THE COUNCIL OF AUSTRALIAN GOVERNMENTS AND INTERGOVERNMENTAL COOPERATION — COMPETITIVE OR COLLABORATIVE FEDERALISM?

Martin Painter

No. 28       June 1995

ISSN 1036–8655
ISBN 0 7315 2189 7
An important and distinctive episode in the history of Australian federalism began in July 1990 with the announcement by Prime Minister Bob Hawke of a Special Premiers' Conference (SPC) to be held in October. That Conference was followed by others and opened a period of Commonwealth–State relations when the rhetoric of cooperation was heard as often as the sound of battle, and during which a wide range of issues was placed on the table for intergovernmental negotiation and agreement. The Council of Australian Governments (COAG), which came into being at a Heads of Government meeting in May 1992, was the product of a relaunching of the cooperative process after a brief hiatus due to the downfall of Bob Hawke and the accession of Paul Keating. Hawke was not the only political casualty among the original team of leaders: by 1994 only one of those who had attended the first SPC meeting was still in office. Moreover, their partisan composition had turned around: in 1990, Nick Greiner of New South Wales was the lone Liberal Party leader, but by 1994 Paul Keating faced a majority of increasingly assertive Liberal Premiers.

SPC and COAG have been convened on eight occasions up to and including April 1995 and have spawned a number of schemes of uniform legislation and several new intergovernmental bodies which have worked hard and, in some cases, made significant progress on an agenda of intergovernmental policy initiatives. The rhetoric was accompanied by action. A balanced appraisal of the significance of this period of busy intergovernmental activity is beginning to become possible as time passes and some of its products come into clearer view. Some judgements have already been passed, including both 'official' views of the process and more critical assessments by outsiders. This paper seeks to contribute to this process of appraisal by first placing the events in a context of contemporary politics and policy. This 'new federalism' was a pragmatic response to a set of policy issues and not a deliberate process of federal reshaping, much less constitutional rethinking. This makes it doubly important to probe the institutional and constitutional
implications. The paper sets out a conceptual framework which, hopefully, will allow us to undertake the task of appraisal without getting distracted by the rhetoric or confused by loaded terminology. It then applies this framework to undertake a preliminary analysis of some aspects of the processes underlying SPC and COAG and of the outcomes of some of the agreements and joint schemes.¹

The Context

Hawke's new federalism had its origins in the Commonwealth Labor Government's microeconomic reform program and in a growing focus on a similar agenda of reform at state government level. A widespread sense of the inevitability and necessity for fundamental structural reform of the Australian economy emerged in the 1980s (Kelly 1992). There was a loss of confidence in existing institutions and policies, brought on by a series of crises and a growing realisation of decline (Henderson 1995). High tariffs, state paternalism and 'protection all round', once the solutions, were now seen to be the problems. Many of the perceived impediments to greater efficiency in a variety of product markets stemmed from industries that were traditionally owned or regulated by state governments: electricity, gas, water, waste disposal, ports, rail and road transport and so on. Targets for structural reform also included interstate barriers to free movement of goods and services, while a plethora of state regulatory regimes and instruments was singled out as a source of unnecessary costs and rigidities in the market place.

Although state governments across the country have since more than matched the Commonwealth Government in their enthusiasm for microeconomic reform, in 1990 they were seen as laggards. The Commonwealth's Economic Planning Advisory Council, highlighting the need for extensive Government Business Enterprise Reform, noted that of the ten largest government business enterprises, six were state-owned (The Age, 9 June 1990). The Industry Commission, which from 1989 turned its main attention to microeconomic reform, focussed increasingly on the slowness of reform at state government level and highlighted that many of the problems had significance for national

¹ Much of the source material for this analysis comes from papers presented at a Federalism Research Centre Conference in June 1995 on Microeconomic Reform and Federalism, at which practitioners closely involved in the events described and reflected upon them. The conference papers are to be published with the support of the Federalism Research Centre.
economic performance, while many of the solutions had cross-jurisdictional, and hence intergovernmental, dimensions.

While these were the issues that stimulated Hawke's approach to the states for a new 'partnership', the manner and style of his 1990 initiative owed as much to the circumstances of leadership personalities and politics as to a policy strategy. He sought to open a dialogue with the states on microeconomic reform in the months leading up to the June 1990 Premiers' Conference but this came undone in the acrimony of a bitter confrontation over finances. Treasurer Keating — whose ambitions for Hawke's job were plain by mid 1990 — had, in the eyes of some, pulled the rug from under the Prime Minister's feet. The launching of 'New Federalism' was thus, in part, an attempt to re-establish Hawke's credibility. In his speech to the National Press Club on 19 July titled 'Towards a Closer Partnership', he restated the importance of what he called 'national cooperation' for the implementation of microeconomic reform. Duplication, regulatory reform, the performance of government business enterprises and federal fiscal relations were among the issues he mentioned. It was a personal statement, expressed in a style closely identified with the man himself, in an effort to strengthen his leadership credibility.

The state premiers reacted positively. Nick Greiner, the only Liberal Party Premier, was a vocal and ambitious enthusiast for microeconomic reform, and he echoed the cooperative spirit (Greiner 1990). South Australia's John Bannon, who had previously stated his views on the need for federal reform (Bannon 1987), quickly committed his support to the process, particularly as Hawke had opened the door to federal financial relations as part of the reform agenda. The other Labor premiers could see no obvious risk in a 'wait and see', supportive approach. Thus it was that, only weeks after one of the most bitter Premiers' Conferences in memory, the states and the Commonwealth were embarking on a major initiative in cooperative federalism. By the October 1990 Conference, a long agenda of issues for joint discussion had been drawn up. At that meeting a commitment was made to proceed with resolving most of them, machinery was set up to undertake the work and an agreement was made to hold further meetings.

Cooperative Federalism

One of the arguments pursued in this paper is that SPC and COAG are aptly characterised as institutions of cooperative federalism. This term requires some clarification:
1. Cooperation — the search for common ground as a basis for joint action — is viewed as one among several ways of resolving problems of coordination. Others include central command and 'partisan mutual adjustment' (Lindblom 1965, 25–34). The archetypical coordination problem is a 'collective action dilemma' such as the tragedy of the commons, in which uncoordinated, rational, individual decisions eventually produce counter-productive outcomes for each and all (Ostrom 1990). A familiar example in the present context is a range of cross-border problems such as varying railway gauges. Although unequivocal benefits from coordination in such situations can be modelled, in practice cross-cutting political and jurisdictional goals often win the day.

2. In federal-state relations cooperation is always partial and conditional and occurs where the parties, because their actions are interdependent, see the possibility of mutual benefit. They can still retain distinct (perhaps otherwise conflicting) purposes. Cooperation is voluntary and 'signifies a relationship between entities capable of non cooperation — of divorce (or secession), competition or conflict' (Kincaid 1991, 95).

3. Cooperation can also be a ploy to use in bargaining. Intergovernmental cooperation is tactical, and it will normally be temporary because it coexists with competition and conflict (even within the same room).

4. Cooperation, while voluntary, can be induced and maintained by sanctions, for example the moral sanctions that develop from a 'culture of cooperation'. By definition, however, if the capacity to impose sanctions is too unevenly distributed we more than likely have coercion, as is characteristic of the Financial Premiers' Conferences. The kinds of sanctions that maintain cooperation are those that the group can consensually wield against a recalcitrant member — ultimately perhaps expulsion, or at least non-participation in some collectively produced and shared benefit. Cooperation can also be maintained, however, by allowing 'escape routes', such as opting out.

5. The kind of cooperation among governments that might be exemplified by aspects of the SPC and COAG processes would not necessarily cross over into the whole gamut of contemporary federal relations, either in COAG or outside it. If COAG has been an instrument of cooperative federalism it should not be taken that the label is being applied to cover all aspects of intergovernmental relations in this period.
Cooperation, Collaboration and Competition

Many federalists are wary of the language of cooperation because so often its rhetoric disguises coercion. One school of federal thought is suspicious of cooperation for another reason: it is seen as 'collusion', a kind of unholy alliance among governments who ought to keep their distance (Sproule-Jones 1975). Both views are to be found in the work of Australian critics of COAG such as Nahan (1995). They draw on public choice models of politics and government, arguing that the cooperative rhetoric merely conceals the true motives of governments and politicians. Cooperation either is a process in which governments get together to enlarge the reach or scope of public power for their individual benefit, or a sham behind which the Commonwealth concentrates its power vis-a-vis other governments. For his critique of some of the joint arrangements surrounding COAG, Nahan draws on the model of competitive, arm's length federalism, in which self-interested, competing governments and political leaders strive to offer the most efficient and responsive packages of goods and services (Breton 1985, Kincaid 1991). Indeed Nahan argues that microeconomic reform would occur most effectively if the states and the Commonwealth left each other alone to get on with it: the most potent driving force for innovation and reform is not collaboration and agreement, but competition. Collaboration in this view blunts and undermines the competitive dynamic and produces an unnecessary level of conformity that stifles initiative and experimentation.

This interpretation prompts a set of questions to counterbalance the cooperative rhetoric, to evaluate the collaborative effort and to explore its limits. First it suggests the need for a careful empirical analysis of the processes and outcomes to explore the nature of the intergovernmental agreements arising from COAG: to what extent, if at all, do they reflect various forms of coercion? And do they facilitate expressed demands for diversity and autonomy or do they impose an unnecessary and unwanted degree of uniformity and conformity? These two questions are the subject of this paper. In addition, it prompts us to explore the costs, as well as the benefits, of collaboration, to examine more closely the need for cooperation, case by case, and to ask whether collective public policy gains would be best achieved — or even might only be achieved — in this way; or whether coordination might proceed more effectively through arm's length, competitive means or through central command. This paper can only touch lightly on this second set of issues.

Forsyth (1995) provides an example highlighting the need to consider carefully the specific reasons for lack of coordination and the kinds of
remedy that might be needed. He argues that the historical problem of coordination between Australia's railway systems — the centralist's favourite example of the need for an agreed, unified, cooperative approach — is not so much a problem of multiple ownership and inter-connection itself as of the way the federal system has operated to provide perverse incentives to railway corporations. Other interconnecting railway systems in the world have solved their coordination problems without being placed under unified control or ownership. If each state's railway system had been forced (or enabled) to operate efficiently and not to pursue distracting objectives — such as subsidising 'home' producers and deliberately channelling traffic towards its metropolitan centre — then they all would have found their own solutions to coordination problems simply though the attempt to maximise efficiency. This is not to say government would have been out of the picture in this coordination process: interstate or overarching forms of regulation and joint administration using the public power might still have been needed.

An analysis of the nature of the coordination problem might also often reveal the existence of perverse incentives that prompt the states to cooperate with the Commonwealth rather than adopt some other remedy. For example, it is arguable that a primary reason for cooperation in some cases is that the only way the states can assure themselves of revenue is to go along with the Commonwealth in a joint scheme. Underlying agreement is the coercive fiscal power of the Commonwealth. The problem in this case is not the 'need' for cooperation but the lack of fiscal autonomy, and the sort of remedy required would not be COAG and its attendant plethora of intergovernmental machinery but fundamental fiscal reform so as to remove the Commonwealth's dominance and to remedy vertical fiscal imbalance. As in Forsyth's example of the well-run railway, this might point us to look to other reforms that made autonomous, arm's length action by state and commonwealth governments more rational than it would otherwise be.

However, where governments and public policy are concerned, there can be no hard and fast rules about the relationship between a particular type of coordination problem and the best method of resolving it in particular circumstances. The coordination problems confronted cannot be extracted from their political and constitutional settings. Governments could not choose to stand at arm's length and eschew collaborative solutions even if they wished. Kasper (1993) correctly sees as a precondition for a fully fledged competitive federalism a new division of powers to remove the entanglements of concurrency. Australian federalism is a system in which functional powers are shared rather than
neatly divided, due both to the wording of the Constitution and to political evolution — notably Commonwealth expansionism. The present cannot be cut off from the institutional past so easily — the issue is how to move from a current set of arrangements to one where (for example) railway managers will operate more rationally. Policy makers have to take one step at a time, and this requires negotiation and tactical decisions about what is and is not possible. Above all, the political dynamics — the process — is vital (Weller 1995). COAG should thus also be appraised for the success of its processes in reaching agreements, as well as for the nature of these agreements themselves and their outcomes.

COAG — The Institution and the Processes

SPC and COAG owed their origin and their continued existence to a perception on the part of the Commonwealth that a level of cooperation was required from the states to achieve its economic reform objectives. The Commonwealth could not dominate some fields due to the constitutional division of powers; in others Canberra depended on the states to act effectively — for example it lacked the access to up-to-date, accurate information or it lacked administrative resources (Kellow 1995); in yet others the Commonwealth was in fact peripheral, and it was the states that were cooperating to achieve 'horizontal' coordination, with the Commonwealth on the sidelines.

Moreover the continued existence and cooperative character of new federalism beyond its initial flurry owed much to the fact that the issue of fiscal reform was relatively soon taken off the agenda. This was always — and remains — the key issue for the states, and Bob Hawke for some twelve months was willing to see it seriously discussed. Some hard negotiating took place but came to nought. Hawke was forced to retreat by the Keating challenge to his leadership in 1991, particularly when Keating, in his attack on Hawke, exploited the hostility among ministers and caucus to surrendering the Commonwealth's overwhelming fiscal dominance. In a sense, failure to resolve this issue through SPC and COAG was the exception that proved the rule: as an issue it was out of kilter with the cooperative rationale and norms of the new institutions. Edwards and Henderson (1995) contrast the cooperative style of COAG with the rancour traditionally accompanying the Financial Premiers' Conferences. There a 'take it or leave it' attitude on the part of the Commonwealth, and the states' resentment of the Commonwealth's dominant position which leaves them mendicant, always carries the potential for antagonism. SPC and COAG were different.
This is not to say that COAG could not be the forum for the cooperative working out of a program of fiscal reform. The institution alone, however, is not a magic wand: it reflects broader political relationships and interests. By definition, it can only produce outcomes cooperatively if the wider political conditions are favourable to all agreeing to cooperate. That these preconditions were not met for fiscal reform during the life of SPC or COAG (although they came quite close in 1991) should not be used as the benchmark for appraising the role of these institutions.

Processing Business

From early on SPC was characterised by a high degree of preparation and collaborative effort by state and commonwealth central agency officials. The first meeting, in October 1990, dealt with issues presented in background papers, most prepared by the Commonwealth but some jointly with state officials, and others by the states without the Commonwealth. A number of joint working parties were set up with reporting deadlines. The network of working parties and committees grew rapidly and become increasingly institutionalised, although many reported quite quickly and then went out of existence. Most are chaired by the Commonwealth but several state officials have occupied the chair, while some have rotating chairs. A few have been chaired by independent outsiders. A Senior Officials group comprising the heads of each first ministers' department sits at the centre and channels reports to COAG itself (Edwards and Henderson 1995, 6). Aside from the facilitating structures and procedures, the two most important features have been the regular interactions of a group of central agency officials and their development of a strengthened intergovernmental focus within each government. This last has also been necessary due to the need for cabinets to be briefed so that Premiers and the Prime Minister could come to COAG with the capacity to negotiate effectively.

COAG itself normally deals in detail with a limited number of issues. At the August 1994 meeting six of the twenty items were listed for discussion and most of the time was spent on one of them — National Competition Policy (Edwards & Henderson 1995, 5). Many decisions and agreements are effectively made 'out of session', with chief officials and first ministers in close contact, refining and circulating drafts in order to reach agreed positions. COAG rubber stamps the agreed positions and issues a communiqué. As a decision-making body, COAG operates by consensus. In some cases agreement is only reached by devising formulae to avoid some aspects of the issue, perhaps by handing them on to a new
intergovernmental body. Where an issue, even a contentious one, has got so far as to reach the final stage of a report and a draft communique, the pressure on a recalcitrant, hold-out state to 'toe the line' is very strong. As well there is pressure on ministers and premiers once they return to their home states to stand by an agreement even when they might have expressed reservations and be vulnerable to local opposition. In other words, COAG reflects in some degree the kind of solidary norms and conventions that most such bodies come to acquire if there is a broad commitment to see them continue to function as a cooperative forum.

Case 1: National Competition Policy

Recognition of the need to cooperate does not rule out adversarial behaviour in the process of reaching agreement. The tough issues, such as National Competition Policy, have given rise to some typically robust federal political conflict. There were moments when trust and mutuality almost evaporated; insider accounts tell, however, of a series of 'last minute' rescue acts by key players (*Australian Financial Review*, 12 April 1995, 4). The August 1994 COAG meeting in Darwin broke up in rancour and acrimony after a bitter argument over the implications of competition policy for state revenues.\(^2\) The February 1995 meeting was cancelled by Keating, ostensibly due to an upcoming New South Wales election, but the premiers met in any case and decided on a common approach that demanded much less of the Commonwealth. The April meeting of COAG, after some tough talk, reached an agreement.

The public war of words was part of the negotiating process, while brinkmanship and tough bargaining went on behind the scenes. The states were reluctant to agree to a national scheme without first seeking to safeguard their autonomy, including moderating the budgetary impact of a reduction in their revenue base. This interconnection with fiscal policy and revenues brought out Keating's implacably centralist perspective. The Commonwealth frequently appeared to be 'acting the bully' and behaving in COAG just as it did in the Financial Premiers' Conference, and there was a deliberate and studied blindness on the part of the Commonwealth to the states' positions on fiscal autonomy and jurisdictional integrity (Charles 1995).

\(^2\) The national competition policy implied breaking up state government owned monopolies, opening them up to private or interstate competition and possibly seeing them privatised. The states would suffer a major loss of revenue from dividends while there would be a gain in company tax revenues for the Commonwealth.
But a 'take it or leave it' offer was not possible in this case and the Commonwealth had little option but to seek agreement. The alternative to a cooperative scheme was a risky, unilateral strategy which would face resistance, constitutional challenge and uneven results — that is, a loss of control over the outcomes. In the behind the scenes officials' negotiations on the details of the scheme in 1994, the Commonwealth made concessions to state concerns for flexibility and decentralised administration. A majority of the states supported the Hilmer principles, were already implementing them in one form or another, and for their own reasons wanted to reach an agreement. Some final concessions by the Commonwealth on a distribution of the financial benefits from competition policy reform and on procedures to safeguard state interests in overseeing the implementation of a national scheme were sufficient to sign up all the Premiers. Along the way there was turmoil and name-calling, but the COAG processes provided what was ultimately a successful cooperative framework for reaching agreement.

Case 2: The Mutual Recognition Scheme

The mutual recognition scheme was the mechanism adopted to remove some of the barriers to the operations of a 'single Australian market'. This issue was highlighted by both Hawke and Greiner in the lead-up to the first SPC and it was placed on the agenda as a joint Commonwealth–State paper on regulatory reform. Mutual recognition was an idea borrowed from Europe, the value of which was first recognised in Australia by the Industry Commission (Carroll 1995). Its adoption required an agreement that each state recognise that any other state's standards for goods, services and occupational qualifications was acceptable. Without taking the more difficult route of uniformity or harmonisation, mutual recognition would ensure the removal of barriers to interstate trade.

The formulation of the scheme and the lead role in the process of negotiation were handed over by SPC into the keeping of the New South Wales cabinet office. From the first the Commonwealth sought to get the states themselves to reach a mutually acceptable scheme that they would implement. The Commonwealth was an enthusiastic supporter and facilitator, with no direct territorial or jurisdictional ambitions. Discussions coordinated by New South Wales clarified the principles and the methods of adopting a mutual recognition scheme (Sturgess 1994). Much effort was needed to prevent the acceptance of long lists of exemptions and a procedure was incorporated under
which objections and disputes could be dealt with after introduction of the scheme. The SPC provided the framework in which 'whole of government' attention and priorities could be focussed on the problem, with carriage taken by central agency officials rather than officials concerned primarily with client or bureau interests (Weller 1995). Central agency officials, who were keen to see the scheme adopted, fought hard to resist attempts to qualify and water down the proposal.

What emerged at the May 1992 COAG meeting was an interstate agreement involving the Commonwealth as the jurisdiction to enact the states' agreed legislation. But aspects of the consensus were fragile. The Intergovernmental Agreement envisaged that the states would refer the power to the Commonwealth to enact the initial legislation and subsequent amendments, through an agreed procedure as set out in the Agreement. Victoria and South Australia refused to refer the power to the Commonwealth to amend the Act and, although joining the scheme and adopting the legislation, they will amend it by their own legislative processes. The newly elected Western Australian Government delayed joining the scheme due to similar objections about referring powers to the Commonwealth, and the Government has proposed that a new scheme be negotiated excluding the Commonwealth as a party altogether (Western Australia 1994). Despite the doubts and differences, the scheme is in operation.

The mutual recognition legislation also brought to the surface another issue of particular concern in the states: the sovereignty of state parliaments. Joint legislative schemes have the potential to reduce the autonomy and control of parliaments, particularly if structures are adopted in intergovernmental agreements to minimise the chances of uniform schemes being undermined by future uncoordinated legislative amendments. The concern extends to a suspicion of ministerial councils and the national bodies they supervise as a new 'executive arm' beyond the direct control and accountability of parliament (Pendal 1995). This issue is one aspect of the clash between different perspectives on cooperative federalism — clearly a less collaborative, decentralised, competitive federalism is more likely to maintain the independence and integrity of separate and distinct systems of parliamentary accountability. In the case of mutual recognition and other such schemes, it is worth noting that state parliaments are beginning to develop and recommend measures to adapt parliamentary accountability systems to the realities of the new joint legislative and administrative arrangements (Western Australia 1995).
Case 3: The Australian National Training Authority

In 1992 the Commonwealth, eager to see a major upgrading of technical and vocational training, unilaterally presented the states with a proposal to 'occupy the field' of technical education policy and funding. Accompanying the 'offer' was a promise of considerable additional funding. The states objected to the loss of control but could not reject the money. The result was an Agreement, discussed at the May 1992 COAG but finally signed at the July Financial Premiers' Conference, to set up the Australian National Training Authority (ANTA), a body accountable to a ministerial council on which the states each had a vote and the Commonwealth two (plus the chair's casting vote). A large injection of Commonwealth funding, and a matching maintenance of existing state funding, was agreed to (Finn 1995).

This was a case of an Agreement brought about through coercion as much as cooperation — a Commonwealth invasion of state jurisdiction achieved through the power of the purse. The stimulus for the agreement was not so much a compelling, unresolvable coordination problem, although there was a need in some areas to increase the degree of standardisation and cross-border recognition. There were also gaps and deficiencies in services and in responsiveness to customers. But the states argued that under-provision and gaps had arisen not so much from their neglect as from a lack of resources and distorted Commonwealth priorities (for example, a stronger focus on higher education), and there was no reason why the problems could not have been solved by other means.

It is thus clearly debatable whether ANTA was the product of cooperative federalism, although its federal form reflects the models being developed in other cases. According to Weller (1995), this is a continuing sore point for the Commonwealth Department of Employment, Education and Training, which resents having to deal with the states as equals and share power with ANTA. The Authority's Chair, businessman Brian Finn, emphasises the extent to which ANTA has seen itself as a body with the primary task of reforming the training industry through a process that actively engages not only each of the state providers but also private providers and — most importantly — the end user, industry (Finn 1995). ANTA is seen as a new type of player providing access to new perspectives and interests in the training sector, but not dominated by any one government or interest. If these comments on ANTA's role reflect the real state of affairs, the outcome would seem to be a genuinely federal power-sharing arrangement, even if the process by which it was arrived at was marked by Commonwealth coercion.
Nahan (1995, 11) argues that training policy and programs is a case where state diversity and autonomy would bring competitive benefits, while the creation of ANT A has stifled this dynamic and brought an unnecessary and counter-productive drive to uniformity. Although we are not in a position to evaluate such a claim here, it is worth noting that the cooperative scheme did owe its origins in large measure to a unilateral centralist intervention that was only possible due to the Commonwealth's power of the purse. Had the states been able to adequately fund their own training services without depending on Commonwealth funds, and had been free from the program control threats and interventions that came with this dependency, an alternative, decentralised model of competitive service provision stressing variety and voluntary coordination would have been possible and might, in the long run, have brought better results. However, although COAG in this case was clearly a vehicle for imposing an alternative collaborative model, it turned out to be one that contains important federal and decentralist elements that distinguish it from many other grant schemes and direct provision programs where the Commonwealth can take a more unilateral, directive stance (through mandatory conditions, contracts and the like) in seeking to impose its own priorities.

SPC, COAG and the Establishment of New Federal Institutions

What these brief case histories illustrate is the variety of purposes to which COAG is put and the different forms of joint action that are included in and emerge from it. In the mutual recognition case, COAG was a forum to stimulate the achievement of a voluntary interstate agreement with the help of the Commonwealth's good offices; in the ANT A case, COAG was a venue to legitimate a compromise arising from a typical 'take it or leave it' financial offer to the states, resulting in a new set of federal arrangements that are not unequivocally centralist in form or operation, and seem to have opened access to new interests and perspectives. In this section we look at other cases of new national institutions with a federal character that have emerged from SPC and COAG, and ask what type of coordination arrangements they embody.

While COAG operates strictly by consensus, some other ministerial councils specified under intergovernmental agreements have been structured to operate under various majority formulae. The power of the holdout, or the veto, is (at least in theory) removed. Under the supervision of these ministerial councils, a number of new national
commissions and authorities have been set up, with specified powers and roles in providing advice and making policy. Their composition, and a method of appointment reflecting the contributions and interests of all signatories, are always specified as key items of the agreement and in the originating legislation. Here we look briefly at two cases from the transport field.

Case 4: The National Road Transport Commission

The negotiations leading up to the agreements on heavy and light vehicle charging, registration and regulation, and the subsequent operation of the NRTC, provide a good illustration of the kinds of outcomes COAG has achieved. In the first place the problem embodied classic elements of a 'collective action dilemma' (Painter 1992, 64–5). Varying state and territory heavy vehicle regulations provided incentives for operators to seek out the least constraining jurisdiction. Some governments acted opportunistically, permitting heavier vehicles and imposing lower charges without regard to the spillover costs on other jurisdictions, including the cost of damage to their more congested roads. High cost states sought to levy special charges on cross-border trucks high enough to approach full road cost recovery but more operators fled to low charging jurisdictions and evaded charges. Commonwealth road grants embodied counter-productive incentives allowing some states to 'free ride' on the benefits of lower charges and more generous regulations. Governments with low road costs had strong reasons unilaterally to set generous limits and lower charges while states with higher road costs maintained stricter limits, preventing the full realisation of the economic benefits of technological improvements (larger trucks). The economic efficiency losses arising from these restraints and differences were of national as well as regional economic significance. All sectors of the industry, while disagreeing on details, were unanimous in the call for reform.

Progress towards harmonisation of regulations was frustratingly slow but not insignificant by the end of the 1980s. It had reached an impasse on road use charges (Painter 1992). The Commonwealth had become involved through its own interstate registration scheme while the Interstate Commission was undertaking studies. There was a will to make further progress, a considerable amount of groundwork had already been done and understandings had been reached on desirable forms of harmonisation. The main obstacle was disagreement over moves towards uniform charging, because there were very large interstate and territory differences in existing charges. The issue landed on the SPC agenda as a piece of 'unfinished business'. New working groups were set up
embodying central agency participation alongside the transport specialists. As Derek Scrafton recalls, the process of reaching a resolution of complex problems was tortuous and full of conflict and compromise (Scrafton 1995). The 'cooperative spirit', the involvement of central agency officials, the prodding and stimulus provided by the SPC timetable and the expectation of an agreement by the members of COAG tipped the balance. But the agreement was reached only by putting off crucial decisions and setting up elaborate decision-making rules that allowed the protagonists to feel secure as to the future outcomes of those issues (Painter 1992; Taplin 1993).

The mechanisms for coordinated joint action which were set up were a national body — the NRTC — a Ministerial Council and an agreed procedure for legislating agreed harmonisation schemes under which each of the states would adopt a single piece of Commonwealth legislation, as amended. None of these mechanisms has worked as intended. The Ministerial Council was later absorbed into the larger Australian Transport Council, but specific majority decision rules continued to apply for considering NRTC recommendations and other matters under the scheme. 'Out of session' voting is a common decision procedure and eases adoption (Scrafton 1995). The adoption of NRTC recommended codes and standards by the Council does not, however, end the story as each state has then to implement them. No jurisdiction had adopted the Commonwealth legislation over two and a half years after it was passed. The resolution of the charging issue remains deadlocked, with New South Wales and Western Australia, for opposite reasons, refusing to accept the recommended uniform charges. Nevertheless, the issue remains on the table. The NRTC and other players now view it as less important in terms of achieving greater efficiency in the industry than harmonisation of regulations.

Despite the lack of adoption of the template legislation there has been considerable progress towards harmonisation as a result of the processes of consultation and study by the NRTC and due to the added stimulus it has given to existing forms of inter-jurisdictional collaboration (Hurlstone 1995; Taplin 1995). The NRTC has played a crucial role, not only by acquiring a solid technical reputation for its analysis, but also by deliberately adopting a responsive stance towards the industry, allying itself with industry demands for reform and assisting those demands to be articulated and felt across all jurisdictions. The NRTC has not so much been a bureaucratic device for intergovernmental collaboration as an independent player offering a new focus for initiative and for access by significant community interests. In this respect it resembles ANTA. The
outcomes, in other words, do not reflect a process of centralisation nor a blind march towards unnecessary uniformity but a revitalised federal process of negotiation and mutual accommodation. The process remains slow and, to many, frustrating. Although it has not yet achieved most of the things originally envisaged necessary for achieving coordinated solutions, it has operated in somewhat unexpected ways to achieve some of the desired results and to take significant steps towards others.

Case 5: National Rail

The National Rail Freight Corporation was set up following an intergovernmental agreement arrived at under the auspices of the SPC in 1991. The national integration of the interstate rail freight industry had been identified as a worthwhile reform by a number of bodies within the industry itself during the 1980s. In the final establishment of the Corporation the promise of an injection of a large amount of Commonwealth funds (both to set up the Corporation and to renew state-owned track infrastructure on the national network) was vital to reaching agreement, while the joint action mechanism chosen — a company law corporation with state and Commonwealth governments as shareholders — offered forms of operational accountability on the one hand and flexibility of association on the other, such that all could agree to participate. For example, Queensland did not become a shareholder but participated as a non-share holding signatory to the Agreement, while Western Australia at first agreed to buy in and then opted out and followed the Queensland model. The essential components of a national freight system — an effective commercial basis for operations, agreements about effective access to or ownership of infrastructure and so on — were put in place on the basis of mutual agreement and varying (not uniform) forms of association.

Thus SPC as a framework for reaching agreement provided a basis for at least some of the elements of the 'efficiency maximising' coordination strategies that Peter Forsyth argued should (in his best of all possible worlds) occur spontaneously as a matter of commercial strategy. This was made possible only by accommodating, in a federal spirit, the diversity of interests of the different operating agencies and governments in the new joint ownership and operating arrangements. Moreover, Commonwealth funds in this case clearly operated as incentives for cooperation. Again, this was not a case of uniformity for the sake of it nor of a simple central takeover of state assets or functions. Although the scheme clearly benefited principally Victoria and New South Wales, neither was the outcome one that only reflected their interests and priorities. The other states were able to relate to the national system and
share some of its benefits as suited them, and they retain options to vary the form of their participation.

Conclusion

COAG is not an instrument of Commonwealth domination nor a site for intergovernmental collusion. It is an institution in which otherwise competing or hostile governments can cooperate to their mutual advantage for agreed, limited, specified purposes. The states willingly join with the Commonwealth to seek solutions because each finds it advantageous to deal with a problem jointly rather than separately. Underlying the 'need for cooperation' is not only the existence of some form of 'jointness' in the nature of a particular problem but also the overlapping of jurisdictions and the sharing of powers. COAG has not changed fundamentally the underlying political or constitutional realities but it has added a new element. It is essentially a federal element. Flexibility, variety and a multiplicity of forms of joint action and opting out are to be found in the agreements and in the schemes. In the context of the contemporary Australian federal system COAG is a new departure, not one that would satisfy the advocates of fully-fledged competitive federalism but one that, nevertheless, embodies some decentralist tendencies.

Neither is COAG unequivocally an instrument of creeping executive power: rather it is a forum of mutually restraining, competing and hostile executive powers whose agreements reflect diverse viewpoints. It has enlarged the capacity of government and implemented some important 'positive sum' solutions to some pressing policy issues, but only by putting in place mechanisms for voluntary joint action by governments which otherwise retain their distinctiveness. As mentioned earlier, COAG has heightened some tensions inherent in the mixed federal and parliamentary traditions of the Australian polity — for example, by giving national intergovernmental bodies and ministerial councils executive and quasi legislative powers that seem to deny conventional forms of parliamentary accountability — but arguably these simply bring to the surface already existing federal elements of Australia's system of constitutional checks and balances, rather than abrogate accountability processes altogether (Painter 1995). One interesting development has been that some of the new intergovernmental bodies have considered it particularly important to adopt an open and responsive stance in relations with the community and interest groups: that they do not exist under the normal shelter of one government's overarching authority, but are exposed because they straddle more than one government, is an incentive
to openness and responsiveness in order to establish their standing and legitimacy (Finn 1995, Taplin 1995, Slater 1995).

As to the future, because COAG is a creation by agreement it can be dissolved if agreement breaks down, that is, if the parties no longer see mutual benefit. Its business might simply come to an end. Hostility and non-cooperation is another possibility. On the one hand, the current oppositional stance of Western Australia might not be sufficient to bring about its collapse if taken to the extreme of complete non-participation, whereas if New South Wales adopted the same stance it would be hard to see it survive. This simply reflects the fact that New South Wales is more indispensable to most joint schemes than is Western Australia.

If the Commonwealth no longer saw any gains to be had from continuing to support and service COAG, a similar institution could still have value for its purely interstate dimensions. Two scheduled COAG meetings have taken place despite being 'cancelled' by the Prime Minister, and have conducted business that was part of the ongoing COAG agenda. Separate 'Leaders' Meetings' of State and Territory Leaders have been held without the Prime Minister to consider joint state strategies relating to COAG agenda items and other matters of intergovernmental relations. Thus one important outcome of SPC and COAG has been to provide the states with a heightened sense of their own collective identity, each as a member of the federation. There is, for the moment, a new assertiveness on the part of the states in national politics and it has come about in part because SPC and COAG have provided them with a learning experience in the benefits of limited cooperation within an adversarial, competitive federal system.

---

3 The Court Government of Western Australia, elected in 1993, has taken an aggressive 'states rights' anti-Canberra stand. There is a strong partisan component to this, although it also echoes past episodes of Western Australian separatist sentiments. Western Australia, to this point, has continued to take part in COAG, although the Premier's rhetoric is largely hostile to it.
References


Charles, Christine (1995), 'COAG and Economic Reform — A South Australian Perspective', in *Microeconomic Reform and Federalism*, P. Carroll & M. Painter (eds), Federalism Research Centre (FRC), Australian National University (ANU), Canberra.

Finn, Brian (1995), 'The ANTA Model as a Case Study', in *Microeconomic Reform and Federalism*, P. Carroll & M. Painter (eds), FRC, ANU, Canberra.


Hurlstone, John (1995), 'Road Transport Law Reform', Institute of Transport Studies, University of Sydney, Sydney, 2 May.


Nahan, Michael (1995), 'Competitive and Uncompetitive Approaches to Competition Policy and Microeconomic Reform', in *Microeconomic*
Reform and Federalism, P. Carroll & M. Painter (eds), FRC, ANU, Canberra.

Ostrom, Elinor (1990), Governing the Commons, Cambridge, Cambridge University Press.

Painter, Martin (1992), "New Federalism" and Road Transport Regulation, Australian Journal of Political Science 27, Special Issue, 63–77


Scrafton, Derek (1995), 'National Investment Planning and Transport Infrastructure', in Microeconomic Reform and Federalism, P. Carroll & M. Painter (eds), FRC, ANU, Canberra.


— (1995), 'The National Road Transport Commission: the First Three Years as an Agent of Reform', in Microeconomic Reform and Federalism, P. Carroll & M. Painter (eds), FRC, ANU, Canberra.


Western Australia Legislative Assembly, Standing Committee on Uniform Legislation and Intergovernmental Agreements (1994), Interim Report on Australia-Wide Mutual Recognition, Perth.

— (1995), A report concerning the various methods available for implementing the Australian Uniform Credit Laws Agreement 1993 in Western Australia, Perth.


No. 8 Brian Galligan, *The Character of Australian Federalism: Concurrent Not Coordinate*, forthcoming 1992


No. 12 Cliff Walsh (with contributions by Jeff Petchey), *Fiscal Federalism: An Overview of Issues and a Discussion of their Relevance to the European Community*, February 1992.


