

# Working better with other jurisdictions



An ANZSOG research  
paper for the Australian  
Public Service Review  
Panel

March 2019

Ben Rimmer, Cheryl Saunders  
and Michael Crommelin

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## INTRODUCTION

The first few weeks of a new Government's term are full of interest, risk, excitement, professionalism and opportunity for any public service in the parliamentary tradition. In the Australian context, the corridors of the ministerial wing of Parliament House are full of intensity and movement, with senior public servants, ministerial advisors, stakeholders and Ministers themselves all involved in the action.

For senior public servants, there is a lot at stake over this period. Expectations are formed, and relationships are established. Judgments are made, and careers are affected. These early weeks can be the crucible for nationally significant policy outcomes, as professional advice about policy challenges reaches a new audience seeking innovation and ideas.

To illustrate the point, imagine a hypothetical discussion between an incoming Minister for Employment and Youth Affairs and her departmental Secretary. As expected, the Minister is pragmatic and focused on short term issues, including media, early opportunities to excel within Government, and stakeholder perceptions. She is also ambitious and capable. She thinks that the election campaign did not sufficiently focus on the government's policy responsibilities in the areas that now fall within her portfolio, and that her colleagues agree with her assessment.

The first discussion covers all the usual topics: an incoming government brief is provided, election commitments are discussed, immediate media opportunities are identified and practical logistics are resolved. The Minister takes the brief away, reads it overnight, and quickly calls for a second discussion.

The Minister is frustrated. She wants more ambitious advice, responsive to the needs, aspirations and lived experience of individual young people in their local communities. Her question for the Secretary is straightforward: "What is the best advice the Australian Public Service (APS) can give me on my policy priorities, given that I want to pursue the highest impact initiatives possible to improve the engagement and employment of young Australians?"

### National policy challenges

The Secretary is highly motivated to provide an effective response to this question. Indeed, it could well represent a 'moment of truth' in the early days of their working relationship with the new Minister. As such, it also represents a moment of truth for the APS: will the APS have the skill, knowledge, experience and relationships required to provide the Minister with an effective response and add public value?

Beyond the individual interests of the Minister and her Secretary, there are broader considerations at play in this interaction. The national interest – Australia's economic, social and environmental wellbeing – depends on an effective APS response to questions of this kind. There are significant challenges facing the country. The best policy responses have the potential to improve Australia's wellbeing, and the APS has a central role in effectively formulating these policy responses.

In this instance, however, comprehensive and effective policy responses in the areas that are the focus of the Minister's question must involve the States and Territories, local government and Indigenous communities. The authority and capabilities that Commonwealth institutions can bring to bear when implementing policies for engaging and employing young Australians are significant, but also limited. Commonwealth institutions cannot fully understand the situation on the ground (to which effective social and economic policies must respond) in all parts of Australia. The States and Territories also have significant responsibilities in these areas, for which they are

democratically accountable to their own constituencies. All levels of government will have insights, perspectives and preferences on which an effective national policy must build.

The Minister's question is a good one. These are issues that matter. Nor is it hard to imagine other important questions of this kind; the policy area that the Minister seeks to pursue shares critical features with many other contemporary governmental challenges. It raises issues that cross traditional policy boundaries between economic, social and environmental outcomes. Success depends on factors that are profoundly local and relational; the best policy response in the world has no relevance to the people of Gladstone, or Burnie, or Kalgoorlie or Cape York if services are not delivered effectively in each of those diverse locations. To that end, service users should play a part in designing what must necessarily be diverse responses, and local communities should feel engaged in the policy development and delivery processes. Service providers also have an important role.

Effective policy intervention in areas of this kind is not confined to a single clear domain of government action. Youth engagement and employment, for example, necessarily requires consideration of actions involving schools, vocational education, welfare, business taxation, housing and employer engagement, amongst many others. At the very least, effective policy responses call for active collaboration between the Commonwealth and the States in both designing and implementing new policy. In this and many other areas, it is likely to be both useful and necessary to collaborate with local government and Indigenous communities as well.

There are many other examples of issues with features of this kind in the contemporary landscape of policy challenges. They are not secondary issues – indeed, they are frequently at the heart of contemporary political debate and of such great national significance that they cannot be ignored. Examples include resolving sustainable water use in the Murray-Darling Basin; ensuring the future of the Great Barrier Reef World Heritage Area; providing better support to those with chronic and serious mental illness; boosting innovation-driven entrepreneurship; or reducing the carbon intensity of the economy while delivering energy security. Each of these sets of issues crosses traditional policy boundaries and draws on a wide range of governmental activities and interests. Many have a deeply local dimension, requiring diverse strategies and applications. All involve the responsibilities of at least the Commonwealth and the States and Territories; and often those of local governments and Indigenous communities as well.

## Reimagining the role of the APS

For the APS to perform at its best, to deliver on its legislative mandate, to add most value to our system of democratic institutions, and to respond with skill and capacity to questions of the kind raised by the Minister, it must therefore work effectively with other jurisdictions. Many of Australia's most pressing challenges straddle Commonwealth and State activity. As a result, the ability of the APS to support effective national action involving multiple jurisdictions is an integral aspect of overall APS effectiveness.

At the moment, however, APS performance in this area is weak. Australian political culture has developed in a way that has lost sight of the critical importance of these issues. Lack of interest and understanding in the authorising environment has fed into the capability of the APS to work effectively with other jurisdictions. In an environment where stewardship functions are structurally weak, this often translates into a lack of focus, resourcing and prioritisation by Secretaries and a weak authorising environment within Departments.

The APS has poor capability to lead truly national initiatives. It finds it systemically difficult to work collaboratively with other jurisdictions in ways that maximise the contribution that each level of government can make. It finds it difficult to ensure the mutual ownership of those shared endeavours that is a key to their success. In this paper we argue that these problems stem from lack of vision, commitment, priorities and resourcing. They also stem from low levels of continuity that present further difficulties to relationship building. As a result, there are limited opportunities to learn from successes and to avoid repeating failures.



The stakes are high. Significant national interests are involved in individual policy areas. At a time of deteriorating community trust in Australian government, there is also additional value to be gained from reinvigorating federal democracy more generally in ways that focus on the needs of the people that government is designed to serve. The APS can, and should, deliver effective outcomes that enhance trust through collaboration between what are – and what are seen by the community to be – capable and accountable levels of democratic government.

The stakes are also high for the APS. If the APS of 2030 is to be more trusted, engaged and effective, then this opportunity to improve performance must be seized with energy. While success requires a change in culture across many institutions of our federal system of government – including Parliaments, Ministers and their staff – the APS has a central role.

This paper is structured as follows:

Part 1 sets out the context and background necessary to understand APS capability for cross-jurisdictional working.

Part 2 identifies the current APS approach to working with other jurisdictions, how this situation has been reached, and its likely future trajectory.

Part 3 considers the practical constraints on the APS as it works with other jurisdictions.

Part 4 begins the task of identifying the way forward. In this part, we make the case for developing a new and enduring 'national' approach to working with other jurisdictions, led by the APS, on which the more specific recommendations in the next part build.

Part 5 identifies the principal characteristics of effective cross-jurisdictional work and sets out some possible steps needed to enhance APS performance in this area.

# 1 CONTEXT AND BACKGROUND

## Australian Constitutional Framework

Australian democracy is delivered through a federal system under a Constitution that provides for two levels of government. It allocates specific powers to the Commonwealth, most of which are concurrent, in the sense that they can be exercised by either level of government. The residue of power is left to the States. In the event of inconsistency Commonwealth legislation prevails.

The Constitution assumes that each level of government is democratically accountable to the people that it serves through its own institutions, in accordance with the principles of parliamentary government. Each level of government has constitutional authority within its own sphere, although as this paper explains areas of responsibility may be interdependent. Each level of government is also responsible for implementing its own legislation, unlike many other federations (in which the sub-national level of government implements most central legislation, in addition to its own, in recognition of the value of more localised service delivery).<sup>1</sup>

In all federations, including Australia, some policies are uniform nationwide, and others are not. This enables diversity, local responsiveness and innovation. This pluralism of governmental actors, with complementary capabilities, is a defining feature of Australian democracy. It allows for the reality that different communities have different needs and perspectives and can learn from each other, ultimately using diversity to enhance national outcomes. Australia has a dispersed population across a territorially vast country in which conditions and attitudes differ in myriad ways. Policy responses in a volatile and uncertain world frequently benefit from experimentation, diversity and localisation. Australian federalism offers the means and the opportunity to respond effectively to its scale and diversity and to maximise its potential.

Working with other jurisdictions also necessarily involves local government. There are more than 500 local government bodies across Australia. They differ in role, structure, size and governance. By definition, they can engage with communities with a degree of granularity that is impossible for other levels of government to achieve, and they pursue innovations that may not yet have sufficient support at a State or national level. They offer critical insights for many national policy initiatives and opportunities grounded in local democratic processes. They are engaged in many issues that have national policy relevance. Councils can play a key role in sustainability policy, for example, through waste management arrangements, urban forestry, and adapting to changing climate conditions. Through their roles in planning Councils are relevant to national population policy, and in the course of positioning their local area, can contribute to tourism, international education and international investment.

Local government is established and structured by State and Territory legislation and recognised in State Constitutions. Local government is, in effect, a third sphere of democratic government in Australia. Effective design and implementation of many Commonwealth, State and Territory initiatives require collaboration with local government. Similarly, there are many policy initiatives that require active collaboration between all three levels of government, and in ways that recognise the potential contribution and credentials of each. This need for collaboration with local government goes in both directions: Commonwealth and State Ministers are more effective in achieving their policy ambitions with local engagement; and local governments are more effective in delivering the democratic mandate of their community with respect and engagement from the other levels of government.

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<sup>1</sup> Francesco Palermo and Karl Kossler, *Comparative Federalism*, (Hart Publishing, Oxford, 2017), 146.

Debate on Indigenous recognition over the last decade or so, and in particular over the two years since the Uluru Statement from the Heart, has made clear what should have been acknowledged long before: that First Nations represent another sphere of government that fits well with the ethos of federalism. Uluru suggests that our system of government should take steps towards recognition of First Nations as distinct polities, or jurisdictions, that are integral to Australian democracy.<sup>2</sup>

First Nations bring unique knowledge and perspectives to the intergovernmental table that are essential for policy initiatives that have a direct bearing on them, and desirable for all other policy areas. Working with other jurisdictions also requires the skills and capacities to work collaboratively with First Nations, to draw on their insights and to give them ownership of programs that affect their communities. The Voice to Parliament for which the Uluru Statement provides would offer an institutionalised structure through which this could occur. Ultimately, if the Uluru proposal is implemented, its success will depend significantly on the APS response – in particular, the capacity of the APS to work collaboratively with the Voice.

The modalities of interjurisdictional relations in any federation evolve over time, although the allocations of power in the Constitution and the lines of democratic and legal accountability for which the Constitution provides necessarily remain the backbone. The Australian Constitution provided interjurisdictional flexibility from the outset by, for example, assigning concurrent powers to the Commonwealth that can also be exercised by the States; empowering the Commonwealth to use legislative powers referred by the States; enabling the Commonwealth to offer financial assistance to the States; and providing for the exercise of Commonwealth jurisdiction by State courts.

## A national approach to cross-jurisdictional matters

The need to reconcile the interests of multiple jurisdictions by developing a national approach to matters in which all jurisdictions had a stake was recognised from the earliest days of the federation. The constitutional provision for an Interstate Commission was in one sense an early recognition of the need for a national solution to a shared problem of this kind.<sup>3</sup> Further, intergovernmental meetings of heads of government preceded federation and continued afterwards with the Commonwealth as a new, significant, national player.

In the second decade of 21<sup>st</sup> century, new policy areas – such as climate change – are emerging that cut across roles and responsibilities. Older policy areas, such as health, are becoming more interdependent than before. Globalisation, along with significant levels of volatility and uncertainty, means that increasing levels of interdependence will likely continue, placing a premium on the ability of the APS to work with other jurisdictions. Australia is not unique in this regard: every system of multi-level government confronts the challenge of how to work together most effectively while retaining the benefits that multi-level government offers and the lines of democratic accountability on which it depends.<sup>4</sup>

To an extent that surprises many observers, almost every aspect of government is affected by the need to work effectively with other jurisdictions, even those that are formally assigned to the Commonwealth or the States. For example, there is currently a substantive Commonwealth and State role in foreign investment, immigration, taxation, industrial relations, the environment, aged care, education and infrastructure, to name only a few.

The interdependence that flows from the design of Australia's federal system engages many different aspects of governmental activity: from policy formulation and evaluation to funding, and from regulation and data governance

<sup>2</sup> Dylan Lino, *Constitutional Recognition: First Peoples and the Australian Settler State* (Federation Press, 2018), 244-249.

<sup>3</sup> Commonwealth Constitution secs 101-104. While the Commission fell into disuse, the provision for it makes the point in the text.

<sup>4</sup> Johanne Poirier, Cheryl Saunders and John Kincaid, *Intergovernmental Relations in Federal Systems* (OUP, 2015).

to service delivery. Each of these different policy interventions has different characteristics in cross-jurisdictional work, may engage multiple levels of government, and presents different requirements for APS leadership.

In Australia, this interdependence is complicated further by the extent of the fiscal imbalance in favour of the Commonwealth, with all its attendant complications including the question of how to fairly distribute general and specific purpose funds between jurisdictions. We take no stand on whether or not the imbalance could be eased to a degree by greater State revenue raising effort. On any view, the imbalance is significant and continuing, with a range of consequences that are relevant for present purposes.

One consequence of the fiscal imbalance is that it enables the Commonwealth to extend its policy influence through its financial dominance, but without the full array of regulatory options at its disposal and the accountability regimes that accompany them. Secondly, fiscal carrots can be used to achieve Commonwealth policy objectives – whether or not Commonwealth involvement is fully justified, and without any agreed yardstick that determines the appropriate degree of Commonwealth involvement. Third, fiscal dominance sometimes encourages the Commonwealth to try to achieve its policy objectives without State involvement in areas beyond the scope of Commonwealth legislative powers. Programs of this kind have the potential to skew policy initiatives at the State level, and may also be constitutionally doubtful.<sup>5</sup> Fourth, to the extent that the delivery of Commonwealth funded programs in areas of State responsibility is managed in detail by Commonwealth agencies, it distorts the logic of multi-level government: that services (at least) are delivered by lower levels of government, adapted to local conditions, for which they are democratically accountable to recipients. Arguably, this effect is compounded where service provision is contracted out by the Commonwealth to third parties – as lines of accountability are even further blurred, and the relationships become even more complex.

The nature of interdependence and the range of jurisdictions involved will continue to evolve. One catalyst is the increasing and varied impact of globalisation on domestic policy, which is not necessarily predictable or orderly. Paradoxically, it has been argued that this development fosters a counterpoint: the demand for more localised decision-making, in phenomenon called ‘glocalisation’.<sup>6</sup> Other new challenges also will need to be accommodated in interjurisdictional relations in the future: increasing use of technology, for example, and emerging demands for information architecture and data governance.

It is not the task of this paper to provide a blueprint for interjurisdictional relations (even if that were possible) in a field that changes rapidly over time. Rather, the task is to identify the enduring implications for the APS that flow from the imperative to work effectively with other jurisdictions, in a wide range of areas, where policy challenges so require. These implications include the capacity to identify the need for collaboration and to design appropriate mechanisms to enable policy dilemmas to be resolved, consistent with the Australian system of government. The remainder of this paper examines current problems and identifies future directions to these ends.

## Meeting the challenges of working across jurisdictions

Three final points should be made by way of background:

First, the complaint is often heard that dealings between jurisdictions are time-consuming and unpredictable. Even if this is so, it is the necessary price for effective, responsive policies tackling pressing national issues, where collaboration is required. While it may be tempting, in all jurisdictions, to shape policy ambitions in a way that

<sup>5</sup> The School Chaplains program was one obvious example of a Commonwealth policy initiative operating in an area in which there was existing State activity in a way that proved also to be constitutionally invalid: *Williams v Commonwealth* (2012) 248 CLR 156.

<sup>6</sup> Thomas J. Courchene, ‘Glocalization: The Regional/International Interface’, *Canadian Journal of Regional Science*, XVIII:1 (Spring 1995) 1.

avoids interaction with others, this has the undesirable effect of reducing the possibility for more effective action on a wide range of critical issues of national significance.

In any event, however, the challenges of dealings between jurisdictions should not be exaggerated in Australia where, arguably, they are less than in federations elsewhere. With only six States and two mainland Territories, Australia has a relatively small number of jurisdictions around the formal Commonwealth-State relations table. All have parliamentary systems that can usually deliver mutually agreed outcomes. And all have reasonable, if variable, capabilities, as one would expect in a prosperous, peaceful and developed democratic country. If difficulties arise, through resistance from particular jurisdictions, rejection by an Upper House, or concerns about capability on particular matters, these can be dealt with through compromise, negotiation, adjusting system design and capacity building. For reasons developed further in this paper, the APS has important roles to play in guiding the federal system through all of these challenges. While public services in States, Territories and other jurisdictions also have important roles to play, the APS is the only public service institution with national scope and scale. While Ministers and Parliaments necessarily provide the democratic authorising framework, the APS is the institution most able to exercise stewardship of this role across political cycles.

Secondly, some observers question the continuing relevance of the constitutional allocation of powers between the Commonwealth and the States to current interjurisdictional challenges. It is true that policy challenges now present themselves in ways that could not have been contemplated when the Constitution was framed. It is also true that the fiscal imbalance has distorted the de facto allocation of powers in ways that have come to be taken for granted by politicians, bureaucrats and the public at large.

On the other hand, the constitutional allocation of powers, as expansively interpreted by the High Court, remains a political and legal reality. It is also a defensible division of powers between the Commonwealth and the States, for which each jurisdiction is accountable. While the legalities may be blurred by practice, the Constitution drives the drafting of Commonwealth legislation. When lines are crossed, constitutional limits may be enforced through the courts. The constitutional allocation of powers also offers a useful guide to the design of interjurisdictional arrangements, and hence to the role of the APS. For the purposes of this paper on the capabilities of the APS of 2030, we neither argue for, nor assume, any substantive change to roles and responsibilities.

In the face of interdependence, where a matter falls primarily within the constitutional sphere of the Commonwealth, the role of the latter can be expected to be relatively 'thick', in terms of the degree of detailed control. Conversely where a matter falls primarily within the constitutional sphere of the States, this indicates that the role of the Commonwealth is relatively 'thin', and confined to broad influence over outcomes on issues with agreed nation-wide relevance. Policy initiatives that fall between these two poles require attention to the appropriate roles of participating jurisdictions, to which the Constitution is one necessary guide. In all circumstances, however, there is a requirement for case by case consideration on the merits.

Third, it is sometimes thought that what can be seen as the time-consuming and unpredictable task of cross-jurisdictional working could be resolved by constitutional amendment, or by executive agreement to rationalise roles and responsibilities. This is occasionally articulated as a swap involving, for example, full State responsibility for schooling in return for full Commonwealth responsibility for vocational education and training. These are false hopes, which do not obviate the need for the changes identified in this paper. Formal constitutional change is historically rare. Even if a political agreement were reached on a de facto reallocation of roles, it is unlikely to prove enduring and may not even be desirable. The argument in this paper is that interjurisdictional engagement is positively desirable in all of these circumstances. It may well be practicable to isolate some areas from interjurisdictional collaboration to a greater degree, but even in this event it would continue to be necessary for the APS to have skills of this kind in a wide range of other policy areas.

## 2 THE CURRENT APS RELATIONSHIP WITH OTHER JURISDICTIONS

As the earlier section shows, there is considerable interdependence between Commonwealth and State decision-makers and, to a lesser extent, between Commonwealth and local government. Interaction between governmental decision-makers and First Nations could be expected to increase significantly, and change in nature, through implementation of the Uluru Statement.

### Cross-jurisdictional work takes many forms

Interaction between jurisdictions takes a wide variety of forms; both formal, through official meetings and other institutions and informal, through relationships, networks, and on-the-ground engagement. This interaction may be bilateral or multilateral.

The most formal vehicle in which Commonwealth and State officials interact is the COAG Senior Officials' Meeting (SOM), which Davis and Silver describe.<sup>7</sup> SOM, sub-committees of SOM, and other official-level forums in specific policy domains all support the Council of Australian Governments (COAG) and the other associated COAG Councils. SOM acts as a clearing house for important cross-jurisdictional issues and can provide a useful opportunity for shared reflection about national challenges.

An enormous amount of cross-jurisdictional work also takes place outside the COAG and SOM processes. There is a myriad of non-COAG Ministerial Councils, forums, meetings and advisory arrangements in place at any given time – and often these arrangements have history, capability and context that is unique to a particular policy area. Some very practical cases of operational coordination are also in effect, for example, in law enforcement. Often the art of effective public service cross-jurisdictional leadership relies on building momentum and capability under the radar, outside COAG or COAG SOM. In some cases, this occurs over decades.

Of course, any of these arrangements may, at any particular time, work effectively. Many public servants would be able to point to policy areas, or cross-jurisdictional fora, that they consider have performed well, on particular matters or at particular times. Our argument is that when they do work effectively, they do not do so as a result of sustainable, deep, cross-APS capability. It is more likely to be the product of a particular context, a particular set of leaders, some inherent skills of relevant public servants, or a particular political imperative. In addition, we would argue that even relatively high performing cross-jurisdictional activity today is somewhat limited in ambition and achievement by the overall environment and by the systemic capability of the public services involved.

Nevertheless, it is important to understand the full range of current cross-jurisdictional work. Two examples illustrate the very different forms it may take. The Australian Institute of Teaching and School Leadership is a wholly owned Commonwealth company that provides a forum for discussions between educators and Commonwealth, State and Territory education departments about improving Australian educational performance and also assesses the authority of people migrating to Australia as teachers. In an example of a very different kind, the Australian Government office delivering Centrelink services in Katherine is deeply engaged with Northern

<sup>7</sup> Glyn Davis and Helen Silver, 'Intergovernmental Relations and the Role of Senior Officials: Two Case Studies and Some Lessons Learned', *Australian Journal of Public Administration*, 23 November 2015.

Territory services and officials, and with the Katherine Town Council. All these interactions are important; they all have their own dynamic and all deserve priority from the APS perspective.

Notwithstanding its significance and extent, the current APS relationship with other jurisdictions is typically uneasy and underachieving. Privately, many on both sides of the relationship would say it is sometimes characterised by threats, contempt, a lack of understanding and low levels of goodwill. Arguably it has become less effective over time, even as the importance of the relationship has increased. Too often, the APS norm is to determine policy outcomes for other jurisdictions (or at least, to attempt to do so) without sufficient respect for the perspectives of others, engagement with their counterparts in other jurisdictions, understanding of context on the ground, or localised knowledge. The culture, as it translates into practice, is of a hierarchical relationship, in which central institutions unilaterally develop and insist on their preferred outcomes, with results that may be less satisfactory, comprehensive and enduring than could otherwise have been achieved.

In these conditions, States and Territories are treated as a means to deliver a specific set of outputs determined by the Commonwealth, rather than as parties in a common undertaking with the potential to deliver mutual benefits. Whatever the situation in the past, interjurisdictional relations now are characterised by a lack of mutual respect and trust. Despite the individual contributions of many senior leaders, at an institutional level the APS seems to have lost sight of the advantages of high functioning, collaborative, cross-jurisdictional interaction.

Of course, this institutional challenge is not only true for the APS. It may be that many State and Territory approaches to specific cross-jurisdictional issues and opportunities are also problematic. However, the focus of this paper is on the APS itself, on the contribution it makes to national progress through more effective work with other jurisdictions, and on the leadership it can provide in this regard.

## The APS institutional problem

The APS institutional problem has a top-down, a bottom-up, and a governance dimension.

From the *top-down*, decisions about the best cross-jurisdictional path to follow on any policy issue are overwhelmingly driven by the Commonwealth. This affects decisions about, for example, whether to engage in a full multilateral process, in what forum and on the basis of what process design. It could also affect decisions about engaging in bilateral process with one, or a number of jurisdictions, or in 2019 practice, whether to bother about State or local perspectives at all. It also inevitably extends to decisions about the substantive policy that results from the process. An additional complication for the APS in recent years has been the heightened difficulty of managing the Parliament for the executive government. Minority government and the fragmented composition of the Senate challenges may have contributed to the willingness of Ministers to engage effectively with other jurisdictions.

A related top-down issue concerns timing. Frequently, decisions about how to handle an issue, in terms of either process or substance, are driven by the Commonwealth, and do not emerge until the last minute. This leaves limited opportunity for the institutions of the other levels of government to engage with the issues, or to go through their own consultative and accountability processes. For example, the Prime Minister might announce just before a COAG meeting that a particular issue will be on the agenda, and foreshadow outcomes. In these circumstances there is little time for State and Territory officials to take internal soundings on the issue, to draw on their own considerable reserves of knowledge and experience, or for State Cabinets to determine the State position. In another example, the Commonwealth might demand a formal decision from a local government on a timeline that does not allow for full consideration by the elected representatives through a formal Council meeting. Even where timelines are longer to enable appropriate consultation, a Commonwealth minister may disregard an elaborately agreed process and attempt a short circuit.

It is impossible to overstate the practical impact of this approach on trust and respect between jurisdictions. Premiers frequently receive a letter from the Prime Minister literally minutes before a significant public announcement about a cross-jurisdictional matter. The position announced is not 'this is our negotiating approach and I look forward to the constructive discussion', but rather 'this is what the Commonwealth has decided will happen'.

Frequently, these decisions are seen as an opportunity to maximise immediate political impact and are driven by Ministers and their political advisors. While politics will and should always feature prominently, a longer-term view of political advantage, trust and institutional integrity can produce significant benefits, including better and more lasting outcomes. These decisions are in part a product of the advice that is given by the APS, or perhaps more accurately advice that is not given. In practice, it is a vicious cycle. The APS offers advice on an issue, which in itself is affected by many of the factors identified in this paper. Ministers make decisions on the basis of that advice, frequently bringing political considerations to bear. The end product is a unilateral decision by the Commonwealth that is insufficiently cognisant of the interests of other jurisdictions and insufficiently informed by and responsive to conditions around the country. The other jurisdictions, in turn, have less incentive to engage appropriately or invest in the relationship. The result further erodes the quality and usefulness of the APS advice. The entire process feeds a culture in which Commonwealth officials assume that they and their Ministers can control cross-jurisdictional interaction. Even if this proves correct, the interaction is unproductive in these circumstances.

On any individual policy issue, this vicious cycle is problematic. Even where the immediate issue is of no particular concern – for example when all jurisdictions are agreed on a policy position – the process used to conduct cross-jurisdictional work often undermines the medium-term integrity of our federal democracy. This then triggers a longer term, cross-issue, institutional challenge. The lack of effective working relationships across a number of policy issues means that the cultures, norms and practices of cross-jurisdictional working atrophy and fail to keep pace with needs. As a result, when a novel or high priority issue comes to the fore, processes to be followed are perhaps under-developed and less reliable. Procedures may need to be invented, at speed, under pressure, and with little certainty.

From the *bottom-up* perspective, there is insufficient attention to individual users, local conditions, differences between States and between regions within States, and the lived experience of front-line service delivery and front line service delivery organisations. Too few in the APS leadership – particularly the Senior Executive Service staff at Assistant Secretary and First Assistant Secretary levels – have significant experience working in other jurisdictions. Correspondingly, this also means that very few senior leaders in other jurisdictions have experience working in the Commonwealth. The combined cultural dimension of this is important to understand. The prevailing APS culture privileges Ministers, their staff, Senate Estimates, Canberra lobbyists and industry bodies, and Expenditure Review Committee submissions. It downplays implementation, local circumstances, jurisdictional perspectives and the benefits of diversity. Local Government, and obviously First Nations, have grounded knowledge about country and local circumstances that are practically impossible to engage with from a national altitude without explicit effort. While there have been attempts to inject user experience more directly into the APS operating model, in general this is seen as necessary to improve service delivery, rather than to influence government policy and better tackle national challenges.

There is also a significant *governance* dimension to this problem. As the earlier analysis suggests, the design and operation of cross-jurisdictional activity requires attention to the democratic and legal accountability obligations of the participating jurisdictions through cabinets, Parliaments and courts. The challenge is exacerbated where a cross-jurisdictional project requires the creation of a single, shared institution to achieve the desired effect. How to design and operate an institution with a genuinely joint governance character that secures the full benefits of cross-jurisdictional collaboration remains elusive; indeed, the Commonwealth Department of Finance even cautions



against it.<sup>8</sup> As a result, some genuinely collaborative negotiations, that lead to positive cross-jurisdictional announcements, are then weakened in implementation by a governance mechanism that is uni-jurisdictional in character and dominated by the Commonwealth. It is arguable that the Murray-Darling Basin Authority has some of these characteristics. Conversely, when an institution established through cross-jurisdictional work becomes too distant from a Commonwealth Minister, other challenges arise. This may be one factor in the recent difficulties involving the Great Barrier Reef Marine Park Authority.

Whether through a lens that is bottom-up or top-down, deficiencies in the authorising environment for cross-jurisdictional work, and in the APS' capability to work effectively with other jurisdictions, affect the quality of policy outcomes.

They also have detrimental effects on the infrastructure of Australian democracy. States, Territories and local governments need to be vibrant levels of government, taking responsibility for serving the interests of their communities and being accountable for the results. It is in nobody's interest for representative government to atrophy at any level. There are many consequences of the ways relations between levels of government are presently conducted in Australia – ways in which the APS is complicit. One of these is that the mechanisms for political accountability in State and Territory Cabinets and Parliaments have inadequate opportunities to engage with decisions that are taken in the name of the jurisdiction in the course of dealings between governments. To take only one obvious example, if a national law has been developed through an interjurisdictional process, the State and Territory Parliaments have an unsatisfactory, binary choice. Effectively, they are told that this is the law that has been developed and agreed across the country, and they need to 'take it or leave it'.

In addition, data and performance reporting is very difficult in this context, and hampers efforts towards greater public transparency and more technical evaluation efforts. States and Territories frequently approach any question of data release from a highly defensive and technocratic perspective, which is evidenced in the ongoing Productivity Commission Report on Government Services processes. While the Commonwealth may be right to ask more of jurisdictions in this area, it is at the same time extremely reluctant to publish information about areas of Australian Government service delivery – for example, relating to primary care – in circumstances where the States can point to significant flow-on effects for their service systems – for example, hospitals. An overly narrow depiction of national policy endeavour puts real and practical limits in place regarding shared, consistent and stable ongoing reporting. Further, the interaction between big data, data governance and privacy in the context of cross-jurisdictional reporting appears to be a significant gap.

## The state of the relationship

It can be argued that the relationship between the APS and other jurisdictions has deteriorated over recent decades. This is driven by a number of factors:

1. *State resentment*: Hostility has grown gradually, over decades, as the fiscal imbalance between the Commonwealth and the States has become further entrenched and the Commonwealth has relied more and more on its fiscal capacity to extend its de facto authority. The recent decisions of the High Court in the *School Chaplaincy* cases may have curtailed some aspects of this trend, but perhaps only for the time being.<sup>9</sup>
2. *Erosion of trust*: While cross-jurisdictional political relationships have always had a prickly character, the wild, unilaterally determined swings in intergovernmental relations by the Commonwealth over the past 20 years has significantly eroded mutual engagement and trust. Other jurisdictions have had to accept the shift from the Howard administration, which largely managed Commonwealth-State relations in a cautious and selective

<sup>8</sup> Australian Government, Department of Finance, "[Types of Governance Structures: Inter-jurisdictional arrangements](https://www.finance.gov.au/resource-management/governance/policy/structure-types/#h6)", <<https://www.finance.gov.au/resource-management/governance/policy/structure-types/#h6>>.

<sup>9</sup> *Williams v Commonwealth* (2012) 248 CLR 156; *Williams v Commonwealth* (No. 2) (2014) 252 CLR 416.

manner, to the Rudd/Gillard era of deep engagement, through the COAG Reform Agenda and National Health Reform, to the Abbott-era retrenchment, enacted through the National Commission of Audit, the 2014 Commonwealth budget, and the ill-fated White Paper on the Reform of the Federation. While these swings were driven at the political level, the effect on working relationships between public servants, despite their best endeavours, has often been negative.

3. *Weak relationship formation:* An upsurge in hyper-partisan acrimony and alienation at the political level has been accompanied by a decline in inter-governmental consultation and deliberation on specific and detailed policy and service delivery matters. This has had a detrimental effect on APS's ability to build open relationships with other jurisdictions.
4. *Shallow policy understanding:* A lack of policy specialisation and continuity, in particular in key areas of cross-jurisdictional interaction, together with resource constraints in the APS has increasingly curtailed its capacity to achieve intergovernmental outcomes.
5. *Oversight:* Problems of Ministerial, Cabinet and Parliamentary oversight of intergovernmental arrangements at both Commonwealth and State levels have worsened. As interaction intensifies, these problems become more profound – say for example in relation to appropriate Parliamentary oversight of the National Disability Insurance Agency, or in resolving the appropriate depth of Auditor-General scrutiny of Commonwealth grants to States.

Simplistic approaches to reform have significantly weakened APS understanding of the importance of this task, especially by systematically undervaluing deep policy expertise in high spending, high impact areas of national policy endeavour. The reality of many policy challenges is that they are complex, multidimensional, and reliant on many different elements of the policy and service system.

The rapid emergence of artificial intelligence and big data, and continuing breakneck advances in technology, place the whole system under additional pressures. These changes make more things possible, and encourage the community to see fewer constraints, but also require engagement on whole new high intensity policy landscapes. For example, personal data sovereignty, identification standards and biometrics will likely feature very prominently in cross-jurisdictional work over the next decades.

### **A short case study: child protection**

To illustrate our analysis of the current nature of APS relationships, we explore the case study of child protection. This is an area which most observers would describe as a State and Territory responsibility and, indeed, it lies properly within the State and Territory domain from the standpoint of subsidiarity, local responsiveness and the coherence of policy delivery. Yet the Commonwealth and local governments have important responsibilities that bear on child protection too. First Nations also have a strong interest here, and demand a voice. A far-sighted approach to the field with people as its focus would see significant social and economic benefits from high quality, well-coordinated action which engages and includes all levels of government to improve outcomes for vulnerable children. For example, the Commonwealth delivers Family Tax Benefit, and Parenting Payments. The rules about how families get on and off these payments, and the payments associated with different family composition, waiting periods and compliance obligations, have an important practical impact on families who are involved in the child protection system. To illustrate the point, a single parent whose children are removed faces a reduction in their payment level. This may make it more difficult for the parent to maintain a rental property large enough to support a plan for reunification with the children.

In addition, the Commonwealth substantially funds early childhood education and care. The ability of parents and support organisations to rapidly access a high quality service is an important mechanism to prevent escalation of child protection involvement. The Commonwealth is responsible for marriage and divorce legislation and

adjudication, with consequential impacts on children that are particularly acute in cases where child protection are involved. The Commonwealth also participates in the National Quality Framework for services to children under 13 years of age. Services that are better at identifying and supporting vulnerable children also have an important preventative impact.

Some local Governments are also involved in this area, through maternal and child health services or through delivery of libraries and recreation centres, which present important opportunities for primary prevention.

Despite the national interest in more effective management of these issues, there is little expression of it through the lens of the APS. The APS lacks systematic capacity and knowledge in this field and does not really understand or value its own service delivery insights on this important topic, let alone those from the service delivery systems of other jurisdictions. As a result, there is less attention paid to joining together the insights that the Centrelink program may hold with other areas of service delivery or with early childhood policy, or to working with the States to improve outcomes for vulnerable children.

In conclusion on this part, we emphasise that, in our view, the current trajectory of APS relations with other jurisdictions has considerable risks. The most obvious are increased deterioration of relations between levels of government, and increasingly poor policy outcomes. In addition, however, hostility and lack of collaboration between elected governments in Australia brings all levels of government, not least the Commonwealth, increasingly into disrepute and diminishes public support and understanding of changes that are needed. Against this background, the APS review offers a real opportunity: to review, reset and overtly adopt new directions. At a time of deteriorating respect for Australian government, the APS review can encourage an approach with new energy: that makes people a priority, requires mutual respect between spheres of government and reinvigorates Australian democracy and the relations between governments and people.

### 3 CONSTRAINTS ON THE APS IN WORKING WITH OTHER JURISDICTIONS

This child protection case study and other examples demonstrate some of the downside of the current lack of APS engagement capability. But this capability exists in a context. The current culture, practice and structures of cross-jurisdictional working reflect their history and a kind of unconscious equilibrium between the roles and interests of the different jurisdictions, shaped by the constitutional and political context. People in the system work in particular ways that express this equilibrium – that reflect the pressures of time, context, environment and incentives that operate. Ways of working of this nature are often institutional, ingrained behaviours that are hard to change.

For the purposes of this paper, we see these issues as constraints on APS leadership in this area. A proper understanding of those constraints is an essential first step in setting out opportunities for improvement. If it were easy and obvious to improve APS performance in this area, perhaps it would already have been done.

Some of these constraints are driven ‘internally’ by the values, behaviours and cultures of the APS itself. Some are driven more ‘externally’ by Ministers, their staff, and stakeholders, or simply by the nature of our system. Therefore the APS response to the constraints may differ – in some cases, APS leaders may have a strong role. In others, the constraint may continue for the foreseeable future regardless of strong, unified APS action.

Key constraints in the current cross-jurisdictional approach include:

- a. *Political choices that diminish trust and respect.* This paper has already outlined the caustic effect of often ‘last minute’ unilateral Commonwealth action. For example, in the Rudd era health reform process, significant reform propositions were announced mere minutes after State and Territory leaders were informed of their existence.
- b. *Political attractiveness of Commonwealth intervention in State or local matters.* A Commonwealth Minister may gain short-term political benefit from intervening ‘against’ another jurisdiction, particularly where that jurisdiction is engaging in difficult reform. For example, the Howard Government intervened to ‘save’ the Mersey hospital at a time when the Tasmanian Government was trying to rationalise care arrangements in North-West Tasmania to improve efficiency and patient safety. The everyday pressure from Commonwealth media advisors for their Ministers to take credit for local, tangible initiatives – whether CCTV installations, school flagpoles or swimming pools – is also a very big factor.
- c. *Assumptions that Commonwealth interests should prevail.* The significant fiscal dominance of the Commonwealth leads to the assumption that the Commonwealth interest must prevail in any negotiation. There is no intrinsic reason why this must necessarily be so, yet it is the assumption. There is little attempt to explore the idea that the Commonwealth can fund something it disagrees with, on the basis that another jurisdiction takes a different view for which it is accountable to its electorate.
- d. *Weak understanding of how fiscal incentives might be used constructively.* With the possible exception of the implementation of competition policy, the Commonwealth has struggled to make appropriate use of fiscal incentives in cross-jurisdictional dealings. Incentives may be useful where cross-jurisdictional outcomes come at significant cost and/or generate substantial new revenues. They may, perhaps, also be appropriate in other circumstances, where genuinely agreed between participants and entitlements are determined in a neutral and defensible way. As the level of government with most tax resources at its disposal, and the level of government which gains most of the potential revenue benefits of reform, the Commonwealth is the obvious source of such

payments. Fiscal incentives can be a useful tool in the intergovernmental kit, but only if used openly, honestly and in the right contexts.

- e. *The tension between transparency and effective negotiation.* Negotiation relies on interactions ‘in the room’, rather than through the media. A very practical difficulty arises, given that a controversial matter discussed between officials may be difficult to keep confidential. As media advisers frequently want the Commonwealth to stay on the front foot in any public discussion, Ministers often decide to announce more controversial directions before, rather than after, they have been negotiated.
- f. *The appealing illusion of Commonwealth ‘control’.* Policy issues are frequently complex, and often contested. For Commonwealth officials, this is frequently exacerbated by lack of information, experience and understanding of diversity and complexity regarding policy issues that involve State service systems. In this environment, the attraction of ‘control’ is very real – often demonstrated by highly prescriptive input-based measures. For example, a key element of the 2006 COAG Mental Health package was the introduction of a new Commonwealth funding program called ‘Personal Helpers and Mentors’. The program suffered because money, staffing and program design were managed to a national template, despite the enormous diversity of jurisdictional circumstances regarding mental health and the lack of clear policy evidence about the best response.
- g. *Low levels of current trust, respect and understanding.* Contempt breeds contempt, as has been outlined throughout this paper. Specifically, a practical constraint on better cross-jurisdictional working is cynicism that it can produce enduring, sustainable improvements. For example, many of those involved in the very intensive cross-jurisdictional work around establishing the Intergovernmental Agreement on Federal Financial Relations then watched as the subsequent 2014 Commonwealth Budget, informed by the National Commission of Audit, reversed much of that effort.
- h. *Lack of institutional and individual stability.* Effective cross-jurisdictional work is a relationship game. Even in a highly contested political environment, trust between principal negotiators can play an important part in avoiding unproductive hostilities and securing an enduring peace. However, senior officials change roles frequently, and there are also many machinery of government changes. At any cross-jurisdictional meeting, this means that a number of individuals may be quite new to the issues and the personalities, and it may even mean that whole new government departments are involved in a new area.
- i. *Lack of investment by sub-national jurisdictions.* Some smaller jurisdictions have resource and capability constraints that limit their ability to influence national reforms. Even larger, better resourced jurisdictions sometimes underinvest in this area. Effective cross-jurisdictional working will be constrained to the extent that non-Commonwealth actors are not investing in the reform analysis and producing their own ideas for national reform directions.
- j. *Low levels of resourcing and attention in the APS and other jurisdictions on cross-jurisdictional matters.* Efficiency dividends and other forms of budget constraint within APS departments over many years have reduced the capacity of Secretaries to invest in policy capacity, or in technical know-how regarding cross-jurisdictional working. Even in the Department of the Prime Minister and Cabinet, the Commonwealth-State Relations Branch sometimes has difficulty consistently finding the time to move beyond tactical COAG process matters and project a forward-looking vision for cross-jurisdictional outcomes. This APS challenge creates a corresponding resourcing constraint in other jurisdictions, further diminishing overall capacity.
- k. *Lack of deep sectoral and subject matter expertise within the APS.* Generalist policy skills are valuable, but are not sufficient for the APS to progress debate about national reform in policy areas such as energy, early childhood or water management. The APS, in practice, may not even aspire to have substantive policy expertise in some areas that are nevertheless the subject of large budget appropriations and extensive Commonwealth-

State interaction, for example acute health services. And even where it does aspire to policy expertise, for example in early childhood, it has struggled over time to build and retain institutional expertise that goes beyond the administration of current Commonwealth programs. This profoundly weakens the prospects for effective cross-jurisdictional working.

- l. *Lack of practical skill and hands-on experience within the APS workforce.* Cross-jurisdictional working is a very practical and interpersonal task. Setting up the meeting, designing the agenda and the best mechanisms to surface complex issues, and resolving difficulties are all best handled through an ‘apprenticeship’ model. Historic under-investment by the APS therefore means that a whole generation of APS people has less hands-on experience in this area than is desirable.
- m. *Under-developed intergovernmental ‘tradedcraft’.* Those familiar with international institutions and meetings describe cultures, norms, conventions and routines designed to create an effective forum for a diverse group of senior leaders. Those norms of behaviour are under-developed in the domestic cross-jurisdictional field – ranging from very practical matters such the best way to organise an effective meeting involving nine or more distinct participants, through to questions about the best way to handle more challenging issues such as when one jurisdiction is standing apart from an otherwise ‘national’ settlement.
- n. *A lack of priority on longer term policy options.* Arguably, there is declining interest on the part of senior public servants in initiating and prosecuting longer term policy options. Effective senior public servants in areas with a high cross-jurisdictional load would ideally prioritise longer-term efforts to improve outcomes from that cross-jurisdictional work. This prioritisation necessarily can take some focus away from the immediate needs of the Minister of the day. This tension is not easy to manage in an environment where role security for senior public servants in all jurisdictions has diminished over time. Put simply, given a choice between meeting the Minister’s immediate need and building a longer-term reform opportunity, the immediate need will usually win. This can significantly constrain the human capital invested in cross-jurisdictional working.
- o. *Poorly developed and unsatisfactory arrangements for involvement of local government.* Local Government representation at COAG and SOM is delivered by having a representative of the Australian Local Government Association (ALGA) participate in those meetings. ALGA membership, however, is overweight to smaller, regional and rural Councils in NSW, QLD and WA, and underweight in major cities in all jurisdictions, sometimes distorting its interests. As an industry association, it can also lack the direct first-hand knowledge of local service delivery issues. The model of a single local government representative at a cross-jurisdictional meeting therefore has significant challenges.
- p. *Inadequate arrangements for participation of Indigenous communities.* There is no formal mechanism by which First Nations can participate in cross-jurisdictional working. This means that cross-jurisdictional work that directly relates to Indigenous issues, or that touches on issues of concern and relevance to First Nations, can lack legitimacy from those communities and will miss important insights. The APS engages with First Nations peoples, and it engages with other jurisdictions, but it rarely sees both as part of the same policy challenge.

These constraints are very real – in some cases, it is a ‘rational’ short term response for the APS to advise against cross-jurisdictional responses, and underinvest in relevant capacity. In other cases, Ministers may decide against optimising cross-jurisdictional outcomes. However, the accretion of these short term responses into the overall APS institutional culture has profound effects on its ability to pursue the national interest, and to share the pursuit of ‘national matters’ with other jurisdictions.

## 4 THE WAY FORWARD: A FRAMEWORK FOR DEALING EFFECTIVELY WITH NATIONAL MATTERS

The way forward is critically dependent on an understanding that many policy issues require a national approach – that is, something wider and more inclusive than a unilateral Commonwealth, State, local or First Nations approach – in which each participating jurisdiction makes a contribution conscious that it is operating as part of an overall national endeavour in a federated Australia. A proper understanding of ‘national matters’ is therefore essential to understanding the role we see for the APS over the next decade or more.

### A national approach

A consequence of the design of the Australian Constitution is that, along with a few matters that are the sole responsibility of either the Commonwealth or the States, many matters fall within the authority of both the Commonwealth and the States. These are, potentially, national matters. Examples include hospitals, housing, employment, education, energy, taxation, infrastructure, the environment, and natural resources such as minerals, petroleum and water. The Constitution requires the Commonwealth and the States to identify and fulfil their respective roles in relation to each of these matters. Those roles may change from time to time.

The APS, other public services and other stakeholders have not yet established an acceptable conceptual framework for meeting this challenge, which can endure across time and across policy domains. Such a framework would acknowledge and promote the core values of the federal union: democracy within multiple polities, together with equality, responsibility, mutual respect, and diversity among those polities. The framework would provide for the development of common understanding regarding particular national matters, including the nature and extent of the roles to be played by the Commonwealth and other jurisdictions. Understanding would depend on genuine negotiation and agreement among equal polities, while preserving the capacity of any of those polities to pursue individual initiatives within the scope of their constitutional authority. The framework would add a measure of coherence and structure to the relentless evolution of the Australian federation.

At present, the roles of the Commonwealth, States and Territories with respect to any given policy issue *in practice*, for policy practitioners, bears a tenuous relationship (at best) to the *constitutional authority* of the particular jurisdictions.

All jurisdictions must recognise and respect the roles that others derive from their constitutional authority. We see how as a matter of constitutional authority, foreign investment may appear largely to be the responsibility of the Commonwealth, yet in practice, States play a significant role, and some local governments are also involved. In reverse, child protection is clearly a State responsibility. In practice, the Commonwealth and local government can play significant roles, as outlined above. Our point is simply that all jurisdictions must work together where appropriate through negotiation and agreement, acknowledge that the status quo is never immutable, and appreciate the value that diversity provides to meet the needs and aspirations of various communities in multiple polities.

## Complexity can be managed constructively

Complexity is unavoidable (both in federal and unitary systems), but need not be detrimental. There is complexity in particular policy issues, complexity in service delivery arrangements, and, of course, complexity in cross-jurisdictional working. The issue is how this complexity is managed. A federal system provides institutional arrangements which derive legitimacy from their democratic foundations, with the capacity to manage complexity and even derive benefits from it. This claim has now achieved widespread recognition through the principle of subsidiarity.

The APS must shape its analysis of and response to all issues of national policy with a deep understanding and sound appreciation of the principles and practices of the Australian federal union and the multiple polities within that union. It is apparent that failures in the development and implementation of Commonwealth policies in areas such as energy, climate change, natural resources and environment (to take but a few) betray mistaken assumptions about the capacity of the Commonwealth to resolve national matters unilaterally. One such assumption is that any use of Commonwealth funds justifies (or requires) Commonwealth control over State action.

National matters require agreement on a national approach. There is no template for such an approach, which may include a broad spectrum of common and individual roles and responsibilities that are amenable to revision in response to experience and changing circumstances. The first step, as suggested above, is to devise a conceptual framework based on premises of multiple polities, mutual responsibility and democratic accountability rather than assumptions that depart from the core values of the Australian federal union. A good example of that kind of conceptual framework is one where all jurisdictions agree on a set of common outcomes and measures of performance against those outcomes, then agree roles and responsibilities, but then have considerable flexibility in how those roles and responsibilities are put into practice, subject to each jurisdiction's accountability to its own Parliament, and each jurisdiction's measurable performance.

Once the conceptual framework is created this framework must then be applied in situ, in the context of a given policy from any level of government.

In practice this is messy, and requires detailed policy analysis. It is not an accident that this is so – it is a feature of our democracy. The framework is very rarely susceptible to propositions for radical change in responsibilities. It is not susceptible to pronouncements or simplistic approaches, to the frustration of many who would rather that the world were more straightforward. For example, this approach directly cuts across the 'top idea' of the Australia 2020 summit to overhaul Australian federation to clarify and define roles and responsibilities, or the starting premise of the Abbott Government White Paper process that each jurisdiction should, as far as possible, be 'sovereign in their own sphere'.

In the process of working it through, a key step for all participants is to think through the range of interests and perspectives that need to be considered. APS perspectives on cross-jurisdictional matters are very 'vertical' – serving the interests and demands of the Commonwealth Executive. While at one level this is entirely appropriate, and is clearly technically correct as a matter of governance, it is tilted too far in the direction of responsiveness, not stewardship. As a result it is not the most suitable approach to achieving sustainable policy outcomes in the context of the Australian federation.

The application of the framework to each policy area also requires a deep understanding of the capacity of each jurisdiction in that area, and then assembling capabilities, interests and priorities into a workable approach. Some jurisdictions will have more capacity than others, or be at a different stage of the political cycle, have a more open authorising environment, or have different levels of service system capability. Frequently some of the smaller States and the Territories will need support to engage across a broad reform agenda, resulting simply from their smaller scale and the resulting lower capacity to 'flex' policy resources in and out of cross-jurisdictional work.



## The roles of the APS in a national approach

The place that the APS would have in this framework is highly significant. The Australian Constitution gives the term 'Commonwealth' two distinct meanings: one is the national level of government in the federal union, and the other is the nation, the polity comprising both constitutionally recognised levels of government, Commonwealth and State.

Properly considered, the APS similarly has two distinct but complementary roles. One is obvious: it relates to the Commonwealth in the narrow sense, and includes advice to Commonwealth Ministers, and exercise of the executive power of the Commonwealth government. The other role is more subtle. It relates to the Commonwealth as the nation, and amounts to stewardship of national matters. The subtlety lies in the critical distinction (often overlooked) between stewardship and control. Stewardship has elements of guidance and responsibility within a federal union where power (ie, control) is specifically and deliberately divided, not concentrated. It seems that this stewardship role is insufficiently understood and too infrequently exercised.

The matter of 'stewardship' in the APS context is still unsettled, and so requires some explanation. We see it as requiring APS leaders to provide frank and fearless advice to Ministers about policy options, and cross-jurisdictional opportunities, when the context makes this relevant. It also involves APS advice on what is required for the medium-term stability and effectiveness of the institutions supporting government, including the public service itself.

Stewardship requires APS leaders to look beyond the immediate and specific interests of the Australian Government, and with more breadth to the broader interests of the Commonwealth as a nation. It means that APS leaders should invest time, effort and energy in matters that are less interesting to Ministers, but yet highly relevant to future capability – for example, training and development of future public service leaders. Many cross-jurisdictional capability matters fall into this latter category.

Stewardship in this sense does not run counter to ministerial accountability to the Commonwealth Parliament. The conventions and practices of responsible government in Australia are necessarily shaped by the context of Australian federal democracy in which they operate. Given this context, the APS should be expected by both Ministers and Parliament to perform a stewardship role, which is in the interests of the country as a whole. Of course, if a Minister, having considered the advice of the APS regarding stewardship responsibilities, nevertheless decides on a particular course of action, then unless that direction is unlawful it must be followed, consistent with the relationship between Ministers and the public service. While beyond the scope of this paper, we would expect that meaningful APS embrace of stewardship, of the kind that effective cross-jurisdictional capability requires, will give rise to an increasingly transparent understanding on the part of government, Parliament and the community about the boundaries between Ministerial direction and APS stewardship advice.

The implications of the fiscal imbalance for effective interjurisdictional working can be understood from the perspective of a national approach as well.

From the time of federation, the Commonwealth has raised some taxation for redistribution to other jurisdictions; a situation that has become further entrenched over time. In doing so, the Commonwealth is performing a national function. Of course, much of the revenue raised by the Commonwealth is used to defray the Commonwealth's own expenditures, narrowly understood. For this, the government is accountable to the Parliament in the usual way. There is no necessary objection in principle, however, to the Commonwealth raising revenue for redistribution to other levels of government, by whom it is spent, in ways for which the other levels of government are accountable to their own institutions and their own constituents. In this respect, intergovernmental fiscal arrangements are national in character. The role that Commonwealth institutions, including the APS, play in managing and designing the transfers – including the purposes for which some are made – should be tempered by this understanding.

## The Commonwealth's involvement in a national approach

The idea of a national matter, or of a national approach, requires clarity in some key dimensions.

First, fairly obviously, the Commonwealth's view is not synonymous with the national approach. The Commonwealth may well be best placed, on some issues, to articulate what a national approach could be, and the APS should play a key role in that articulation. But if it is to be truly national, then in our system of government it requires engagement and probably agreement with other jurisdictions.

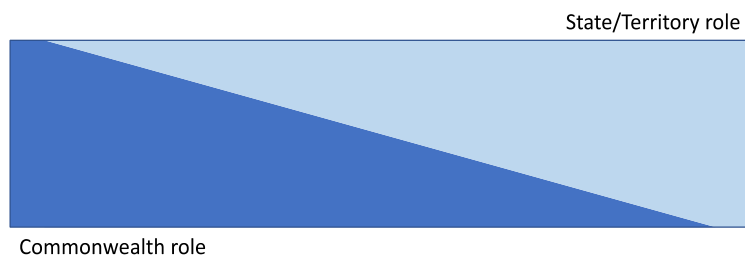
Second, a national approach is not synonymous with a uniform approach across the country. In some policy areas, such as heavy vehicle management, the appropriate policy tool to achieve a national policy approach is probably uniform regulation across all jurisdictions. In other areas, such as school education, the appropriate policy tool to achieve national outcomes is likely to involve a high degree of flexibility, autonomy and room for innovation for States and Territories, consistent with their constitutional roles.

Third, the Commonwealth is not essential to achieving a national approach. For example, in 2006 the States and Territories were close to resolving an agreed approach to the national matter of emissions trading, prior to the change of heart of Prime Minister Howard on such matters. In this increasingly hyper-partisan and volatile political environment, it is entirely conceivable that States and Territories could reach sensible agreement on national policy issues while the Commonwealth remains unable to engage – for example, because of difficulty in getting an outcome through the Senate.

Fourth, a national approach may have a strong role for the Commonwealth, or a weak one. Even a nationally uniform regulatory approach, for example, could conceivably have a negligible Commonwealth role – say in cross-border trade licensing. We have set out previously that few policy matters are completely State and Territory, for example, or completely Commonwealth. But in that shared area of responsibility, the Commonwealth's responsibilities can be 'thick' (think migration) or 'thin' (think school education).

The diagram below explains this further. There are a few matters, at either end of the spectrum, that are solely within Commonwealth power (for example, currency and coinage, and the national capital site) or solely within State power (for example, the number and identity of State employees, and the terms and conditions of employment of senior State public servants). There are also matters which, practically speaking, can and should be handled effectively by either the Commonwealth or a State, acting alone. But in relation to the remainder, which is a very significant proportion of the policy landscape, roles can be thicker or thinner for the Commonwealth and the States as the policy circumstances at the time suggest and as they are determined. Contrary to many assumptions, roles and responsibilities are rarely a binary on/off switch.

Commonwealth-State roles can be 'thicker or thinner' in different circumstances – they are not 'on or off'



## 5 THE APS IN 2030: SUPPORTING EFFECTIVE CROSS-JURISDICTIONAL COLLABORATION IN AUSTRALIA'S FEDERAL DEMOCRACY

The previous section introduced the idea of greater focus on national matters, and the important role for APS stewardship of the system of cross-jurisdictional collaboration in the Australian federal system.

### Principles for interjurisdictional collaboration

We argue that the 2030 approach of the APS to interjurisdictional collaboration should be informed by the following principles that underpin the Australian system of government.

- Australian democracy is organised through different levels of government, each of which derives limited power to govern from the Australian people, or a segment of them, to which it is accountable.
- Democratic accountability relies on the elected Parliaments of the Commonwealth and the States and Territories in which public deliberation on significant decisions can take place and through which transparency can be secured.
- All dealings between levels of government must be conducted with the mutual respect, trust and good faith that are due to democratically elected representatives of the Australian people.
- Intergovernmental collaboration is an integral part of Australian federal democracy, when properly used. It should be undertaken for purposes that are clear and publicly justifiable by reference to need, using machinery that is consistent with democratic principle and practice.
- The Commonwealth level of government raises the public revenues required not only to meet its own constitutional responsibilities but also to assist the State and Territory level of government to meet theirs.
- The values of the composite concept of Australian federal democracy apply also in relation to local government and to spheres of Indigenous self-government.

### The APS of 2030

These principles set the context for Australian government as a whole, including the authorising environment. They require collaboration across jurisdictions. To these ends, the APS of 2030 should have the following characteristics.

- a. **A national and collegial outlook.** The APS will, through collegial efforts, lead all jurisdictions to greater shared understanding of the idea of a national approach within the Australian system of federal democracy. It will also ensure greater clarity about the variety of roles each jurisdiction can play within that system.
- b. **A stewardship role.** The APS would see itself, and be seen by others, as having a special stewardship role of the national system of cross-jurisdictional work. This role must go beyond the political cycle and be an important part of our federal democratic institutions.
- c. **Enable all jurisdictions.** The stewardship role of the APS includes enabling all relevant jurisdictions – States, Territories, Local Governments, First Nations – to have real opportunity to participate and engage, and take into account the different levels of capability and resourcing in different jurisdictions. Some sharing and pooling of capability would be evident, not only in the formal structures that support SOM and COAG.

- d. **Understand and respect other jurisdictions.** People leading and working within the APS must have a deep understanding and appreciation of the role of other jurisdictions. They must recognise the strengths of each element of Australia's contemporary federal democratic system.
- e. **Distinguish between politics and institutions.** APS involvement in negotiations between officials would be characterised by a high degree of trust and respect for the formal role of each jurisdiction as an institution, even in circumstances of conflict at the political level.
- f. **An open approach.** The APS must welcome and engage with other jurisdictions regarding the best way of handling national matters, and the best means of engagement with other jurisdictions to that end.
- g. **Deep policy expertise.** The stewardship role of the APS within each policy area would must include deep policy expertise regarding all aspects of that area necessary to achieve an effective national approach; expertise beyond current roles and responsibilities. For example, the APS would need policy expertise about the effective management of hospital systems, even though it may never manage one, because it is impossible to properly understand an integrated national approach to health policy without that degree of expertise.
- h. **Investment in 'tradedcraft'.** The art of effective cross-jurisdictional working would be an essential part of most APS policy officers' professional practice, and an integral part of leadership expectations.
- i. **Secretary role modelling.** Secretaries would, on paper and in practice, invest in high levels of professionalism, accountability and performance regarding their leadership of cross-jurisdictional working. This will form an important part of their overall approach to stewardship of the institution of the APS itself.

## Preconditions for reform

These characteristics will not be realised without significant change – an incremental, initiative-based approach will be insufficient. Such a change necessarily requires Australian Government leadership at a Cabinet and Ministerial level, together with related reforms that strengthen the APS, the role of Secretaries, and the governance and oversight of Secretary performance. It will also require ongoing guidance and direction from the Secretaries' Board.

Three broad issues, subjects of discussion by the APS Review Panel on their own merits, are relevant to establishing the right environment in which more specific reforms aimed at improving cross-jurisdictional working might flourish.

*First, the need for user-focused approaches in the APS policy and service delivery landscape.* Creating more citizen/customer focused user-centred design approaches would benefit cross-jurisdictional working significantly. Different levels of government frequently have little relevance to service users, who simply want to get the job done, solve the problem, or receive the service. An approach to policy and service delivery which privileges user perspectives necessarily provides a stronger platform for effective cross-jurisdictional working. It is a kind of enforced humility from all, to the benefit of the user.

*Second, greater clarity about an overall APS approach to service delivery through contract management with third parties.* This would help achieve a more sophisticated approach to cross-jurisdictional working. At its worst, the current approach sees States as no different from contracted private providers, and manages both with low levels of effectiveness. This ignores the democratic character of other levels of government, causes them immense frustration, and reduces the effectiveness of Australian Government service delivery more broadly. The APS needs to strengthen performance on outsourced contract management – say for example in the field of employment services. This improvement is likely to be complementary to more effective cross-jurisdictional work. Working effectively with the non-government organisations and other groups in the Australian community that provide governmental-type services offers additional benefits in its own right.

*Third, the need to improve sectoral and subject matter expertise.* While this paper talks about the need to deepen subject matter policy expertise, because of the complexity of resolving a shared approach to many national matters within the Australian federal system, this is an issue that may well have broader relevance and benefits.

## Potential reform directions

If the right environment is formed, including as a result of improvements in those three broad areas, and the right ambitions for 2030 are established, then many specific reforms aimed at improving the APS role in cross-jurisdictional work will be pursued. Effectively, APS leadership itself promote higher levels of performance in this area in a sustainable, self-replicating way.

Some specific ideas could be considered in this context, including:

### 1. Ideas to strengthen governance and focus:

- a. **Consider improvements to employment and performance management arrangements for APS Secretaries, given the integral role of APS Secretaries in stewardship of cross-jurisdictional work.** While much broader than the scope of this paper, it is important to clarify in a substantive way through performance agreements that the role of APS Secretaries includes stewardship of relevant cross-jurisdictional skills, capabilities and institutions, and stewardship of national policy agendas within their areas of responsibility. These aspects of the Secretary role, like other stewardship functions, will receive too little focus and attention without a stronger formal place within legislation, appointment processes and performance agreements. Importantly, the stewardship role relating to cross-jurisdictional work involves culture, systems, processes and relationships.
- b. **Engage Ministers early in their terms with advice, support and historical experience in relation to cross-jurisdictional working.** This task is equally relevant to all jurisdictions, and should be undertaken by all public services as part of early induction-type efforts as these develop. While Ministers arrive in their portfolios with a clear view of the expectations of both the community and their political party, it is often the case that they do not have relevant experience in cross-jurisdictional work, or in multi-party negotiations. For many Ministers this will be a significant part of their role and requires early and focused attention.
- c. **Provide better, more independent support to COAG, SOM and the entire system of cross-jurisdictional work by establishing an Agency dedicated to the purpose, which might be called the Federal Relations Secretariat (FRS).** It might be formally located with the Prime Minister's portfolio, but would have a whole-of-system agenda, governed at least by the Commonwealth, States and Territories, responsive to all jurisdictions and not to the Commonwealth alone. The Canadian Intergovernmental Conference Secretariat provides a loose analogue on which an Australian agency might build: an independent entity, dedicated to administrative support and planning services for interjurisdictional meetings, funded by both federal and provincial governments and comprising federal, provincial and territorial public services.<sup>10</sup> The purpose of the Agency would be to ensure that all jurisdictions had a stronger stake in the overall system, trust in its processes and the ability to engage in the substance of the policy issues.
- d. **Provide greater clarity and guidance to officials from all jurisdictions on strengthening accountability of all relevant Ministers to their Parliaments.** This could be a task for the new Federal Relations Secretariat, and would strengthen multi-Parliamentary oversight of cross-jurisdictional work. This 'missing link' in Australian democratic institutions directly translates into low levels of Ministerial ownership of cross-jurisdictional work, and also into low levels of knowledge and understanding from Parliaments. It also infects the roles of statutory office holders such as the Ombudsman and Auditor General in each jurisdiction,

<sup>10</sup> [Canadian Intergovernmental Conference Secretariat](http://www.scics.ca/en/), <<http://www.scics.ca/en/>>.

reducing the level of effective Parliamentary scrutiny of executive action. There is significant tension in the cross-jurisdictional system that would be crystallised through such work, reduction of which would reduce noise in the system and strengthen accountability arrangements.

- e. **Revisit the question of how to best represent local governments, including major cities, through the Australian system of cross-jurisdictional work.** This would ensure that local governments are represented effectively, and that the practical, grounded perspective that Local Government can provide is best utilised. New forums may be required as it is unlikely that a single voice can represent the diversity of the sector. The particular role of major cities is important to recognise – Australia’s 21 major cities generate over three quarters of national GDP, for example, but are particularly poorly represented in the current system of cross-jurisdictional governance.
- f. **Consider, in consultation with First Nations peoples, how best to ensure an Indigenous perspective in cross-jurisdictional work as part of ongoing work on the ‘Voice’ to Parliament and enhanced Indigenous governance.** This will require attention in all relevant cross-jurisdictional working arrangements – for example, the COAG Education Council. Again, new forums may be required as different mechanisms may suit different policy issues and a variety of indigenous governance structures may be necessary.
- g. **Strengthen the governance of and approach to cross-jurisdictional outcomes data, evaluation and comparative analysis.** This should include revisiting the question of whether a COAG-driven institution should be established and given this task, building on the experiences and insights gained from the COAG Reform Council. The Australian federation will only reach its potential if jurisdictions are assisted to learn from each other, to understand what works and what does not, and to grapple with the challenges and opportunities associated with big data. Data ownership, privacy and democratisation of data will be significant future challenges. A key lesson from the COAG Reform Council experience is that it will take many years, and sustained focus and effort, to build the institution that is required.
- h. **Consider again the design of arrangements for governance of inter-jurisdictional institutions.** This technical task is an essential prerequisite to effective, accountable, cross-jurisdictional endeavour. Without institutions that give effect, in an enduring way, to the intent of Ministers to create genuinely cross-jurisdictional bodies, implementation will often lag behind shared policy intent. Current policy guidance and administrative arrangements are often well behind the intentions of participating Ministers, senior officials and their Governments. It is difficult in the Australian context to develop bodies that are genuinely owned by and responsive to the participating jurisdictions, but the challenge must be met. In doing so, it will be necessary to take into account the perspectives of jurisdictional finance departments, Auditors General and parliamentary committees, as well as the public at large, whom such bodies ultimately are designed to serve.
- i. **Require SOM to oversee further work led by officials to strengthen political, public service and stakeholder understanding of the particular design features and characteristics of Australian federal democratic institutions and structures, including the idea of a ‘national approach’ that is distinct from that of the Commonwealth, narrowly conceived.** The particular role, characteristics and opportunities that flow from better cross-jurisdictional working with First Nations and Local Governments should be a particular area of focus for this effort.

## 2. Ideas to strengthen the ‘tradedcraft’ of cross-jurisdictional working:

- a. **Improve cross-jurisdictional relationship management and negotiation.** The proposed Federal Relations Secretariat, with oversight by SOM and engagement with Public Service Commissions and their equivalent, should rapidly develop guidance and training programs to explicitly improve cross-jurisdictional relationship management and negotiation. A range of entities should be involved in developing this approach, having internalised it themselves. Examples might include The Australia and New Zealand School

of Government, the Institute of Public Administration Australia, LG Pro (Local Government Professionals), or Indigenous bodies identified in consultation with Indigenous communities.

- b. **Improve chairing of multi-jurisdictional negotiations.** Specifically, more attention could be paid to the role of chairing complex multi-jurisdictional negotiations, establishing the right rhythm and expectations about the cross-jurisdictional work, and building the skills, experience and support required to lead this work effectively. In many cases there could be a need for the role of Chair to be detached from the Commonwealth advocates within the negotiation – potentially by the forum appointing an independent chair for that purpose. The proposed Federal Relations Secretariat could establish a panel of eminent independent chairs for potential deployment for specific COAG working groups, to better enable particular high priority negotiations; potentially one group well suited to meetings of Ministers, and another better suited for more technical discussions between officials.
  - c. **Increase APS access to a national talent pool with experience outside the APS and other jurisdictions’ access to APS talent.** Applicants for APS Senior Executive Service positions should be required to demonstrate skills, experience and capabilities built in non-APS contexts in almost all circumstances – for example, work in other jurisdictions, or in non-government organisations, or in service providers. Explicit mobility programs such as secondments, recognition of service, and entitlement portability are also essential. One aspect of building a genuinely national talent pool is reducing the Canberra effect – this requires expansion of flexible work arrangements and tele-commuting infrastructure, and could include establishing the Australian Government equivalent of Victorian ‘GovHubs’ in capital cities and perhaps other major centres to reduce logistical difficulties associated with travel. These GovHubs could offer flexible work arrangements, across APS Departments, modelled on private sector co-working spaces and building on the extensive APS office footprint that already exists. In 2019 there is no good reason for the APS not to have access to a national talent pool.
  - d. **Test different ways of incorporating service user and broader community perspectives into cross-jurisdictional working.** This would build on the latest evidence from deliberative democracy and service design. These tests should be explicitly designed to maximise the potential to strengthen institutional arrangements underpinning cross-jurisdictional working. Options could include, for example, jointly convened service design and user experience testing, or a jointly initiated peoples’ panel.
  - e. **Build collaboration and coalition building into performance expectations for APS Senior Executive and Executive level staff.** Consideration should be given to greater recognition of negotiation skills, collaboration, stakeholder management and coalition building in performance arrangements for relevant staff. This is a broader issue than cross-jurisdictional working, but is an essential element of the tradecraft.
- 3. Ideas to ensure monitoring and reporting on the effectiveness of APS leadership of cross-jurisdictional working:**
- a. **Establish regular monitoring and reporting on the effectiveness of the cross-jurisdictional ‘machine’.** For example, measures could include trust between governments, community trust in Australian federal democracy, levels of trust between officials, and perceived effectiveness of the negotiation process.
  - b. **Provide for regular reviews of the cross-jurisdictional system.** The Federal Relations Secretariat should regularly review the cross-jurisdictional system to identify areas of strength, and matters that require further attention. This should be an ongoing process that is itself cross-jurisdictional in design, and have a mechanism to ensure that lessons from international experience are fully appreciated in the Australian context.

Taken together, and in the context of broader action to improve the capability and performance of the APS, these ideas have the potential to strengthen the APS contribution to our federal democratic system of Government.

## CONCLUSION

There is significant national benefit in the APS pursuing a careful, thoughtful and analytical approach to improving cross-jurisdictional working as part of its overall stewardship function. The APS of 2030 needs this additional capability to meet the challenges that will face it. This pursuit is necessary, even in the context of variable levels of commitment from political leaders and variable levels of capability and engagement from the other jurisdictions. Engaging Ministers in this task is essential, but it is equally unrealistic to expect Ministers to personally drive this kind of technical, longer term endeavour at any level of detail. Engaging other jurisdictions is essential, but the APS cannot wait until all jurisdictions are ready. This is a leadership responsibility that sits only with the APS in our unique, evolving, and multi-jurisdictional democratic system. It is the 'Australian' part of the Australian Public Service.

Effective cross jurisdictional work requires a supportive authorising environment, and high levels of APS capability. It also requires the tactical combination of trust, goodwill and time in any specific negotiation. It will always be an imperfect art – but reaching significantly higher levels of performance is both realistic and desirable.

To return to our hypothetical Ministerial question to the Secretary about the engagement and employment of young Australians: the APS of 2030 must draw on years of engagement in relevant national policy matters, and on deep policy expertise that covers all relevant policy and program issues in a national context. APS SES staff would draw on their experience of working in other jurisdictions, their established relationships with other leaders, and on the skills and capabilities of their team in this area, to ensure that the answers provided reflected the best national thinking on this issue, and clearly outlined the complexity of interests and objectives in the area.

With this new direction, the APS would then be in a position to identify which negotiating pathway might offer the best prospects of success for this policy topic, given the needs and interests of other jurisdictions and the history of this policy issue. It would provide its Ministers with advice and support to enable them to succeed and achieve meaningful political and policy outcomes. It would move with confidence through the negotiations and support other jurisdictions' involvement, knowing that an effective negotiation process benefits all parties. Its degree of openness and engagement would be reciprocated by other jurisdictions. It would support the nation's politicians as they moved towards announcement of a shared national approach, characterised by trust and respect, and recognising the unique benefits of diversity, flexibility and responsiveness that flow from our federal democratic system of government.



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