as has become the situation, this mechanism has not proven to allow the views of the States and Territories are heard in the formulation of Commonwealth legislation. The Senate, as was predicted by framers like Alfred Deakin and John Macrossan,65 has become hostage to Commonwealth-level political imperatives where the Senators ceased to be, first and foremost, representatives of their State and instead became, first and foremost, representatives of their Commonwealth-based political party. Nevertheless, it was envisaged that the States would have a voice in the legislative actions of the Commonwealth. Given this is the case, it follows that States and Territories were envisaged to be involved in the national decision making process at an executive level as well, especially where joint legislative responsibility exists on matters of national concern. Outside of the Senate, there is no other forum for the States and Territories to be heard by the

62 The Senate cannot originate appropriation bills and cannot amend taxation bills or bills which 'increase any propose charge or burden on the people.' Australian Constitution s53.
63 Australian Constitution s24.
64 Ibid s7.
65 Both Deakin and Macrossan noted that State identification would become largely irrelevant once the parliament began to operate and party and opinion identification would be how parliamentarians divided themselves. For Macrossan see Official Record of the Debates of the Australasian Federal Convention, Sydney, 3 April 1891, 434 (John Macrossan). For Deakin see Official Record of the Debates of the Australasian Federal Convention, Adelaide, March 22 to May 5 1897, 297-8 (Alfred Deakin).
Commonwealth before a policy of theirs is actioned. Yet COAG provides an opportunity for State and Territory officials to provide their views to Commonwealth officials. As such, COAG can be seen to be fulfilling the spirit of the Constitution especially where other mechanisms like the Senate have failed to ensure that spirit endures.

Overall, COAG, and Premiers’ Conferences before it, is a highly important institution that has been able to flexibly facilitate intergovernmental relations over the course of Australia’s colonial and federal history. Yet importance is not enough. It needs to be a remedy to a constitutional problem in order to be a convention. In fact, it remedies three constitutional problems. First, it allows for practical legislative division of responsibility between the levels of government. Second, it also allows for division of responsibility between the executive governments at both the national and sub-national levels. Finally, it provides an opportunity for the States and Territories to have their voices heard in national decision making, especially where their cooperation is needed. None of these roles are undertaken by any institution written into the Constitution, they are undertaken by COAG and, previously, Premiers’ Conferences. Without COAG, there is no mechanism to undertake these functions. As such, COAG has become the practice which fills these gaps in the Constitution. This means that, absent an alternative institution that could fill these gaps, COAG is constitutionally required and it fulfils the first criteria for being a convention.

B Convention Criteria: Capacity to be Binding

In the previous chapter it was determined that a capacity to be binding is represented by the fact that the participants feel like they ought to adhere to the practices or the actions of the institution in order for the practice or institution to be a convention. Relevant in determining this is an idea of some political consequence befalling a participant who breaks those practices or disregards the directives of the institution. After all, as discussed earlier, both levels of government are dependent on one another to operate effectively. Therein lies the necessity for COAG to exist, so that the levels of government can come together and agree actions to allow each other to pursue their goals. Even if one level of government or the other felt free to disregard a COAG commitment, they would inevitably need to reconvene in the future to negotiate future commitments. This imperative is a strong incentive to remain faithful to the agreements, despite this incentive being non-legal in nature. To test whether this incentive is strong enough to be considered binding, the consequences of reneging on an agreement would need to be grave enough to compel compliance. The question is, what sort of consequences would befall a member of COAG should they disregard the rules of COAG, and how serious are they?

To determine whether actions of COAG are binding or not, it is the actions of the participants (namely the member governments) which must be examined. As an intergovernmental decision-making body, COAG depends on its members taking action on the agreements made at the meetings. If COAG’s actions had the capacity to be binding, the members would need to feel normative pressure to comply with its decisions and implement them accordingly. This normative pressure would need to come in the form of political consequences which the members feel are stronger than the potential inconveniences caused by implementing a COAG agreement. Essentially, these consequences compel compliance, and thus are essentially binding even in the absence of legal constraint.
Both the Commonwealth and the States generally have something to gain from a COAG agreement. By virtue of the fiscal imbalances in the federation discussed earlier in this thesis, the States and Territories ordinarily do not have the financial capacity to fulfil all their constitutional responsibilities, while the Commonwealth does not have the constitutional power to fulfil its legislative or policy ambitions to national consistency and uniformity in a wide variety of policy areas. Intergovernmental agreements allow both these problems to be solved. The Commonwealth can set up agreements to enable nationally consistent or uniform policy positions by negotiating the cooperation of the States and Territories, while the States and Territories can negotiate payments from the Commonwealth to increase their financial capacity. If the Commonwealth did not abide by a COAG agreement, it loses State and Territory cooperation. Similarly, if the States and Territories do not abide by an agreement, they risk losing the Commonwealth resources embodied in the agreement. As such, to abandon such agreements could have social and economic consequences for policy and service delivery at both levels of government, as well as flow-on political consequences for the government in question affecting the level of support they have in the community. The question is, are these consequences perceived as being strong enough to compel compliance, even in more controversial circumstances, where agreement implementation would require the use of political capital to either get an agreement through a member’s parliament, or to respond to other political pressures.

Most COAG agreements are relatively uncontroversial so no choice has to be made by the participants as to whether they adhere to the imperative of supporting and implementing a COAG agreement or responding to other concerns. However, on the occasions where there are competing concerns, there is evidence that the members remain faithful to the COAG commitments they have made. One example of this occurred with the early agreements on the National Water Initiative. At the COAG meeting of the on 25 June 2004, the Commonwealth, New South Wales, Queensland, Victoria and South Australia agreed to establish a system to trade water entitlements across the entire Murray-Darling basin in the hope of ensuring sustainable flows. However, after initially agreeing, the States (all having ALP governments) reneged on the agreement before the 2004 federal election under the accusation by then Deputy Prime Minister John Anderson that they did so to attempt to bolster the federal ALP campaign. Following the federal election, the prospect of losing out on the national system the Commonwealth had worked for and the States losing out on the resources attached to the agreement led both the Commonwealth and the States to return to the Initiative in November of 2004 and, despite ongoing intergovernmental negotiations, the first round of the agreement began following a Ministerial Council meeting in November 2004.

Similarly, even when faced with the prospect of an agreement’s implementation requiring political capital to make it through Parliament, participating jurisdictions are still inclined to proceed, possibly indicating a capacity for the consequences of reneging on an agreement to bind participants to their undertakings at COAG. One example of this was the Australia’s Counter-Terrorism Strategy, agreed

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at the COAG meeting of 23 July 2015. Following their agreement to the Strategy, Tasmania introduced legislation into their Parliament to expand police powers. This led to the Tasmanian Greens to express reservations about the Bill. While this is not unusual in of itself, their position ensured a more difficult passage through the Parliament. However, rather than consider abandoning the scheme, the Tasmanian Government took the potentially politically unpalatable path of negotiating passage with the Labor Opposition. While this is not unusual practice in the Tasmanian Parliament, it does represent a willingness to take steps to overcome political barriers to a COAG agreement rather than face the potential of losing the benefits accrued as a consequence of it.

Both of these indicate that COAG agreements, despite their non-legal status, involve enough consequences to compel members to remain faithful to the agreement, even in spite of other political consequences resulting from its implementation. Ultimately this indicates that COAG agreements are strong enough to effectively bind members, adding to the indication of convention status.

**C Convention Criteria: Acknowledgement as a Convention**

Another criterion required for COAG to be considered a convention is that it is acknowledged to be a convention. This criterion presents a problem for this thesis as there has never been an express statement by the members, either past or present, that the institution is a constitutional convention. Without such an acceptance, categorising COAG as an express constitutional convention is difficult. There is, however, even in the absence of an express acceptance of COAG as a constitutional convention, an indication of implied acceptance as a convention based on common practice.

Convention literature examined in the last chapter identified two ways an acceptance of convention status could be found: first, that the participants affected by the convention actively acknowledge and agree that an institute or procedure is a convention; second, that acknowledgement is inferred from long term usage. In other words, it is a well-established governance custom and practice. Furthermore, it has been identified that as governing practices change, conventions can emerge to manage those new circumstances. For example, in the United Kingdom, Mark Elliot identified new conventions were emerging to dictate that the theory of parliamentary legislative sovereignty be exercised with deference to international human rights norms and the devolved powers to Scotland, Wales and Northern Ireland. First ministers’ conferences pre-date the Constitution and there is evidence that the high use of COAG and its predecessor conferences throughout Australia’s post-Federation history is such to indicate it either is a convention, or is emerging as one.

As discussed in Chapter Two, official meetings between leaders of governments regarding cross-jurisdictional issues have a long history in Australia. The first heads of government meeting between two colonial premiers following colonial self-government took place in Sydney in 1869 and involved the Premiers of New South Wales and Queensland meeting with representatives from New Zealand.

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in the hope of establishing a telegraph cable between Sydney and New Zealand. Initially, the conferences were relatively infrequent and often colonies were represented by ministerial representatives rather than first ministers.

Following Federation, Premiers’ Conferences continued relatively uninterrupted despite a new Commonwealth government being able to govern several of the policy areas that were previously the subject of Intercolonial Conferences. Since that time, the conferences have focused on cross-jurisdictional issues between the Commonwealth and the States and Territories collectively.

Despite the change in focus of the conferences over time, the conferences have been a constant part of our governance system. To show this, the average number of conferences assembling each year (compared by decade) between 1910 and 2010 is presented below.

![Figure 5: Average conferences per year 1901-2010](image)

What the above chart demonstrates is that conferences have been in continuous use since Federation, averaging between 0.9 and 2 conferences per year in each decade since Federation. This has continued since 2010 with two conferences occurring in the years 2011, 2013 and 2014, and three occurring in 2012. In addition to this, the members of the conferences have been highly proactive about attending the meetings. Below is a break-down of the attendance profile of the conferences above.

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As demonstrated in Figure 6, the vast majority of conferences are represented by the relevant jurisdiction’s head of government. The lowest Head of Government attendance is 87% (Queensland and Tasmania) while the highest was 97% (Northern Territory and Australian Capital Territory). There could be a number of reasons why leaders do not attend, it may be due to a pending election or a policy stand taken by a leader. There are also times where due to the travel commitments required to attend a meeting in the early part of the 20th century, in particular for the Premiers of Tasmania and Western Australia, there was less inclination to attend. Furthermore, where the head of government was not present, it was more common for another minister to attend in their stead rather than allow the jurisdiction to go unrepresented. The highest percentage of total non-representation was 4% (Western Australia). This indicates that the members place a high priority on attending these meetings, showing a high recognition on their importance.

While long term usage and recognition of high importance do not, in of themselves, definitively prove an acceptance of convention status, they do indicate that the members have attached a high degree of importance to these meetings for as long as the federation has been in place. This high degree of use and acceptance indicates and intention to maintain the pre-existing practice of first ministers’ conferences as the preferred method to conduct intergovernmental relations, ultimately supporting the idea that leaders, albeit implicitly, see COAG as an institution and practice either with, or at least very close to, convention status.

D Lack of Legal Status- the Negative Criterion

From the criteria determined in the previous chapter, by definition, a convention cannot be a law. Similarly, if an institution has a legal basis, it cannot be conventional. While this has dominated the
debate on the place of conventions within a constitutional system in the literature discussed in the previous chapter, this is not a difficult criterion to be satisfied in the case of COAG.

Legal status derives from three sources in Australia. The first is a legal status derived from a constitutional provision. An obvious example is the Commonwealth Parliament. It is provided for in Chapter One of the Australian Constitution and, as such, has a basis in legal provisions which can be a foundation for judicial consideration by the courts. The second source of legal power is legislation. The Fair Work Commission is an example. It is created under Chapter 5 of the *Fair Work Act 2009* (Cth). This institution too has a basis in legal provisions that could be the foundation of action in the courts. The third source of legal status is through declaration of a common law doctrine; this tends not to be the source of the legal status of institutions yet, since court decisions carry the force of the common law, is still a potential source of legal status.

As stated above, COAG was established by Prime Minister Paul Keating in 1992 having been agreed to by the State and Territory leaders at a Premiers’ Conference in May of that year. Its predecessor conferences never had any particular legal instrument or mechanism to establish them at all; they simply evolved as a habit of government due to the necessity for intergovernmental negotiations to take place. COAG has neither express constitutional status nor legislative basis. Since both other sources of legal status are exhausted, the question becomes whether it can claim a legal status through the common law.

Common law legal status is derived from a determination by the courts. Again, no court statement has been made that indicates that the conferences represent an institution with legal status since question of whether the conferences themselves are a legal institution has never been brought before the courts. However, courts have dealt with the question of the legal status of intergovernmental agreements. If the courts considered intergovernmental agreements resulting from COAG as legally enforceable, perhaps the institution from which they emanated could also have a legal status. However, if there is no suggestion that these agreements are legal, then it is highly unlikely that any common law legal status could be attached to COAG and Premiers’ Conferences.

*P J Magennis Pty Ltd v The Commonwealth*\(^{73}\) considered whether land acquired by New South Wales for soldier resettlement following the Second World War under a financial agreement with the Commonwealth afforded the protection of the ‘just terms’ requirement of section 51 (xxxi) of the Constitution. In *Pye v Renshaw*\(^{74}\) the same agreement as was considered in *Magennis* was amended to remove references to the acquisition of property and was similarly challenged on whether any land acquisition made under the agreement still attracted ‘just terms’ protection. In *South Australia v Commonwealth*\(^{75}\) the Court considered whether an agreement on rail gauge standardisation between South Australia and the Commonwealth, incorporated into legislation, created enforceable legal obligations. In *ICM Agriculture Pty Ltd v Commonwealth*\(^{76}\) persons who suffered a reduction in water entitlement when New South Wales due to a new aquifer access licencing system in line with the National Water Initiative (agreed through COAG) took action in the High Court on the grounds

\(^{73}\) (1949) 80 CLR 382.

\(^{74}\) (1951) 84 CLR 58.

\(^{75}\) (1962) 108 CLR 130.

\(^{76}\) (2009) 240 CLR 140.
that the action constituted the acquisition of property other than on just terms. Finally, in *Spencer v Commonwealth*\(^{77}\) considered the constitutional validity of a land management regulation scheme based on an intergovernmental financial grant and whether it constituted acquisition of property other than on just terms. While intergovernmental agreements were examined in each of these cases, none of these cases turned on the legal status of an agreement and so its status as either a legal agreement or a political agreement was never determined beyond doubt.

In *Magennis*, the legal status of the agreement, independent of the legislation actioning its provisions, was not in question. The case turned on the ability of the Commonwealth to authorise a State to purchase property other than on just terms, and legislate accordingly.\(^{78}\) Nevertheless, several justices considered the question of whether the agreement created legal relations. Dixon\(^{79}\) and McTiernan JJ\(^{80}\) considered the intergovernmental agreement a political one not conferring legal obligations on the parties, while Williams J, with Rich J concurring, considered the agreement in this case did confer contractual rights.\(^{81}\) If a position was maintained that intergovernmental agreements did confer contractual rights, there may be some basis to the idea that then-Premiers’ Conferences, and by extension COAG, have some legal basis in common law if they are producing legal instruments. However, as it turned out, this was not a position which was maintained.

The Court in *Pye v Renshaw* did not consider the legal status of the agreement, instead focusing on grounds for the plaintiff to challenge the actions of New South Wales in acquiring and resuming land.\(^{82}\) Similarly, the Court in *ICM Agriculture Pty Ltd v Commonwealth* did not concern itself on the status of the agreement, instead focusing on the question of whether an acquisition of property had taken place and whether it required just terms.\(^{83}\) *Spencer v Commonwealth* considered the content of intergovernmental agreements in the context of the operation of legislative scheme,\(^{84}\) but did not determine its status at law. However, in *South Australia v Commonwealth*, some clarity was brought to the situation. In that case, Dixon CJ, with Kitto J concurring, reasoned that if an intergovernmental agreement was to give rise to legal obligations if there had been an ‘unmistakable breach of a definite obligation.’\(^{85}\) Essentially this makes it a question of fact in each case whether an agreement gives rise to a legal obligation. McTiernan J used similar reasoning, coming to the conclusion that in this case, unlike his determination in *Magennis*, no legal relations had been created.\(^{86}\) This position was echoed by Menzies J\(^{87}\) and Windeyer J.\(^{88}\) Owen J made a general observation that intergovernmental agreements were political agreements, echoing the reasoning of Dixon CJ in *Magennis*.\(^{89}\)

\(^{77}\) (2010) 241 CLR 118.

\(^{78}\) *P.J Magennis* 382-3.

\(^{79}\) Ibid 409 (Dixon J).

\(^{80}\) Ibid 413 (Mc Tiernan J).

\(^{81}\) Ibid 423 (Williams J). Rich J concurred with the judgement of Williams J, Ibid 406.

\(^{82}\) *Pye* 82.

\(^{83}\) *ICM Agriculture Pty Ltd* [87] (French CJ, Gummow and Crennan JJ), [142-154] (Hayne, Kiefel and Bell JJ).

\(^{84}\) *Spencer* [29-30] (French CJ and Gummow J).

\(^{85}\) *South Australia*, 141 (Dixon CJ).

\(^{86}\) Ibid 148 (McTiernan J).

\(^{87}\) Ibid 150 (Menzies J).

\(^{88}\) Ibid 152-3 (Windeyer J).

\(^{89}\) Ibid 157 (Owen J).
Overall the position held by the High Court seems to be that intergovernmental agreements are political arrangements rather than legal contracts between governments unless the terms are definite enough to create contractual obligations. This gives the impression that agreements gain a legal standing point by virtue of contractual principles rather than by virtue of their sanctification at Premiers’ Conferences and, by extension, COAG meetings. As such, there is nothing to support a position that the conference through which the agreements result is a common-law based institution. Without a constitutional, legislative, or common law basis, there is no evidence of legal basis for COAG or its predecessor conferences, and therefore, it remains qualified to be a convention.

**E Conclusion**

The previous chapter identified four criteria indicating convention status. Without exhibiting these criteria, arguing convention status to an institution is impossible. In this chapter I compared the characteristics of COAG against these criteria and determined that COAG could, in fact, be a constitutional convention, or if not, emerging as one. While determinations on these criteria are difficult and no one of them alone can prove the convention status of an institution, there is evidence within the characteristics and operations of COAG that each of these criteria can be met. Namely, it has been argued that there is a constitutional necessity for its existence, its rules can be considered binding on the participants, there is implied acknowledgement of its importance (to the level of convention status), and it is has no legal status. This provides a picture of COAG either being a constitutional convention or an institution emerging as one. Ultimately this indicates it could be a part of the constitutional structure.

The first criterion, a constitutional necessity for the convention, can be satisfied. Within the constitutional system is a necessity for an organisation that can facilitate intergovernmental negotiation to resolve inherent ambiguities in the legislative power division and executive power division established under the Constitution. Furthermore, there is a necessity for a body to facilitate the States (and by extension the Territories) to have a voice in federal policy both at the executive and by virtue of the failure of the Senate to fill that role, the legislative level, as was envisaged by the founders. While other forms of communication between the leaders of the State and Territories and those of the Commonwealth could, theoretically, facilitate negotiation by communicating a request from one jurisdiction and attain the consent of the other; the crafting of an agreement requires discussion and negotiation which makes methods other than conference impractical. The time honoured tradition of our government system is to facilitate required discussion and negotiation through assembly at COAG and its predecessor conferences. Thus it fulfils a constitutional necessity.

The second criterion, whether the rules of the institution have the capacity to be binding on the participants, can also arguably be satisfied. Ultimately, COAG agreements are political rather than legal in nature. For these agreements to be considered binding on the participants, there must be other, non-legal consequences which are strong enough to compel participants to remain faithful to their commitments. Both levels of government rely on each other to govern effectively. Each agreement contains and benefit for each jurisdiction, these usually being the provision of financial resources or an undertaking to use constitutional powers to benefit a national scheme. For these benefits to accrue, agreements are made which contain rules on how the agreement roles out under the assumption that each party will uphold those rules. Yet the agreements often require political
capital either within their parliaments or with the public to be expended for them to be implemented. To assess the potential for an agreement to be binding, it must be the case that participants remain faithful to their agreements even in the face of other non-legal consequences. Examining the examples of the National Water Initiative and Australia’s Counter-Terrorism Strategy, it is evident that participants are prepared to accept outside political consequences to see agreements implemented. As such, it can be said that the political consequences of abandoning the agreements is strong enough motivation to compel participants to remain faithful to the agreements. This indicates a capacity for these agreements to be binding, fulfilling this criterion for convention status.

The third criterion, whether the members accept COAG as a convention, is more problematic. There has never been any express acceptance of COAG as a convention by the members or by anyone else. Without such an acceptance, COAG cannot be a fully formed convention. There is, however, an indication that COAG has become such a common feature within the governance system through historical conduct and is held in high enough regard by the members to potentially infer recognition as a convention, or at least indicate it is emerging as one. COAG and its predecessor conferences have been in continuous use since federation, averaging between 0.9 and two conferences per year every decade between 1901 and 2010. Furthermore, the members have an attendance record of between 87% and 97%. This indicates that COAG has both the historical position and high regard necessary to be considered at least an emerging convention even in the absence of an express acknowledgement.

The final criterion is whether or not COAG has a legal basis. This criterion is the easiest for COAG to satisfy. COAG lacks an express basis in the Constitution, no legislative basis and no basis to be considered part of the common law. This means there is no legal basis for COAG to be considered a legal institution rather than a conventional one.

Each of these criteria taken together provides an indication of potential convention status. Such a finding would have the benefit of closing a gap in the Constitutional structure by providing a necessary body to allow for the redistribution of power between the levels of government when practically necessary. However, should it result that COAG meetings are declared to be a convention of the Constitution, the consequences to the constitutional system could be substantial. With such a finding and the status of a convention potentially attached to COAG, it becomes a part of the wider Constitution. If it is the case that COAG exhibits characteristics incompatible with the rest of the Constitution, a clash of provisions could result. To ascertain whether that is the case, it is necessary to examine whether COAG’s democratic deficit is interfering with the operation of any other institutions. A constitutional convention exhibiting such a characteristic could come into conflict with other constitutional provisions or conventions centred on democratic accountability, likely Responsible Government. The extent to whether this is the case will be discussed in the final chapter.
V COAG AND RESPONSIBLE GOVERNMENT, THE CLASH OF CONVENTIONS

As was discussed in Chapter One, others have identified a democratic deficit associated with COAG. However, if COAG is emerging as a convention, the way we consider its operation within the rest of the constitutional system must change. Rather than simply being considered a political executive committee, convention status indicates it is an integral part of the constitutional system. This raises the prospect that, through the democratic deficit, COAG could be clashing with other integral institutions such as Responsible Government, while having equivalent constitutional status. Explaining how this would occur is what this chapter will do.

As described in previous chapters, COAG is an essential institution to facilitate the operations of the federal system established under the Constitution. However, COAG, through its democratic deficit provides the executive branch of government (whether in the States and Territories or in the Commonwealth) with a way to avoid democratic oversight and accountability. At both the level of the States and Territories and at the level of the Commonwealth, democratic accountability comes from the operation of Responsible Government. This creates a dilemma at the core of the Constitution where one essential institution is interfering with the operation of another essential institution. If COAG becomes a convention, this problem becomes even greater, since the democratic deficit would then be a structural weakness in the constitutional system, rather than simply a political concern.

To understand how a COAG convention with a democratic deficit would interact with Responsible Government requires an understanding how Responsible Government creates a system where the government remains democratically accountable after being elected. Responsible Government is one of the key institutions incorporated into the Australian Constitution from Westminster. There was scepticism over other constitutional models. Models originating from Switzerland and the United States were rejected due, in part, to the fact that Westminster-style parliamentary systems were already in place in the colonies. This meant that Westminster parliamentary democracy became the favoured model. As Sir Edmund Barton said, ‘I for one, as I do not want my boots made in Germany, do not want my Constitution made in Switzerland.’ Given the inclusion of Westminster parliamentary democracy in the Australian Constitution, the system of government owes much of its origins to English (and later British) constitutional development. As such, in order to examine the nature of Responsible Government and, in particular, its characteristics, aims, and theoretical underpinnings, the first part of this chapter will trace the origins of Responsible Government. First, it will examine the discussions of Responsible Government by British constitutional writers. It will then examine the arguments of its defenders and its critics and analyse how it operates in a British context. This section will provide the basis for a discussion for how Responsible Government operates in Australia, and how COAG is interfering with it.

Having established the basis of the clash, the final part of this chapter will look at practical examples to examine how the clash between the operation of Responsible Government and the operation of COAG would be resolved in practice assuming no action is taken to remedy the democratic deficit.

This section will examine four examples of the democratic deficit: the implementation of the Anti-Terrorism (No 2) Act 2005, the National Rail Corporation implementation in 1992, the implementation of the 1967 Off-Shore Mining Agreement, and the negotiation of National Partnership Agreements. All of these examples resulted from COAG and Premiers’ Conference negotiations and have been subject to criticism that they undermined assumed democratic practice in Australia. They all provide examples of the limited ability of parliaments to examine policies resulting from intergovernmental negotiations even when they require parliamentary passage to be fully implemented. However, with reference to each example I will also analyse the consequences of the democratic deficit is not just interfering with democracy at a political level, but also at a constitutional level if COAG is assumed to be a convention. In particular, I will argue where a clash of constitutional conventions is occurring and one would have to give way, it is Responsible Government that would be sacrificed if intergovernmental agreements are to continue. Thus I will argue that since our Constitution requires COAG for the federation to function, and Responsible Government for it to be democratically accountable, the undermining of Responsible Government means our Constitution would not be as democratic as we would have assumed, especially in a situation where its key democratic institution is being overridden by an institution of equal constitutional status.

This possibility has important consequences for the Australian Constitution and will need to be addressed one way or another. First, it would mean heads of government are conventionally required to act in a way contrary to Responsible Government, since the Constitution, rather than just political expediency, would require they enter into intergovernmental agreements, and the mechanism for making them has a democratic deficit. Furthermore, abolishing COAG wouldn’t solve the problem, since the Constitution would arguably still require a COAG-like body to exist. Therefore more structural reforms would be necessary. Either the Constitution must be reformed so it doesn’t need COAG, or we alter our democratic accountability practices so they ameliorate the democratic deficit. Otherwise we allow the clash to be resolved as described and accept the loss of democracy, or loss of intergovernmental capacity that results. Neither option is desirable if we wish to continue to position both democracy and federalism as core constitutional values. In any case, addressing this issue will require constitutional-level institutional reform, not just political reform.

As such, this chapter will do four things. First, it will examine the origins and nature of Responsible Government. Second, it will examine how Responsible Government manifests itself in the constitutional structure of Australia. Third, it will explain how the operation of Responsible Government is affected by COAG’s operation. Finally, the chapter will look at the consequence of COAG interfering with Responsible Government. Essentially, this will expose the situation of two institutions of equal constitutional status and validity clashing with one another, something which has not been remarked upon previously.

A Responsible Government in England

Understanding how Responsible Government operates in Australia requires examination of the origins of Responsible Government in Britain. As discussed earlier, unlike Australia, England’s (later Britain’s) constitutional system was not written collectively. It is made up of many elements, written and unwritten, which have evolved over time from a medieval system of absolute monarchy (where all power is vested in the Crown) to one of parliamentary sovereignty (where the legislative power
rests with the Parliament and the executive requires the confidence of Parliament). However, it has not been a smooth transition, with power effectively seized from the Crown through rebellion, and the progression from the medieval period into the 19th century where the power of the monarch was eroded in favour of the increasing power of Parliament. Through this period evolved the balance of power between the three constituent powers inherited from the medieval period: the democratic power, the aristocratic power and the monarchical power. At the institutional level, these powers are represented through the Monarchy (acting as the executive branch of the English Constitution), the House of Lords and the House of Commons (acting as the legislative branch). These institutions represented a distribution of sovereignty between the Monarchy, the aristocracy and the wider citizenry. Splitting sovereignty in this way, however, creates the potential for deadlock. John Stuart Mill describes this situation.

In the British Constitution, each of the three co-ordinate members of the sovereignty is invested with powers which, if fully exercised, would enable it to stop all the machinery of government. Nominally, therefore, each is invested with equal power of thwarting, and obstructing the others: and if, by exerting that power, any of the three could hope to better its position, the ordinary course of human affairs forbids us to doubt that the power would be exercised.

As a solution to this potential deadlock, Mill argued that there is an underlying value in the British Constitution that the popular power be dominant over the other powers and succeed in the event of a clash between the powers. As Mill said:

There is in every constitution a strongest power- one which would gain victory, if the compromises by which the Constitution habitually works were suspended, and there came a trial of strength. Constitutional maxims are adhered to, and are practically operative, so long as they give the predominance in the Constitution to that one of the powers which has the preponderance of active power out of doors. This, in England, is the popular power.

Mill therefore argued that this value was incorporated into the Constitution through the convention of Responsible Government, this being the way of ensuring popular control over government.

The meaning of representative government is, that the whole people, or some numerous portion of them, exercise through deputies periodically elected by themselves, the ultimate controlling power, which, in every constitution, must reside somewhere. This ultimate power they must possess in all its completeness. They must be masters whenever they please, of all the operations of government.

As described by Mill the deputies elected by the people (the Parliament) legitimately exercise the controlling power of government as the representatives of the people. Consistent with this dominance of the Parliament, Mill considers the proper role of the Parliament is to provide a

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4 This general acceptance was acknowledged Walter Bagehot, *The English Constitution* (Kegan Paul, Trench, Trübner & Co Ltd, new and cheaper edition, 1904) 2-3.
6 Ibid.
7 Mill, above n 5, 34-35.
measure of oversight to the executive (represented by the Monarch’s ministers). In more modern times, this idea would be called Responsible Government.

The proper duty of a representative assembly in regard to matters of administration is not to decide them by its own vote, but to take care that the persons who have to decide them shall be proper persons. For Mill, Responsible Government is the practical manifestation of an inherent principle of popular dominance in the British constitution. While Mill was the first to explain Responsible Government in a British context, others have continued this work, albeit conceiving it in more practical terms. Like Mill, Walter Bagehot saw the potential danger in the separation of the sovereignty between the executive and legislative branches of government.

If the persons who have to do the work are not the same as those who have to make the laws, there will be a controversy between the two sets of persons. The tax-imposers are sure to quarrel with the tax requirers. The executive is crippled by not getting the laws it needs, and the legislature is spoiled by having to act without responsibility: the executive becomes unfit for its name, since it cannot execute what it decides on; the legislature is demoralised by liberty, by taking decisions of which others (and not itself) will suffer the effects.

Bagehot explained how this is manifest most obviously in the American Constitution and argues that England has managed to avoid this stand-off through the operation of an ‘efficient’ (conventional) part of the English constitution.

The efficient secret of the English Constitution may be described as the close union, the nearly complete fusion, of the executive and legislative powers. No doubt in traditional theory, as it exists in all the books, the goodness of our constitution consists in the entire separation of the legislative and executive authorities, but in truth its merit consists in their singular approximation. The connecting link is the cabinet. By that new word we mean a committee of the legislative body elected to be the executive body. The legislature has many committees, but this is its greatest. It chooses for this, its main committee, the men in whom it has the most confidence.

By drawing its authority from the Parliament, Bagehot argued a stand-off between the legislative and the executive branch can be avoided as the Cabinet can reasonably expect the support of Parliament for its legislative program, potentially forcing its acquiescence with the threat of resignation or dissolution of the Parliament. Conversely, if the Parliament loses confidence in the Cabinet it can withdraw its support and, in so doing, compel its resignation and appoint a new Cabinet in which it has confidence.

In 1895, Edward Jenks described the historical developments of Responsible Government. He highlighted six facets. They were:

(1) The control of the entire executive machinery of state by an informal body of heads of departments, whose advice the Crown is bound to follow in all cases, except in certain rare questions concerning a dissolution of Parliament;

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8 Mill, above n 5, 38.
10 Ibid 10-11.
11 Ibid 18.
(2) The fact that all members of this informal body, or Cabinet, are also members of one House or other of Parliament, and can there be questioned concerning their departments;

(3) The fact that all other State officials (except a few who stand or fall with the Cabinet) are excluded from the more important House of Parliament, and that a Cabinet is thus precluded from directly influencing votes by the gift of places;

(4) The fact that such members of the Cabinet as are members of the House of Commons have to seek re-election on acceptance of office;

(5) The constitutional understanding that a Cabinet shall resign the moment it fails to command a majority in the House of Commons; and

(6) The tendency, not so clear in 1855 as now, for the Cabinet to become more and more a solid body, whose members stand and fall together.\(^{(12)}\)

Despite a broad confidence and theoretical desirability of responsible government proposed by Mill and Bagehot, its desirability has not been universally accepted. As discussed in Chapter One, in 1978 Lord Hailsham argued that Responsible Government, rather than ensuring the democratic accountability of a functioning executive; privileges efficiency over accountability and creates what Hailsham describes as an ‘elective dictatorship.’ The source of his criticism comes from a perceived conflict between two theories in the English constitution: one being the notion of parliamentary supremacy (leading to elective dictatorship), the other being limited government (in which the Parliament is no longer fully supreme and all powerful).\(^{(13)}\) Ultimately, he sees parliamentary supremacy winning out. He argues that the House of Commons, meant to be a safeguard for liberties, has become an instrument of government. By empowering a government with the unwavering support of a majority of the House of Commons via party majorities, the Parliament has abandoned its role of scrutinising the Government. As such, under the system of Responsible Government the principle body meant to ensure limited government has yielded to the theory of centralised democracy where a government, once elected, is free to pursue its agenda without the practical scrutiny and impediment it would otherwise have if the Parliament were independent of the government.\(^{(14)}\)

Such sentiments have been continually referenced as a key failing of Responsible Government.\(^{(15)}\) However, despite this problem Responsible Government has remained the mechanism the Westminster system of government has used to ensure the government has a level of democratic scrutiny. The system has been retained in Britain and formed the basis of Westminster-style constitutions in British colonies.


\(^{(14)}\) Ibid 126-127.

As a central guiding principle in the British constitution, Responsible Government was to be one of most important aspects of the Australian constitutions, both at the colonial level and then, eventually, at the national level.

Fifty years before Federation, the first Australian constitutions were being conceived at the colonial level. The first of these, in New South Wales, placed Responsible Government at the centre of the governance system it established.

As noted in Chapter Four, self-governing colonial constitutions began with the *Australian Constitutions Act (no 2) 1850* (Imp). Under that act, the Legislative Councils of the various colonies were empowered to constitute committees to draft constitutions for each colony.\(^\text{16}\) When drafting their constitution, the Legislative Council committee in New South Wales cited Responsible Government as a key value to be incorporated into their constitution. Despite their explicit ambition that their Constitution would include a system of Responsible Government, the drafting favoured retaining Responsible Government as a conventional system rather than one specifically spelled out in a provision of the written Constitution. Anne Twomey describes how the New South Wales Constitution incorporated a system of Responsible Government.

Although responsible government was in New South Wales in 1855, its expression in the *Constitution Act 1855* is muted. Sections 37 and 51 refer to officers ‘liable to retire from office on political grounds.’ These officers were listed in s 51 as the Attorney General, the Solicitor General, the Colonial Secretary, the Colonial Treasurer and Auditor-General. The holders of offices of profit under the Crown were also prohibited ss 18 and 19 from being Members of the Legislative Assembly, unless they were ‘Official Members of the Government’ (being the Colonial Secretary, Colonial Treasurer, Auditor General, Attorney General, Solicitor General or one of no more than five additional officers declared by the Governor as capable of election to the Legislative Assembly). Some provisions, such as s 18, referred to the Governor ‘with the advice of the Executive Council’ while s 37 referred to the power to make appointments of officers ‘liable to retire from office on political grounds’ as being vested in ‘the Governor alone.’\(^\text{17}\)

The other colonies followed quickly in drafting their constitutions and, like in New South Wales, included a conventional system of Responsible Government with varying degrees of integration in the written words of their constitutional documents.

In Victoria, Responsible Government was incorporated through three sections of their colonial Constitution. The Governor was to make appointments to public offices on the advice of the Executive Council except those liable to retire on political grounds (which were to be appointed by the Governor alone).\(^\text{18}\) In the event such office holders did retire on political grounds, pensions were to be paid.\(^\text{19}\) Finally, in a provisions going further than New South Wales, the Victorian Constitution required that at least four of the office holders liable to retire on political grounds should be members of the Council or Assembly.\(^\text{20}\) A new Constitution of Victoria was passed in 1975. That

\(^{16}\) *Australian Constitutions Act (no 2) 1850* (Imp) s1.


\(^{18}\) *Victoria Constitution Act 1855* (Imp) s37.

\(^{19}\) Ibid s 51.

\(^{20}\) Ibid s 18.
Constitution requires that members of Parliament not hold offices of profit under the Crown, the Governor may appoint up to 22 responsible Ministers who may sit and vote in Parliament, these Ministers must be members of Parliament within three months of taking office and members of the Executive Council may only attend meetings and exercise their powers if they are Ministers. This is on top of including the power of the Governor to make appointments to public offices on the advice of the Executive Council except those liable to retire on political grounds (which were to be appointed by the Governor alone).

As discussed in Chapter Four, the South Australian constitutional story had a somewhat confused beginning. However, the South Australian colonial Constitution went even further to incorporate Responsible Government than its counterparts in Victoria or New South Wales. Like in Victoria, the South Australian constitution required five principle ministers of the Crown hold a seat in Parliament within three months of taking office. Like in New South Wales and Victoria, appointments to these officers were to be made by the Governor alone. Unlike New South Wales and Victoria however, South Australia makes the requirement of holding the confidence of members of Parliament much more explicit. There is a requirement that compensation to be paid to ministers who lost office due to their inability become Ministers of Parliament or to command the support of members. A redrafted Constitution became active in 1934. Like the 1856 constitution, there is a requirement that ministers be members of Parliament, public officers who are members of Parliament (Ministers) were to be appointed by the Governor alone, but did not include the same specified requirement of the Ministers holding the support of Parliament.

The Tasmanian colonial Constitution favoured a largely implicit incorporation of Responsible Government. It relies on a single written constitutional provision requiring ministerial incumbents to retire or be dismissed on political grounds, and requires compensation be paid in this circumstance. The redrafted Tasmanian Constitution of 1934 also favours implicit Responsible Government, relying on a requirement of Ministers not being appointed unless they are members of Parliament and requiring their office end if they cease to be members of Parliament within seven days of the return of writs.

The colonial Constitution of Western Australia made provision for Responsible Government through a requirement for ministers to retire of political grounds and for compensation to be paid in that

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21 Constitution of Victoria Act 1975 (Vic) s49.
22 Ibid s 50.
23 Ibid s 51.
24 Ibid s 87B (2)
25 Ibid s 88.
26 Legislative power in South Australia was originally split between the Governor and Colonisation Commissioner, then reverting to the Governor, and finally coming to rest with the Legislative Council after the original colonisation pieces of legislation were repealed and re-written by the Imperial Parliament. See Bradley Selway, The Constitution of South Australia (The Federation Press, 1997) 5-7.
27 Constitution of South Australia 1856 (UK) s32.
28 Ibid s29.
29 Ibid s39.
30 Constitution of South Australia 1934 (SA) s66.
31 Ibid, s68
32 Constitution Act 1855 (Tas) s 32.
33 Constitution Act 1934 (Tas) s 88.
circumstance. Unlike the other states, this Constitution has continued in force since Western Australia gained self-government.

In Queensland, the Constitution of 1867 made no reference to Responsible Government at all, instead relying completely on convention for its continuation in that colony. Following the Queensland Constitutional Review Commission in 1999, a new Constitution of Queensland brought that State into line with its counterparts around Australia in 2001. It made requirements that the Governor has responsibility for the appointment of Ministers, and requires that the Cabinet be collectively responsible to the Parliament.

Overall, each of the colonies, and later States, incorporated a system of Responsible Government at conventionally (albeit by varying degrees of incorporation in their written documents). It was evident from the very beginning of the drafting process of the colonial constitutions that Responsible Government would be part of their government systems. The same cannot be said for the Commonwealth, where the incorporation of Responsible Government, while eventually favoured, was one of greater discussion.

Like their forebears who were involved in the drafting of the New South Wales Constitution, drafters of the Commonwealth Constitution were proponents of including a system of Responsible Government in that Constitution. Sir Henry Parkes included it in his initial proposals to the 1891 convention.

The resolutions conclude:

> An executive, consisting of a governor-general, and such persons as may from time to time be appointed as his advisers, such persons sitting in Parliament, and whose term of office shall depend upon their possessing the confidence of the house of representatives expressed by the support of the majority.

What is meant by that is simply to call into existence a ministry to conduct the affairs of the new nation as similar as it can be to the ministry of England.[38]

There was wide-spread agreement with this sentiment, with discussion over Responsible Government largely focusing on whether it should be explicitly spelled out in the text of the Constitution or whether it should remain in the realm of convention. Its inclusion was not, however, a matter of universal agreement. Dr John Cockburn argued that due to the federal nature of the new Constitution, Responsible Government might not be appropriate due to the fact federation inherently precludes parliamentary sovereignty.

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34 Constitution Act 1889 (WA) ss 74, 71.
35 That commission was established to investigate whether any reform was necessary to the Constitution of Queensland, to seek public submissions on that topic and particularly investigate whether there would be any necessary reforms in the event Australia became a republic. Queensland, Queensland Constitutional Review Commission, Issues Paper (1999) 2.
36 Constitution of Queensland 2001 (Qld) s 43
37 Ibid s 42.
Even responsible government, which we have all learned to revere so much, has simply been a growth under the shelter of parliamentary sovereignty. We do not know that the parliamentary responsibility of ministers can exist under any other conditions. We have not seen it exist in the United States or in Switzerland, and we have no reason to suppose that it will be compatible with the conditions of federation here. I am inclined to think it will not. I am inclined to think that our best course will be to follow, in that respect, the guidance of Switzerland and have our ministers elected individually by the parliaments.  

In essence the debate over whether Responsible Government should be included in the new Constitution came down to a debate over whether parliamentary democracy was to be the predominant feature of the Constitution, or whether federalism should be. Those favouring Responsible Government argued in favour of parliamentary democracy, those favouring a more independent executive, argued for federalism and States’ rights. In the years following the 1891 Convention, however, those favouring Responsible Government were gaining the upper hand.

L.F Crisp attributed the initial enthusiasm of conservatives towards independent executives to instability and a perceived incompetence of various colonial cabinets (operating under systems of Responsible Government) around the time of the 1891 Convention. However, by the time of the 1897 Convention, colonial governments had become more stable and insistence on popular control over the executive became more widespread to check some of the power of the colonial elites who dominated the colonial Legislative Councils. J.A La Nauze saw things differently. He argues that initial concerns over Responsible Government were more to do with the apparent incompatibility of having a strong State’s house (the Senate) and dominance of the popular chamber (the House of Representatives) in being the only qualification for office. To address these concerns, a compromise which would allow the constitutional system to be flexible enough to adapt, if it was decided that traditional Responsible Government was no longer appropriate, was adopted. Helen Irving puts the inclusion of Responsible Government down to a more basic suspicion that without it, the Constitution would become too American. She argues that with the Civil War still fresh in the minds of the Australian population and concerns over corruption and inequalities perceived to be present in America, to follow the American model too closely may be politically difficult for the drafters.

Whether as strongly influenced by outside political circumstances as suggested by Crisp or for some other reason, the final draft of the Constitution did include Responsible Government, largely at the conventional level. Within the text of the Constitution, it relies on section 64 which largely echoes the constitutional provisions related to Responsible Government in the colonial constitutions.

**Ministers of state**

64. The Governor-General may appoint officers to administer such departments of State of the Commonwealth as the Governor-General in Council may establish.
Such officers shall hold office during the pleasure of the Governor-General. They shall be members of the Federal Executive Council, and shall be the Queen’s Ministers of State for the Commonwealth.

Ministers to sit in Parliament

After the first general election no Minister of State shall hold office for a longer period than three months unless he or becomes a senator or a member of the House of Representatives.44

Similarly, other provisions, like the requirement that money bills not originate in the Senate (s 53), have been seen as supporting traditional British parliamentary arrangements.45 Ultimately, it is only on a skeletal level that Responsible Government has been incorporated into the text of the colonial and State Constitutions and the Commonwealth Constitution. As such, the rules and meaning of Responsible Government in Australia has been left to convention and other non-constitutional sources.

C The Meaning of Responsible Government in Australia

Such limited written constitutional provision for Responsible Government has meant that the vast majority of knowledge on its operation within the governance system has to be found outside the constitutional documents. In some cases, the courts have provided some insights into how Responsible Government operates.

In Australian Capital Television Pty Ltd v Commonwealth46 Mason CJ explained Responsible Government as a practical necessity to ensure democratic accountability to the people and that their views are kept in mind in the formulation of policy.

[In the exercise of those [executive and legislative] powers the representatives of necessity are accountable to the people for what they do and have a responsibility to take account of the views of the people on whose behalf they act.47

In Lange v Australian Broadcasting Corporation48 the High Court reaffirmed this view with reference to the intention of the founders to create a Constitution which included Representative and Responsible Government and went on to describe how this intention was manifest in the constitutional text.49

In Egan v Wills50 the High Court dealt with a situation where Legislative Council of New South Wales passed a resolution finding Michael Egan, then Treasurer and Leader of the Government in the Legislative Council, guilty of contempt and suspended him for a day. The basis for this decision was Egan’s refusal to table certain papers after the Legislative Council had passed a resolution compelling him to do so. Egan challenged the decision to suspend him and forcibly remove him from Parliament on the basis that the Legislative Council had no power to compel him to produce documents which Cabinet had resolved should not be produced. In that case, Gaudron, Gummow

44 Australian Constitution s 64.
46 (1992) 177 CLR 106.
48 (1997) 189 CLR 520.
49 Ibid 557-558.
and Hayne JJ reasoned that Responsible Government included a duty of ministers to provide papers to Parliament on request of a house of Parliament which was, in that case, the Legislative Council of New South Wales.

The arrangements made for New South Wales for the period following 1855 provided elements of what now should be identified as a system of responsible government. There was an assumption of a measure of examination of the executive by the legislature as well as legislative control over taxation and appropriation of money. The consideration that the government of the day must retain the confidence of the lower House and that it is there that government are made and unmade does not deny what follows from the assumption in 1856 by the Legislative Council of a measure of superintendence of the conduct of the executive government by the production to it of State papers.\(^{51}\)

This requirement and the right of the Legislative Council to hold a minister in contempt of Parliament and suspend them for not abiding by this requirement was later endorsed by the New South Wales Supreme Court in *Egan v Chadwick*.\(^{52}\)

While the courts have provided some glimpses into the role and operation of Responsible Government, it has been left to academic commentary to provide more detailed descriptions of Responsible Government in Australia. Like Edward Jenks (see above), Hugh Emy and Owen Hughes\(^{53}\) have provided a list of components for Responsible Government, although tailored to the Australian context. First, they state that Responsible Government in Australia requires a ministry, whose members are members of Parliament and both collectively and individually responsible to it, to exercise executive authority. Secondly, it includes an appointed Head of State who acts on the advice of the ministry. Thirdly, a ministry must resign upon loosing an election or a vote of no confidence in the lower house of Parliament. Finally, the ministry is supported by an independent, non-partisan public service. All of these elements combine to form a chain of accountability from the actions of officials and ministers to the public.\(^{54}\)

While Emy and Hughes focused on the operation of Responsible Government at a level of principle, Ken Turner looked to the actual operation of Responsible Government, analysing the effectiveness of Parliament’s potential control over the executive is. He argues that:

> Parliament has important apparent powers in checking public expenditure and supervising public administration, by asking questions, demanding answers, and holding ministers accountable. Yet the size, remoteness and complexity of government are so great that back benchers may not know what questions to ask. Parliament cannot be said to exercise control, yet it may contribute some supervision and redress of grievances, especially with the improvements of its committee system.

Clearly, ‘parliamentary government’ is not government by parliament or even government controlled by parliament. Parliament establishes expected roles including conventions of ‘ministerial responsibility’, and trains and influences ministers, whose actions it publically attempts to scrutinise.\(^{55}\)

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\(^{51}\) Ibid 453 (Gaudron, Gummow and Hayne JJ).
\(^{52}\) (1999) 46 NSWLR 563.
\(^{53}\) In Hugh Emy and Owen Hughes, *Australian Politics: Realities in Conflict* (Macmillan, 2\(^{nd}\) ed, 1991).
\(^{54}\) Ibid 338-9.
He goes on to voice similar concerns in the Australian context as Lord Hailsham expressed about Responsible Government in Britain; that government control over the House of Representatives diminishes the Parliament’s ability to enforce the accountability of the ministry to it. Turner reasons that:

With the support of its loyal majority, the Government has institutionalised advantage in the very procedures of Parliament. It controls the process of electing the Speaker and Chairman of Committees; usually determines times of sittings; appoints chairpersons of inquiries and decides their terms of reference and resources; amends Standing Orders (frontbenchers in the House dominating the membership of the Standing Orders Committee); curtails debate; timetables legislation and arranges the drafting of bills, effectively monopolising the initiation of legislation (not only of finance measures where its monopoly is constitutional). Within their departments, ministers will subsequently enjoy wide discretion in the detailed implementation of the statutes so created.56

Overall, the general idea of a Cabinet, drawn from and responsible to Parliament, exercising the executive power legally provided to vice-regal representatives has been endorsed widely by academic literature on Responsible Government in Australia. Debate has largely focused on how Responsible Government reconciles having a strong Upper House of Parliament at the federal level. Some see it as strengthening Responsible Government against the impact of having a single party controlling the lower house.57 Others, however, see it as a distorting influence which can illegitimately frustrate the ability of a government, holding a majority in the lower house, from functioning effectively. In this, particular reference is made to the way the Senate, despite not being required to provide support to an incumbent government, was able to force the Whitlam government to the polls by blocking supply.58 While both the courts and academic commentary can provide an insight into the operation of Responsible Government at the level of principle (and, in some cases, an analysis of its efficacy), how Responsible Government operates is in how Parliament draws on both the legal manifestation and principles of Responsible Government to implement it.

D How Parliaments Enforce Responsible Government

Despite criticisms over their efficacy, Parliaments do have mechanisms at their disposal to enforce accountability of ministers (at least in theory).

The Parliament has the ability to inquire into actions of government. Typically this involves the Parliament (or one house of it) setting up an inquiry to scrutinise an action of the government. At the Commonwealth level, this could be through the use of committees, which can be set up to scrutinise legislation or, more relevant for intergovernmental action, executive actions. Similar mechanisms are available at the State and Territory level, depending on the make-up of their

56 Ibid 84.
respective Parliaments. For example: Queensland, the Northern Territory and the Australian Capital Territory each have unicameral parliaments and so neither upper house committees or joint committees operate in those jurisdictions. Nevertheless, the use of committees give parliaments the ability, on the record and under threat of contempt, to seek information from members of the executive on their actions and, in doing so, expose those actions to the judgement of the electorate.

An example of an inquiry into an executive action at the Commonwealth level comes from the Senate on 14 November 2013. The Senate set up an inquiry into the government’s review of the National Broadband Network. The terms of reference for this inquiry are:

a. the establishment of the Government’s strategic review of the NBN including:
   i. the adequacy of the terms of reference,
   ii. the selection of personnel and expert advisers to the review,
   iii. the data provided to the strategic review, in particular, any variation between that data and data used by NBN Co in preparing its annual report and the corporate plan, and
   iv. the impact of the strategic review on the operational effectiveness of NBN Co;

b. the outcome of the strategic review of the NBN, including:
   i. the extent to which the review fulfilled its terms of reference,
   ii. the reliability of the assumptions made in the review, including, inter alia, the cost of alternative network equipment, the revenues of NBN Co under alternative scenarios, construction requirements and access to Telstra’s copper network,
   iii. the implication of any alternatives considered for the long-term structure of the industry, in particular, the structural separation of access networks from retail operations, and
   iv. any other matters arising from the strategic review;

c. the establishment and findings of the Government’s cost benefit analysis;

d. the conduct and findings of the Government survey of the availability of broadband in Australia;

e. any related matter.  

This inquiry was set up not to scrutinise a piece of legislation, nor will it compel the executive to take any specific action. Its sole purpose was to seek information on an action by the government, in this case their strategic review of the National Broadband Network, and to publish the findings for the benefit of the Parliament and, through them, the public. In theory, this process is designed to assist with the enforcing of the individual accountability of Responsible Government ministers to the Parliament for the actions of their departments, and to assist with the requirement of the collective responsibility of the ministry to the electorate. Inquiries are set up and operate in similar ways at the other levels of government in the House of Representatives and in other Westminster parliamentary systems.  


60 An example of this is the Joint Committee on Human Rights in the United Kingdom. This committee was acknowledged as evaluating the actions of the executive in relation to the Human Rights Act in the United
As discussed earlier, beyond simply ensuring information on government actions gets into the public arena, the Parliament, consistent with Responsible Government, retains the ability to refuse the passage of government bills, including budget bills. In extreme cases, this can be interpreted as a lack of confidence in the government.

An example of this occurred in 1941 when the budget of the Fadden government was defeated on the floor of the House of Representatives. In the debate on the budget that year, Independent member for Wimmera, Alexander Wilson expressed his disagreement with the Fadden Budget and withdrew his support for the government.

I do not like the Government’s financial policy. It envisages further debt and, in the natural course of events when the war is concluded, a contraction of finance is likely to occur as on a former occasion, and misery and suffering will follow. The people do not want those conditions. In order to avoid them, Australia must have a government which will take appropriate action. For those reasons, I shall support the amendment moved by the Leader of the Opposition.61

With Wilson voting with the Opposition to defeat the Fadden Budget, Independent member for Henty, Arthur Coles, also judged that Parliament had become was unworkable and an election should be called. In doing so he voted with the Opposition in voting against the budget.62

Within days of the defeat of the budget the Governor-General had appointed the then-Opposition Leader John Curtin to form a government. This situation shows how the Parliament can withdraw its confidence in a government, causing it to fall. In this action it ensures the accountability of the government both to themselves and to the wider electorate by holding their continuation in office in their hands.

As such, Responsible Government does provide a mechanism by which the Parliament can enforce democratic accountability on the government, in spite of concerns about elective dictatorship inherent in the effect party politics has on the effectiveness of these measures. The adoption of a political solution like a less partisan attitude by parliamentarians would remedy this concern. However, this is not the case with COAG. COAG provides an institutional threat to Responsible Government, rather than just a practical political one. Seen as a constitutional convention, COAG is a necessary part of the Constitution just as Responsible Government is. However its very operation precludes the operation of Responsible Government. This causes a clash of conventions which must be resolved.

E COAG and Responsible Government

Having established how Responsible Government operates in Australia, the question becomes how COAG interferes with it. This is at the heart of the democratic deficit. COAG’s very nature of taking decisions collectively, debating behind closed doors and implementing decisions collectively restricts the ability of both the various Parliaments in the different jurisdictions and the electorate in general from scrutinising programs negotiated through there.

61 Commonwealth, Parliamentary Debates, House of Representatives, 3 October 1941, 714 (Alexander Wilson).
As discussed earlier, under a system of Responsible Government, governments are commissioned by the Governors, Administrators or the Governor-General of a particular jurisdiction due to their ability to retain the confidence of the Lower House of Parliament. By extension, in order to maintain this confidence, Parliaments must be able to inquire into government actions to ensure they remain in accordance with views of the Parliament, and to move a motion of no-confidence if this is not the case. Logically, government members (i.e the Ministers) have a primary interest in remaining accountable to the Parliament in order to retain their confidence. COAG, however, creates a conflict of interest amongst its members. First Ministers retain their interest in remaining accountable to Parliament, but also have a strong interest in remaining faithful to the other members of COAG so their jurisdiction can receive the benefits the agreements entail. In practice this means COAG operates like a Cabinet for the Federation. Although it is not perfectly analogous (for example, the Prime Minister, as chair, cannot dismiss a Premier or Chief Minister since they hold their membership due to their position as head of their respective governments), it is still broadly similar in operation. For example, members decide on a particular policy, the policy is announced as a joint decision by all members, and members maintain confidence on what was discussed and how the decision was reached. Similarly, Cabinet members take joint decisions and defend them collectively in public.63 In this way, each COAG member is jointly responsible for the content of the agreement. But while a Cabinet within a jurisdiction can be held to account by the Parliament of their jurisdiction, the same cannot be said of COAG because no Parliament has the jurisdiction to hold the entire body to account. As such, COAG effectively requires its members to take joint responsibility for decisions, maintain the confidentiality of the meetings, and to faithfully execute the actions they have agreed to regardless of the opinion of their respective Parliaments. As will be discussed below, this has resulted in a number of examples where the principles of Responsible Government and the requirements of COAG and Premiers’ Conferences have come into conflict. With COAG seen as a convention, this conflict becomes a clash of conventions.

Not only does this conflict exist, each time it manifests (essentially whenever a new intergovernmental agreement is signed) it needs to be resolved. As things currently stand, this conflict is being resolved in favour of COAG, not Responsible Government since both State and Territory and the Commonwealth Parliaments are limited in their ability to enforce Responsible Government in the area of intergovernmental agreements. While a Parliament could hold an individual member to account for the decision to enter into the agreement in the first place, the basis for such a decision would, in practice, need to be centred on the individual effects of an agreement for the individual jurisdiction, since that is all an individual Parliament has jurisdiction to review. In essence, a Parliament could hold the Prime Minister, a Premier or a Chief Minister to account for signing up to a bad deal for their jurisdiction, as the principles of Responsible Government would imply. However, given in practice the confidential nature of COAG negotiations and the fact that the only information released about COAG agreements happens on the agreement of the members, the agreements are placed in the best possible light to avoid any question over the benefit of a deal. Furthermore, withdrawing confidence in a government over an intergovernmental agreement when Parliament is otherwise inclined to support can be viewed as unnecessarily disruptive to good governance by Parliament, further disincentivising them to do so.

63 See for example: Department of Prime Minister and Cabinet, Cabinet Handbook (Commonwealth of Australia, 7th ed, 2012) 9.
Secondly, COAG interferes with the ability of any Parliament to provide information on the totality of an agreement to the public. COAG programs are intergovernmental in nature. This means that different parts of a COAG program are implemented by different levels of government. No level of government completely controls the program centrally, only the part of the program they are directly responsible for. This restricts the operation of the collective responsibility of the government to the Parliament, and ultimately the electorate, as the Parliament only has the ability to scrutinise their individual government on the individual parts of the program they are administrating. This provides only an extremely limited view of the operation of the program, especially since decisions taken by one government in a COAG program are often the consequences of actions taken by another government under the program, an action which the Parliament of the first government would have no ability to inquire into. This restricts the Parliament’s ability to ensure collective responsibility of the government to the electors by uncovering information on government actions to go onto the public record. The end result is a situation where an institution necessary for the successful operation of the federation is, by its standard operations, interfering with the operation of an institution necessary for the successful operation of parliamentary democracy.

While this is a concern at a practical/political level, as has been remarked on by scholars in the past (see discussion in Chapter One), the democratic deficit in COAG has an even greater effect on the operation of Responsible Government at a constitutional level if COAG is assigned the status of a convention. By their nature, conventions are indispensable parts of a constitutional system. As such, they cannot be abolished or sidelined without compromising either the efficient or effective functioning of the Constitution. However, for this type of convention to settle into the Constitutional system for the long term, it needs to fit in with the other conventions operating in the Constitutional system. Yet due to the democratic deficit, COAG does not fit in with Responsible Government since it requires its members to act in a way contrary to Responsible Government. Thus, were COAG to be a convention, two constitutional conventions, both necessary for the Constitution to operate effectively, would be in conflict. This could either compromise the ability of Responsible Government to continue to make the Constitution democratic, or the ability of COAG to facilitate the necessary role of intergovernmental cooperation. This is because without reform, a conflict, between these two conventions must be resolved in favour of one institution or the other. This means that, once the conflict is resolved, the Constitution would be either less democratic as a result, or unable to facilitate the intergovernmental relations necessary for the federation to function. Such an internal conflict of the Constitution has never been remarked on before in Australia, and could occur in a number of circumstances.

**Example One: The Anti-Terrorism Bill**

In 2005 the Commonwealth initiated COAG negotiations with the States and Territories to gain agreement to unify and strengthen anti-terrorism laws in Australia. As part of the agreement, State and Territory powers were referred to the Commonwealth to create a nationally coordinated counter-terrorism response. As with all COAG meetings, it was conducted behind closed doors and

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limited details were provided about the agreement in a joint communiqué delivered by the leaders at the end of the meeting. Following COAG’s agreement to draft legislation, the Anti-Terrorism (No 2) Bill 2005 went to the Commonwealth Parliament. The legislation included a suit of measures to strengthen Australia’s anti-terrorism powers, measures which would be reviewed by COAG after five years.\(^\text{65}\) During the Senate debate on the legislation where the Minister for Justice and Customs (Senator Ellison) was questioned over the Bill, Senator Nettle expressed frustration over their lack of ability to bind COAG to review the measures under specified conditions or to even gain a report on their review unless COAG volunteers it. The following exchange highlights this.

**Senator ELLISON** (Western Australia- Minister for Justice and Customs) (4.55pm) – Clause 4 in this bill and clause 4 in the bill in the other place cover this aspect of the review. As I said earlier, we are dealing with the Council of Australian Governments, which has agreed to carry out the review after five years. The reason why it says, ‘If a copy of the report in relation to the review is given to the Attorney-General,’ is that this legislation cannot bind COAG. We are talking about other governments. What I have said is that COAG has given a public undertaking. You have an undertaking from the Council of Australian Governments- a very public one- and I think that is one which the Australian community can take great assurance from. But we cannot legislate in this bill to bind COAG. We are talking about other governments in Australia, and that is why it is there. There is no mystery surrounding it, and I point to the very public undertaking COAG gave on this issue.

**Senator NETTLE** (New South Wales) (4.56 pm)- Thank you, Minister, for that explanation. It is great having COAG, isn’t it, because it does not have anywhere near the same sorts of accountability measures as our parliaments do, whether it be environment legislation or a whole raft of other legislation that can be agreed to by COAG. There can be no requirements for the same level of accountability of minutes, information about what is going on at meetings or requirements to ensure that COAG carries out particular things. It makes it all very convenient, and we have seen in a raft of different areas the way this government has sought to move more of the responsibilities out of our parliaments and into meetings of parliaments that cannot be required to have the same sort of accountability. I accept your explanation. It makes sense to me that that would be a forum where you would rather have this issue dealt with.\(^\text{66}\)

This exchange shows the relative inability of Parliament to either gain information on COAG actions or compel it to act in a way it chooses due to their jurisdictional restriction to the Commonwealth level of government. Despite avoiding parliamentary scrutiny not being a specific aim of a COAG agreement, by running policy through COAG, the Commonwealth Government was able ensure that the Australian Parliament is unable to fully review it or to expose the full policy implications of the measures even if Parliament examines legislation made under the agreement.

Furthermore, even if a member of COAG voluntarily comes before a committee of the Commonwealth Parliament, that Parliament has still shown little ability to gain information beyond what is voluntarily provided by the member. The Anti-Terrorism example also shows this occurrence.

\(^{65}\) Ibid.

At public hearings of the inquiry, the Chief Minister of the Australian Capital Territory, Jon Stanhope, made submissions to the inquiry on the position of the ACT government regarding the Anti-Terrorism (No 2) Bill. He was questioned initially by the Chair of the Committee, Senator Marise Payne, on the negotiations which took place at the meeting. However, even in a circumstance where he was willing to reveal the content of the agreement and volunteered to go before the Committee, the Committee was not able to induce Mr Stanhope to reveal details on the meeting beyond those he volunteered supporting his own position, with Stanhope citing the inappropriateness of his revealing the position of other governments. Later, an interaction between Mr Stanhope and Senator George Brandis included several more attempts to induce Mr Stanhope to reveal details of the meeting, but he again refused to reveal more than minor details on the meeting, again claiming it was inappropriate for him to answer questions on anyone else’s positions expressed at the COAG meeting. Exasperated by his inability to get more than minor details on the COAG meeting from the Chief Minister, Senator Brandis returned his questioning to Mr Stanhope’s substantive concerns with the Bill. What this situation shows, is the relative inability of the Senate Committee, attempting to scrutinise government actions (both those of the Chief Minister and, ultimately through the Bill, COAG generally). Even with the Chief Minister volunteering information in accordance with his position, he chose not to reveal anything further and the Committee had no ability to force him to do so.

A final facet of this example is what led Jon Stanhope to make the submissions he did in the first place. Faced with having to make a quick decision without having an opportunity to present the draft legislation to the ACT Parliament for debate, Stanhope posted the draft bill on his website so that public scrutiny could occur. As discussed earlier, in an interview with the ABC later reported on by other media outlets including The Age newspaper, he cited his concerns about the new counter-terrorism proposal and stated his belief that his constituents deserved to see the proposal.

He went on to cite concerns with the impacts on civil liberties and that the Prime Minister, John Howard, was attempting to avoid proper scrutiny and ‘rush’ the proposals into law. The Chief Minister stated that:

Now that’s just an extraordinary suggestion and it’s clear to me that the prime minister doesn’t want debate, he doesn’t want to have to respond to the critics, he doesn’t want to have to explain some of the detail...He [the Prime Minister] simply is intent on crashing through this legislation, with its fundamental implications for civil liberties and human rights, without the need to go through a process of consultation.

In essence this situation is a prime example of the democratic deficit at work. The Australian Parliament lacked the ability to inquire into the agreement in any meaningful way, it was unable to gain information on any facet of the agreement other than those which related to the Commonwealth (even when a member representing another jurisdiction volunteered to come

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70 Ibid.
before a parliamentary committee on the subject) and the State and Territory Parliaments were denied the chance to even see the agreement before it was agreed to. Seeing COAG as a convention places these otherwise political concerns in a whole new light.

Here COAG was required to solve a particular policy challenge recognised to be beyond the capacity of any one government to respond. Without an intergovernmental agreement to solve this particular policy problem, any national response would be limited by the constitutional jurisdiction of Commonwealth, or subject to different responses undertaken at the State and Territory level. As such, a whole-of-government response required intergovernmental action which in our governance system is facilitated by a COAG agreement. Yet the very action of using COAG has undermined the operation of Responsible Government, necessary to maintain the democratic safeguards of the Constitution. This allowed the leaders to make decisions with major consequences for the rights of citizens without meaningful democratic oversight. To remove COAG from this situation would negate the ability of our governance system to respond to this policy challenge, but to use it means constitutional democratic accountability is sacrificed in favour of constitutional intergovernmental capacity.

**G Example Two: The National Rail Corporation**

Another an example of where the clash can occur is when a State Premier or Territory Chief Minister might purposefully truncate the time a Parliament has to review a measure contained in an intergovernmental agreement. Despite this being a common tactic of governments, in intergovernmental matters another aspect of peer-pressure is added. A Premier would advise Parliament of an agreement, provide only limited time to review the measures relating to their jurisdiction, and put pressure on Parliament to endorse or pass any measures required to ensure the agreement proceeds. In a sense, they use peer-pressure. ‘If an agreement is good enough to be endorsed by the other jurisdiction, why isn’t it good enough for ours,’ they might ask. This provides enormous pressure on Parliament. Pressure they resent but all too often succumb to. In the 1992 debate over the formation of the National Rail Corporation, legislation was presented to the Western Australian Parliament and the second reading debate of the required legislation was left as late as possible to minimise possibility of political problems developing in its passage. Members of the West Australian Legislative Assembly expressed its displeasure over the use of this tactic.

This Parliament is being held to ransom on the basis of falling into line with the Eastern States. The Premier has committed to that agreement like a faithful dog. The masters from the Eastern States have said, “This is what we want you to do, this is what you have to do. Politically we need you to come to heel otherwise we will be out in the cold; so do it. Don’t worry about Westrail. We need to have the kudos of kicking microeconomic reform off to a good start.” The old faithful dog falls into line, wags its tail and hangs out its tongue.

As with the previous example, an intergovernmental scheme was necessary to reach an ideal policy outcome. Yet, the operation of COAG ensured that the various parliaments are practically unable (or

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71 COAG, above n 58.
73 Western Australia, *Parliamentary Debates*, Legislative Assembly, 12 November 1992, 6799 (Kennon R. Lewis).
only with great difficulty) to ensure that the members of COAG fulfil their duties to them and the democratic deficit manifests again. Thus again, where COAG is seen as a convention, the constitutional requirement of intergovernmental action through COAG to forge an agreement in this situation would undermine the constitutional requirement that ministers remain responsible to Parliament at the State and Territory level.

**Example Three: The 1967 Off-Shore Drilling Agreement**

Another example shows that the clash can occur at the State and Commonwealth level simultaneously. In this situation, ministerial accountability was sacrificed in order to enable an intergovernmental agreement to operate in the case of the 1967 off-shore mining agreement. In that circumstance, a governance system for offshore drilling operations was established whereby the Commonwealth would establish uniform national regulations but it would be the role of State government ministers and agencies to administrate the system. 74 Essentially, via an intergovernmental agreement, the Commonwealth and State governments were able to establish uniform regulations with decentralised administration, an outcome neither level of government could achieve alone.

Despite the acknowledged efficiency of this arrangement, 75 the arrangement gave rise to criticism that ministerial accountability at either level of government was avoided. Professor Geoffrey Sawer noted in the *Canberra Times* that:

> The trouble with the scheme which the Commonwealth and the States have botched up between them is that it provides neither for proper legal control of the relevant administrative activities, nor for proper Ministerial and parliamentary control either ... The State Ministers who will make the crucial decisions are in no way answerable to the Commonwealth Parliament, whose legislation provides the main basis for their powers. One could easily imagine the readiness with which one Commonwealth Minister will wriggle out of answering parliamentary questions and criticisms. Meanwhile, in the State Parliament, the relevant Minister will wriggle out of responsibility just as easily. 76

Essentially what Sawer identified here is the democratic deficit. Furthermore, despite holding a Senate inquiry into the scheme which acknowledged the loss of ministerial responsibility, the Senate Committee stated that this was an inherent problem in co-operative arrangements and that no legislative change could remedy this. Thus, they recommended no changes be made, 77 and the democratic deficit endured.

Again, here we have a situation here the uniform practical operation of off-shore drilling required and intergovernmental response, which, was provided through a Premiers’ Conference. Yet this


75 Senate Select Committee on Off-Shore Petroleum Resources, Parliament of Australia, *Report of the Senate Select Committee on Off-Shore Petroleum Resources* (1971) [7.13].

76 Ibid [6.156].

77 Ibid [2.2].
required the sacrifice of the normal constitutional ministerial requirements at both the Commonwealth and State and Territory levels. Thus the clash between the then-Premiers’ Conference and responsible government manifested again, and again was resolved in favour of the Premiers’ Conference. Again, were COAG (as the successor to the Premiers’ Conferences) a convention, this situation would require a choice to either sacrifice the ability of the governance system to respond to this policy challenge, or allow the Constitution to operate in a less democratic way than would be generally assumed.

Example Four: National Partnership Agreements

A final example shows how an ongoing series of negotiations continuously undermines the constitutional requirement of Responsible Government. This is the example of intergovernmental funding agreements. As discussed in Chapter Two, the operation of vertical fiscal imbalance has necessitated intergovernmental agreements to allow for fiscal transfer from the Commonwealth to the State and Territory governments. Negotiations for these transfers have taken place at COAG meetings. During a review into one form of these transfers, National Funding Agreements, it was noted that these agreements were subject to the same democratic deficit that other intergovernmental agreements. In a submission to the Inquiry into National Funding Agreements, undertaken by the Joint Committee of Public Accounts and Audit in the Commonwealth Parliament, Paul Kildea, Andrew Lynch and Robert Woods argued that the agreements allow members of the executive to commit their jurisdictions to positions that may not necessarily receive endorsement by their Parliaments. They argue this occurs by sideling the Parliaments during the negotiations process:

Generally, parliaments will have little or no scrutiny role with respect to funding agreements negotiated at the executive level. Where a funding agreement does not require legislative implementation, it will not be subject to any parliamentary scrutiny. Even where legislative implementation is necessary, parliamentary scrutiny will often occur too late in the process to have any real effect, in large part because the details of the agreement are presented to legislatures as a fait accompli.⁷⁸

Despite noting a number of submissions from the Treasury and various State governments that the accountability mechanisms in place were sufficient,⁷⁹ the Committee agreed that accountability mechanisms should be strengthened through tabling COAG Reform Council and Productivity Commission reports in the Commonwealth Parliament, their review by the Committee, that National Partnerships be tabled in Parliament with a Ministerial Statement, and that the Prime Minister make an annual statement to Parliament outlining current, future and the Commonwealth contribution to National Partnership Agreements.⁸⁰

This final example demonstrates how intergovernmental agreements which, due to the operation of vertical fiscal imbalance, are essential to the system of government continuing to function effectively and these agreements are provided through COAG. However, they are continually undermining the

⁸⁰ Ibid 97-8.
normal operation of constitutionally ministerial accountability. Here this is not just an occasional occurrence, it is a continuing and consistent one and again, the choice is between removing the ability of our governance system to ameliorate the effects of vertical fiscal imbalance via intergovernmental agreement, or to sacrifice Responsible Government in favour of COAG.

Overall these examples make it clear what the effect of COAG being a convention could have on the governance system. Each example shows how a key part of the Constitution would be rendered ineffective by another in a practical context, whether that be the capacity to enter into intergovernmental agreements, or to have a democratically accountable system of government. Furthermore, as COAG emerges as a convention due to its continuing and increasing necessity for the federation to function, this clash becomes constitutionally unavoidable without reform. This means Australia either has to accept that the Constitution has an undemocratic aspect, or reform either COAG or Responsible Government to allow intergovernmental agreements to proceed but incorporate an effective mechanism of democratic accountability.

J Conclusion

Responsible Government is one of the key conventions of our constitutional system. Arising out of a necessity for the executive and the legislature in Britain to have a workable relationship, it has become the practical manifestation of the democratic accountability of the executive to both the Parliament and to the people.

In Australia, it was always assumed that Responsible Government would become a part of the colonial constitutions from the earliest periods of their drafting. favouring a conventional rather than fully articulated system of Responsible Government, each colonial constitution incorporated Responsible Government and this was carried over into their State-based successors where applicable.

At the Commonwealth level, the incorporation of Responsible Government was the subject of more debate than it was in the colonial constitution, but never the less it was incorporated again at a conventional level and it has been an enduring part of the Australian governance system ever since. It seems now, however, it faces the biggest test of its existence in Australia.

Concern over a democratic deficit in the operation of COAG is nothing new. In the Chapter One it was explained as a mechanism through which the executive can avoid democratic and parliamentary scrutiny of its actions. But the consequences of this for our constitutional system are deeper than that, especially if COAG is given the status of a convention which, as described in Chapter Four, it can be seen to be moving towards. COAG, as a convention, clashes with Responsible Government and thus, without reform, require a choice to be made between intergovernmental capacity and democratic government. Thus the democratic deficit would not just be a characteristic undermining the political desirability of COAG to continue as our mechanism to facilitate intergovernmental relations, it would be a structural democratic deficit in our Constitution due to the necessity that COAG exist for the Constitution to function.
As discussed in previous chapters, COAG is becoming involved in more and more policy areas which mean this emerging conflict of constitutional conventions will continue to arise. Without some form of constitutional reform, this means in practice that Responsible Government could eventually become a hollow safeguard for democratic accountability, continually sacrificed in favour of a COAG convention.
CONCLUSION

In this thesis I intended to examine the constitutional status of the Council of Australian Governments (COAG) in an effort to assess the true effects of COAG’s democratic deficit. Only by understanding these effects can we hope to devise an effective strategy for resolving it. In order to do this I undertook an original study of COAG from a constitutional perspective. Ultimately this thesis has argued that COAG could, in fact, be becoming a convention of the Constitution and if that were the case, a fundamental clash would be occurring within the Constitution. This clash has the potential to fulfil the prophecy of Hackett in 1891 that federation would destroy Responsible Government, or Responsible Government would destroy federation.

My task in this thesis has been to do three things. First, I undertook to provide a review of the literature on COAG’s democratic deficit. This was done in Chapter One. Second, I reviewed the literature about COAG (and its predecessor conferences) and ran a historical study of the evolution first of Intercolonial conferences, then Premiers’ Conferences and finally COAG across the history of these conferences. This was done in Chapter Two. Third, I developed an analysis of COAG’s constitutional status. To do this I provided an overview of the literature’s position on what characteristics an institution needs to exhibit in order to be a convention of the Constitution and whether COAG had these characteristics. This was done in Chapters Three and Four. Finally, in Chapter Five, in light of a finding that COAG could be a convention with a democratic deficit, I analysed what this meant for the operation of Responsible Government in Australia.

My analysis came to four conclusions. First, the current literature on the democratic deficit, while successful in identifying the nature of COAG’s democratic deficit, did not fully show the extent of its effects at a systemic level. Second, the literature on COAG in general did not fully appreciate COAG’s centrality in Australian governance to the extent it was evident in COAG’s history. Third, COAG is, in fact, so crucial to the governance system as to be potentially emerging as a convention of the Constitution. Finally, COAG’s democratic deficit, when COAG is seen as a convention, forces a clash of conventions with Responsible Government.

Previous studies have expressed concern over aspects of COAG’s operation which interfere with the democratic accountability of the executive (the ‘democratic deficit’). In Chapter One, I reviewed these studies. In particular, concerns are raised that policy decisions are made and in many cases at least partially carried out without any sort of democratic scrutiny through the parliamentary process. Even where legislation is necessary, it has been identified that individual Parliaments only have the ability to examine the individual pieces of legislation which must pass their Parliament. The agreement in its entirety and the negotiated terms remain in the exclusive domain of COAG and it is only at the pleasure of COAG that details of this are released. Previous literature saw the democratic deficit as a political problem requiring a political solution. But in light of a COAG’s increasingly important role in policy making and implementation, this problem could not only have consequences for the desirable running of the political process, but could have important consequences for the operation of the constitutional system. To determine this, a review of what we know about COAG was necessary to inform a more constitutionally focused analysis which would determine the full effect of this democratic deficit. This was undertaken in Chapter Two.
Chapter Two reviewed the previous studies of COAG and the preceding Premiers’ Conferences. These studies have been primarily political in nature, despite having approached these conferences from different perspectives. To demonstrate this, I placed previous analyses of COAG and Premiers’ Conferences into two, broad categories: player-centric studies and rule-based studies. A player-centric approach is where COAG is seen as a forum where the political dynamic between specific political players are manifest. In a rule-based approach, COAG meetings and Premiers’ Conferences are seen as forums where the realities of the contemporary federal environment, largely determined by the constitutional interpretation of the High Court or wider practical imperatives, play out at a political level. Despite this broad body of literature, both of these approaches, like those that involve analysis of the democratic deficit examined in the Chapter One, assume that COAG is an extra-constitutional, political institution used as an ad-hoc ‘fixer’ organisation for individual political problems rather than an embedded part of the Australian governance system. Yet when we look back at the history of these conferences, it is clear that this institution is anything but ad-hoc. Conferences are a constant part of the government experience in Australia, supplementing and even preceding the Constitution. In this they are more akin to a constitutional convention than an ad-hoc political practice.

Since their beginnings before Federation these conferences have performed a vital role in ensuring the federal governance framework in Australia (both before federation and under the Constitution after Federation) works effectively. This indicates that these meetings are an essential supplement to the governance framework and, by extension, the Constitution. Seen in this context, analysing COAG meetings and Premiers’ Conferences (as the post-Federation manifestations of these conferences) simply as an ad-hoc political practice is insufficient to appreciate their true role within the governance system and therefore insufficient to analyse what effects the characteristics of COAG, like its democratic deficit, are having on the constitutional system. So while it is defensible to take a political approach to analysing COAG, given COAG has no legal or constitutional standing in an explicit sense, since COAG facilitates a fundamental government function, i.e intergovernmental collaboration, the possibility exists that the role that COAG serves is a constitutional one, despite its political nature. As such I hypothesised that the existence of a body which facilitated intergovernmental collaboration was critical to the constitutional system and COAG, as the body which fulfils this role, could be a constitutional convention. Conceiving COAG in this way has not been done before and held the potential to uncover hitherto unrecognised constitutional consequences in its operations, in particular in relation to the democratic deficit.

Given that Australia has written constitutions at the Commonwealth and State levels and COAG is not established within any of them, any constitutional status would derive from convention rather than legal provision. Conventions, despite not being legal parts of constitutions, are important parts of them and their existence and operations are critical for the practical operation of our constitutions. Conventions arose out of the British constitutional system, which draws from a number of different sources for its provisions rather than a single written document. Despite this, those British colonies which established a Westminster parliamentary system through a written constitution still inherited a set of conventions as part of that process. Over time, literature from Britain, Canada and Australia has established several criteria for being a convention and in Chapter Three I drew these criteria out. First, a convention cannot be codified elsewhere in law. Second, conventional rules should be binding on relevant parties. Third, these parties should voluntarily agree to be bound by the convention’s rules (thus either expressly or implicitly accepting the
practice as a convention). Finally, there must be a constitutional necessity for the convention to exist. In order to establish whether COAG could have conventional status, I compared the characteristics of COAG to those criteria for convention status.

For COAG to be viewed as a convention it needs to be publically recognised as such. However, just because no such expression has been made does not mean it should not be considered a potential convention due its meeting of the convention criteria established in Chapter Three. If COAG does meet the established criteria for being a convention, COAG could be declared defensibly as a convention. In Chapter Four, I examined whether this is the case. The first criterion, whether the proposed convention has been codified in law, is easily satisfied in COAG’s case. Premiers’ Conferences simply evolved from a pre-existing governance practice and COAG was established by declaration of Prime Minister Paul Keating in 1992 as the latest incarnation of that practice. COAG has not been further codified in legislation or declared to part of the common law by the courts. Furthermore, the Premiers’ Conferences which preceded COAG had no process of codification in law; they simply continued the established pre-federation practice of heads of government regularly meeting to discuss intergovernmental issues. This means that COAG has no legal status and therefore can still potentially be a convention. With regard to the second criterion (capacity of the convention’s rules to be binding), within the processes of COAG are strong inherent risks if any member of COAG to disregard their undertakings made at COAG. For those members who stray from the agreements, potential consequences must be strong enough for the members to prioritise the agreements above other political concerns. Evidence indicates this is the case. For the Commonwealth, the potential loss of State (and Territory) cooperation in implementing a national scheme has been enough to compel their ongoing support of an agreement. Similarly, for the States and Territories, the potential loss of financial resources has been a consequence great enough to compel them to remain faithful to agreements, even in spite of other political consequences resulting from that agreement. The third criterion can also be satisfied (acceptance as a convention) at least to the extent of indicating COAG is emerging as a convention, even if not necessarily being one yet. Attendance at meetings is voluntary. However, should a member agree to attend, they carry an obligation to abide by the rules of the institution and the agreements made there. Historical evidence indicates that despite such obligations, members are highly likely to attend COAG meetings, as they have for virtually all meetings and where they cannot attend them, they usually to send a representative. This indicates an implicit agreement to be bound by the rules of COAG in a members’ attendance and, following on from this, an acceptance at least of the organisation’s importance, arguably to the point of convention status, or at least approaching it. As such, COAG’s potential convention-thood comes down to whether an organisation like COAG is really a necessity for the Constitution to function or just a convenience.

As an intergovernmental institution, a need for COAG would come from the provisions of the Constitution related to the workings of the federation. As discussed in Chapter Four, either through practice or design, the Australian Constitution establishes a system where the powers of the States and the Commonwealth are unfixed. The Commonwealth has legislative power within general limits while State legislative power is, de jure, unrestricted unless a specific policy area is subject to Commonwealth legislation. There are provisions for legislative power to be transferred from the States to the Commonwealth and the Commonwealth has plenary legislative power within the Territories. Beyond occasional declarations by the High Court on the limits of legislative and executive powers of the different jurisdictions, the policy responsibilities of each level of
government are those self-imposed by the jurisdictions themselves. Given that general certainty of jurisdictional power is essential for the practical operation of a governance system, a method of establishing agreed limits of legislative and executive roles and responsibilities in policy formulation and implementation is essential for the constitutional system to function. This is a role that COAG fulfills by providing a forum for negotiations can take place on what jurisdiction takes responsibility for what function. Without it, a federal system without clear constitutional limitations on legislative competence for all jurisdictions cannot function. Furthermore, COAG allows the States and Territories and opportunity to express their views on Commonwealth policy directly to the Commonwealth government, through the Prime Minister. This was a role originally assumed for the Senate but one it has failed to serve. COAG is now necessary to fulfil this role. With a constitutional necessity established in addition to the other convention criteria, COAG could have what it needs to be declared a convention should it be done.

So if COAG is a constitutional convention, how would that change the way it affects the wider constitutional system? This is the question I answer in Chapter Five. Democratic accountability in the constitutions of both the States (and Territories) and the Commonwealth is established primarily through the convention of Responsible Government. Under this system, members of the executive are accountable to Parliament through the requirement that ministers hold the confidence of, at least, the lower house of their parliaments. This convention establishes Parliament as the primary institution which scrutinises the actions of the executive. However, with more and more policy decision-making being undertaken at COAG, Parliament’s ability to scrutinise executive actions is severely curtailed since no Parliament can examine a COAG agreement in its totality. Nor can it examine the agreed actions of another jurisdiction which may have a bearing on the actions of their own jurisdiction. This is the essence of the democratic deficit.

However, if COAG is seen as a convention, the consequences of the democratic deficit are higher since COAG, as a convention, would be undermining the constitutional operation of Responsible Government, another convention. This creates a clash of conventions which, if not avoided, will result in the practical annihilation of one by the other. In Chapter Five I demonstrate how this could happen at both the State and the Commonwealth levels. Parliaments would be increasingly inhibited from doing the job they are constitutionally assumed to do, undermining the democratic credibility of our constitutions at both the State and Commonwealth levels, or the ability of governments to respond to a variety of policy challenges would be removed. Furthermore, given COAG’s essential role in the governance system, potentially to the point of being a convention, and the necessity of Responsible Government to have a democratic system of government, ceasing either is impractical to the point of being impossible. As institutions either with, or approaching, convention status, both have a prestige and an indispensability which means that their role will always have to be performed one way or the other. This leaves us with two choices. Either we reform this situation to avoid this clash or we accept that into the future our constitutions will be less democratic or unable to respond to a variety of policy issues.

Reform to avoid this situation will have to bring intergovernmental cooperation (through COAG or otherwise) into line with the values of Responsible Government, or to alter the method of providing democratic accountable government to one which is more compatible with the operation of our federal system. Since this second option would involve virtually redrafting the entire constitutional system, the most available option for reform would be to reform the system of intergovernmental
cooperation. Other nations have faced similar problems of marrying a system of democratic government with intergovernmental cooperation. One option is to incorporate intergovernmental cooperation into the parliamentary system completely (removing the need for a separate, unaccountable, intergovernmental relations body), another is to provide a form of parliamentary involvement in intergovernmental relations decisions.

Germany represents an example of where intergovernmental cooperation is facilitated by Parliament rather than an outside body. In Germany, 55-60% of legislative policy areas must be governed by ‘consent legislation’. This means that it requires the agreement of the German Upper House, the Bundesrat. This house is made up by representatives of the sub-national constituent governments in the federation, the Länder, who ultimately have responsibility for implementing the provisions of that legislation.¹ This means that intergovernmental negotiations are conducted, at least at the point of agreement, through the public parliamentary process, avoiding problems of secret negotiations and creates public accountability for the agreements. However, there are criticisms of the German system. One criticism is that the makeup of the Bundesrat, often dominated by opposition parties, frustrates efficient government. Another criticism is that the Länder representatives have no legitimate right to frustrate the legislative agenda of the federation, for which the federal government gained a mandate for at election. Finally, incorporating intergovernmental cooperation into the federal Parliament has contributed to a high rate of centralisation of policy control at the federal level at the expense of the Länder.²

An example of a situation where parliamentary agreement is necessary for intergovernmental agreements to be implemented comes from Canada. In that country, considerable controversy surrounded the secretive and opaque process which characterised constitutional amendment in the late 1980s and early 1990s. At that time, intergovernmental negotiations aimed at according a special constitutional status to Quebec (the Meech Lake Accord) and the Charlottetown Accords in 1992 were criticised as being dominated by political elites with Canadians locked out of the process dominated by “eleven men in suits” (representing the provincial leaders and the Prime Minister).³ Such arguments are similar to the criticisms of COAG regarding the democratic deficit. Criticisms have also been made of more recent collaborative federalism attempts in Canada through institutions like the First Ministers’ Conference (a body comparable to COAG) or the Council of the Federation (a body comparable to the Council for the Australian Federation), where concerns over accountability, transparency and reporting requirements are still common place.⁴ This has led to calls for further parliamentary involvement, potentially through the creation of a standing committee for intergovernmental relations oversight.⁵ This would allow for parliamentary oversight

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⁵ Inwood, above n 3, 58.
in the tradition of Responsible Government to be applied to intergovernmental negotiations. However, as it currently stands, none of these ideas have been acted upon in Canada.\(^6\)

Whatever the reform proposal is, it requires the balancing of the requirements of Responsible Government and the necessity for intergovernmental interaction and collaboration to continue, since both of these are, potentially, conventions of the Constitution. As COAG continues to expand and evolve towards convention status, Responsible Government could continue to be overridden by our approach to intergovernmental cooperation, the COAG process. Given that the constitutional division of power, the continuing problem of Vertical Fiscal Imbalance, and the increasingly demanding expectations of efficiency and efficacy in government services by the public are all likely to continue, intergovernmental negotiated collaboration will only become more important into the future. Without reform, Winthrop Hackett’s prediction of federalism destroying Responsible Government, will increasingly be fulfilled and the democratic accountability of our government could be increasingly absent in the governance system of Australia.

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