

COMMONWEALTH CONTROLS OVER AUSTRALIAN SCHOOLS, TAFES AND UNIVERSITIES VIA TIED FUNDING: TIME FOR CONSTITUTIONAL REFORM?

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A matter of some controversy in schools, TAFEs and universities has been the advent of significant controls over these state and territory law bodies by the Commonwealth Government, based on the supply of grants linked to conditions. Under the previous Howard Government the conditions required significant workplace reforms (including Australian Workplace Agreements) at the university and TAFE level. Commonwealth grants for state and private schools contain conditions relating to curriculum, school reports, statements of learning, and various school performance targets. Such controls were never envisaged for the Commonwealth in the Constitution. This paper examines in some detail the conditions imposed on Schools, TAFE and Universities, describes the constitutional position relating to regulation of education by the Commonwealth, including the potential use of the corporations power, and makes suggestions for reform.

I INTRODUCTION

Historically, responsibility for education has been a state and territory matter. Constitutionally, the Federal government does not have an enumerated power over education. Even in wartime, school and university education has been held to be a concern of the states, not of the Commonwealth. This is made very clear in the following passage from Williams J in *The King v The University of Sydney*:¹

If the Commonwealth in the exercise of the defence power can regulate the number of students who can be educated at a university it must also be able to regulate the number of children who can be educated in the schools and to prescribe the matters which will qualify them for admission. The Commonwealth Parliament is not entitled, in my opinion, under the defence power even in time of war to assume complete control of the systems of education operating in the States either in the universities or in the schools, or to prescribe what subjects shall be taught in the universities or in the schools, and what examinations shall be held to qualify for matriculation in the universities.²

That judge would be rather surprised to discover sixty five years later that the Commonwealth's control over education is now very extensive. This has *not* occurred through change to the relevant parts of the Constitution Williams J was interpreting, but rather through a simple expedient — moneys granted to the state, or directly to universities, tied to conditions.

Despite political posturing over the years, income tax remains the exclusive province of the Commonwealth government. From the moneys collected from that and other revenue sources the Commonwealth appropriates goods and services taxation revenue and other funds to the

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states. These funds are used by the state for their broad purposes. This paper is not concerned with such general funding allocated under the *Intergovernmental Agreement on the Reform of Commonwealth-State Financial Relations*.³ However the Commonwealth, for all levels of education, has for some time allocated funding for various educational purposes linked to conditions. Initially these conditions were relatively innocuous, for example, that a state government would pass moneys received from the Commonwealth to eligible private schools. As is described in significant detail below, for each level of the education system, the conditions are now very extensive. This paper considers these conditions, examines their constitutionality and discusses the role the Commonwealth's power over corporations could play in regard to education.

II THE CONDITIONS

The main Commonwealth Acts that impose the conditions are the *Schools Assistance (Learning Together Achievement Through Choice and Opportunity) Act 2004* [SAA] (at the K-12 level), the *Skilling Australia's Workforce Act 2005*[SAWA] (at the vocational education and training level (VET)), and the *Higher Education Support Act 2003* [HESA] (Universities and other Higher Education providers).

What are the conditions presently imposed across the three sectors under these three acts?

A Conditions Relating to K–12 Funding

1 *The Grants*

Commonwealth financial assistance is provided for both government and private schools to assist the ongoing operating costs of schools: SAA Part 5 Div 1 and Part 6 Div 2; and capital expenditure. The latter includes funds to investigate the need for schools, or funds for buildings, land purchases, equipment, furniture and libraries: SAA s 4, SAA Part 5 Div 2, and SAA Part 6 Div 3. The Commonwealth may also make specific grants relating to students in country areas: SAA Part 7; languages education: SAA Part 8; teaching English to new arrivals: SAA Part 9; literacy, numeracy, and special needs: SAA Part 10. Where a State or Territory does not meet the conditions, it may be required to repay any amounts received to the Commonwealth: s 20(1). Similarly, amounts may be reduced if false or misleading statements have been made in relation to the grant: s 131.

2 *Conditions Relating to Government Schools*

There are various conditions imposed which require the state or territory education minister to observe financial obligations: SAA Part 2, Division 2. Under s 14(1) the states and territories have to commit in a written agreement with the Commonwealth to the *National Goals for Schooling*⁴ of the Ministerial Council on Education, Employment, Training and Youth Affairs (MCEETYA) and implement the *National Safe Schools Framework*⁵ endorsed by MCEETYA. They have to agree to achieve performance targets, report against performance measures and participate in the publication of a national report on the outcomes of schooling. School performance must be made public and student attendance at each government school has to be reported to the Commonwealth Minister. Parents are to be given a report on the child's achievement against the national benchmarks⁶ for years 3, 5 and 7. There are curriculum obligations too, including the development of *Statements of Learning* and the implementation of common testing

standards in English, mathematics, science, civics and citizenship education, and information and communications technology. At least two hours per week of physical activity for students undertaking primary and junior secondary education has to be provided. There are also rules which go to the management of schools, for example, the principal, and the governing body of the school must be given strengthened autonomy and responsibility for education programs, staffing, budget and other aspects of the school's operations within a supportive framework of broad systemic policies. Appointments of staff must be made with the approval of the principal, or the governing body. There are conditions relating to achieving national consistency before 1 January 2010 in school commencement ages, in the description of the two years before Year 1 and for the transmission between schools of student information relating to students moving interstate.

Section 15 requires each government school to give confidential student reports at least twice in any program year⁷ that are readily understandable, and accurately and objectively assess the child's progress and achievement against any available national standards and relative to the performance of the child's peer group at the school. The reports must be followed by an opportunity for the child and the parents or guardians to meet with the child's teachers to discuss the report and obtain advice regarding the child's further progress at school.

3 *Conditions Relating to Non Government Schools*

Under SAA s 30 there must be an agreement between the Commonwealth and the relevant authority of the school or system before financial assistance can be provided.⁸ Furthermore, financial assistance cannot be provided to a State for education at a non-government school unless the school is included in the list of non-government schools: SAA s 46. Under SAA Part 2 Div 3 quite specific details for each school must be included in the list, including the approved school system the school belongs to, if there is one, the levels of education provided, funding levels for non systemic schools, and whether the school may provide distance education or is a special school.

The shopping list of conditions imposed on private schools is very similar to those described above for government schools. These are described in SAA Part 2, Div 4.

B *Conditions Relating to Vocational Education and Training Funding*

1 *The Grants*

Under the *Skilling Australia's Workforce Act 2005* (Cth) Commonwealth financial assistance for vocational education and training is provided to the states and territories for capital expenditure and recurrent expenditure. This is administered through the Department of Education, Employment and Workplace Relations, though overall allocations are determined by the Ministerial Council which has responsibility for the objectives, priorities and targets of the national training system: SAWA s 6. Payments consistent with these allocations are made by the Commonwealth Minister: SAWA s 6. The new Labor government introduced legislation designed to deal with a perceived skills crisis in Australia for which the Government has committed funding of 450,000 training places over four years. This legislation is the *Skills Australia Act 2008* (Cth). Section 5 establishes a new body, Skills Australia, which will, *inter alia*, analyse skills needs and 'provide the government with recommendations on current and future skills needs to help inform decisions to encourage skills formation and drive ongoing reforms to the education and training

sector, including on priorities for the investment of public funds'.⁹ Accordingly, the conditions described below may well change when this body is able to make those recommendations.

2 *The Conditions*

Under SAWA, financial assistance must not be provided to a State for vocational education and training unless a written agreement, the 'Commonwealth-State Agreement for Skilling Australia's Workforce' has been entered into by the Commonwealth and the State: SAWA s 7. These payments are subject to statutory conditions, the Skilling Australia's Workforce Agreement and any bilateral agreement between the state and the Commonwealth: SAWA s 8. If conditions are not met the state may be required to repay the amount, or delay further payments: SAWA s 32.

Statutory conditions are of various types. Workplace and management reforms are contained in s 12. These include the states giving technical and further education institutions (TAFE) greater flexibility and capacity to respond to local industry and community needs, obligating TAFE to introduce more flexible employment arrangements¹⁰ and supporting stronger leadership and authority for directors of TAFE especially relating to recruitment and remuneration of employees. Fair and transparent performance management schemes have to be provided. TAFE has to be allowed to enter partnerships with industry and sponsorship arrangements and to develop entrepreneurial and commercially oriented business plans that will enable government funding to be reduced. TAFE workplace agreements, policies and practices must be consistent with the freedom of association principles contained in the *Workplace Relations Act 1996* (Cth). TAFE must neither encourage nor discourage trade union membership.

Section 11 of the Act contains provisions obliging states and territories to maximise 'choice for employers and apprentices' and 'introduce genuine competition' in the vocational education and training sector. Section 13 requires states to modify their awards if these reward length of time spent in education or training rather than competence. States must also strive to achieve a consistent national system of occupational licensing requirements: SAWA s 13. States must maintain a State Training Authority: SAWA s 16.

Other reforms require TAFE premises to be made commercially available to others provided this does not conflict with the provider's purposes: SAWA s 14; prevent financial assistance being used for vocational education or training to overseas students or for private recreational pursuits or hobbies: SAWA ss 10, 18, 19; require client advisory arrangements to exist to allow the views of students to be considered in decision making about the delivery of VET: SAWA s 17; and ensure that targeted financial assistance for the education of Indigenous people must meet the objectives of the *Indigenous Education (Targeted Assistance) Act 2000*: SAWA s 10A.

The *Skilling Australia's Workforce Agreement* must include a commitment by all parties to the agreement to support the national training system and its guiding principles, including the *National Governance and Accountability Framework* and the *National Skills Framework*, by working collaboratively with the Ministerial Council, the National Quality Council and National Industry Skills Committee: SAWA s 20(3). Under SAWA s 20(2) the agreement must contain conditions relating to the national goals, objectives, priorities, initiatives and performance measures of vocational education and training. There must be policies to improve the consistency, quality and responsiveness of providers, the standards for auditing and monitoring of providers, and the standards for recognition of qualifications provided by providers.

There are also reporting obligations which are to be contained in the agreement relating to the expenditure of financial assistance: SAWA ss 22, 23, 24 and 25.

C Conditions Relating to Higher Education Provider Funding

1 The Grants

The *Higher Education Support Act 2003* (Cth) provides for Commonwealth financial support for higher education through grants to universities, self-accrediting providers or non self-accrediting providers, these are known as higher education providers (HEPs). Various types of grants are described in s 3.5 of HESA including those under the Commonwealth Grant Scheme (CGS) for student places: Part 2-2; a range of grants under Part 2-3, and Commonwealth Scholarship grants under Part 2-4. Part 2-3 grants cover a wide range of areas including learning and teaching in higher education, equality of opportunity, productivity, superannuation liabilities, research and research training, collaboration and reform, infrastructure, quality, and open access. HEPs must meet any conditions of the grants and the quality and accountability requirements considered below: HESA s 41-25.

CGS funding is available to a range of public and private HEPs by specific agreement with each provider relating *inter alia* to the discipline mix and number of places to be provided. The amount will vary according to their classification as Table A, B or C providers. Category A are the public universities, Bond and Notre Dame Universities are in Table B, and Carnegie Mellon University is in Table C. Private providers can access CGS funding if the student place is in a national priority area such as teaching or nursing, funding agreements have been made, and quality and accountability conditions described below are met.

Other matters covered in HESA include provisions on review of decisions, indexation, and methods and administrative mechanisms of payment: HESA, Chapter 5.

2 The Conditions

If a condition is not met as specified in Parts 2-2, 2-3, and 2-4 a provider may have to repay a grant or have the grant reduced: HESA Part 2-5. The quality and accountability conditions described in HESA and summarised below relate to financial viability, quality, fairness, compliance, contribution and fees. If these quality and accountability requirements are breached the provider may lose its status as a HEP and its right to receive funding under the Act: HESA s 36-60.

A HEP must remain financially viable and has to report its audited financial position at regular intervals: HESA s 19-5. A HEP must operate at an 'appropriate' level of quality: HESA s 19-15 and submit to a quality audit¹¹ at least once every 5 years: HESA s 19-27. There are obligations on HEPs to treat their students and persons seeking to enrol fairly based on open and transparent selection procedures: HESA s 19-30. The fairness requirements also include the controversial voluntary student unionism provisions in HESA s 19-37.¹² Unless a Table A provider or otherwise exempted, a provider must comply with tuition assurance requirements:¹³ HESA s 19-40. HEPs must have grievance and review procedures for academic and non academic matters: HESA s 19-45. Special rules apply to non Table A providers.¹⁴ A HEP has to abide by information privacy requirements under the *Privacy Act 1988* (Cth) regarding personal information on students: HESA s 19-60. A HEP is obliged to provide information to the Minister as requested such as statistical information: HESA s 19-70; and information affecting the capacity of the HEP to meet

the quality and accountability requirements or other grant conditions: HESA s 19-75. A HEP must determine a student contribution amount for a unit in a course which is Commonwealth supported. Maximum amounts for the 12 discipline clusters are described in HESA s 93-10. The Minister is to be given schedules of these student contribution amounts: HESA s 19.95.

The recently repealed Section 33-17 of HESA provided for reduction to grants if universities failed to comply with the National Governance Protocols¹⁵ and the Higher Education Workplace Relations Requirements (HEWRRs).¹⁶ This section has been removed by the Higher Education Support Amendment (Removal of The Higher Education Workplace Relations Requirements And National Governance Protocols Requirements And Other Matters) Act 2008 (Cth). It should be noted that while this section has been repealed many of the effects of the governance protocols are now incorporated in relevant university legislation and aspects of the HEWRRs may well be contained in university enterprise bargaining agreements. In other words these protocols may still have a further life well after their formal removal.

The Australian Government recently commissioned a major review of Australian Higher Education, and a discussion paper has been released.¹⁷ It should be noted that those findings of the review which are accepted by government will probably find their way into law, where necessary, via conditional funding. The next section explains why that it the likely way forward and why regulation via the imposition of conditions is the norm in education.

III THE CONDITIONS AND THE LAW

The above analysis reveals extensive Commonwealth control over education matters across all three sectors. It can also be seen that intervention is highest at the university level. An examination of the conditions imposed also reveals that not all of these conditions are related to matters of a clearly identifiable national interest and most are not matters within an enumerated Commonwealth power in the Constitution. The Commonwealth appears to have achieved indirectly legal outcomes that it may not have been able to achieve directly. Accordingly, is such conditional funding lawful?

The sources of such Commonwealth funding at law include s 81 of the Constitution which provides:

81. All revenues or moneys raised or received by the Executive Government of the Commonwealth shall form one Consolidated Revenue Fund, to be appropriated for the purposes of the Commonwealth in the manner and subject to the charges and liabilities imposed by this Constitution

and s 96:

96. During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit.

A Section 81 Funding

Funding to universities comes directly from the Commonwealth and not via a state, suggesting that the funding source for universities has its origins in s 81. To date the constitutionality of this arrangement for universities has not been tested in the High Court, but for reasons considered below and in the section on standing that follows, it is not likely to be. Lane comments:

In practice – that is, because of Parliament’s permitted s 81 freedom or because of non-justiciability or a lack of standing, ... a s 81 exercise, even with expenditure and administration, will be contained by express limitations only, for example ss 92, 116, 117.¹⁸

As Lane implies the appropriation is not limited to matters over which the Commonwealth has constitutional power, such as the matters listed in s 51. More recently Craven, in discussing s 81 and the expression ‘for the purposes of the Commonwealth’, states ‘It is more or less established that this phrase denotes such purposes as the Commonwealth sees fit...’.¹⁹ He goes on to point out that:

It equally is clear that a power to grant includes a power to grant conditionally, so that the Commonwealth may impose such conditions as it desires and enter into a wide range of agreements for the grant’s execution and administration.²⁰

It is precisely this that the Commonwealth has done, resulting in legislation which will be very difficult to challenge, even if a suitable plaintiff with standing could be found. Such a plaintiff is unlikely to be a university as a recipient of the money, or a state or territory, given their limited financial support of universities.

Nevertheless, Craven imposes a caveat suggesting that ‘while the Commonwealth has an undoubted capacity to fund higher education and university bodies on a conditional and very directive basis its ability to exploit that capacity to create detailed administrative schemes is not without serious issues’.²¹

B *Section 96 Funding*

Grants made conditionally to states under s 96 are valid²² and have covered a wide range of matters, such as roads, the environment, health, and as seen in this paper, education. A key aspect to validity as appears in the extract below is that the conditions or ties imposed under s 96 must not be coercive on a state or force it to abdicate its powers.²³ Furthermore, the conditions must not offend an express prohibition in the Constitution such as s 116, which prohibits the establishment of a religion. The conditions are not limited to matters within the constitutional reach of the Commonwealth under s 51.²⁴ In *Attorney-General (Vic); Ex rel Black v Commonwealth*²⁵ (the DOGS case) the condition was that the grant would be paid by the states to non-government schools to finance recurrent and capital expenditure. The majority found that such payments were valid, and did not offend s 116. Wilson J said:

In the present state of the authorities, the legislation satisfies the requirements of s. 96 for a valid law. It is a non-coercive law which in terms grants money to each of the States “by way of financial assistance to the State”. The freedom of each State to decide whether to accept or reject the grant, however restricted it may be in a political sense, is legally fundamental to the validity of the scheme, and its existence as a matter of law cannot be denied. The conditions attaching to the grant are those to be determined by the Commonwealth, but this has always been so. It is not necessary that the grant should benefit the State Treasury directly, or that the purpose of the grant should be within the express legislative power of the Commonwealth, or that the State should be the instigator or even a party to the initiation of the scheme.²⁶

It appears therefore that the numerous conditions relating to education described above are valid. Accordingly, the states and universities are obliged to whistle (if slightly out of tune) the songs of the Commonwealth piper. Nevertheless, there are *locus standi* issues in this area.

C Standing

Who would have power to challenge a tied s 96 grant? The most likely answer would be a state via its attorney general. In DOGS Gibbs J stated:

In my opinion it is clear that the Attorney-General for Victoria has a locus standi to sue for declarations of the invalidity of the Acts in question in so far as they apply to schools in Victoria.²⁷

In that same case Gibbs J ‘gravely’ doubted whether the other plaintiffs in the case had standing to sue. Contrary to Murphy J,²⁸ he thought that the fact that they were taxpayers or parents of children in government schools did not give them a special interest in the subject matter of the action²⁹ within established principles and cases described in *Australian Conservation Foundation Inc v Commonwealth*.³⁰ The Commonwealth relied on these same principles in *Combet v Commonwealth*³¹ challenging the standing of the Mr Combet, Secretary of the ACTU and Ms Roxon, the shadow Commonwealth Attorney General, to bring an action against the validity of an appropriation of money for advertising the workplace relations reform package. The majority did not have to decide the question of standing because they upheld the validity of the expenditure, however McHugh and Kirby JJ expressed opinions in their separate dissents.

McHugh J did not have to resolve the standing of the ACTU secretary because he found that Ms Roxon obtained standing via her status as a member of the House of Representatives and as the shadow Attorney-General of the Commonwealth.³² He hinted that developments in the law relating to standing regarding general law matters might cause earlier decisions to be reconsidered.

Kirby J could see no reason for placing appropriation acts in a position of constitutional inviolability.³³ He thought Ms Roxon had standing as a member of parliament. He thought Mr Combet ‘may have had standing’ but it was unnecessary to express a final conclusion on the matter. Noting that the cases against Mr Combet having standing were over 50 years old, and there were more recent cases such as *Shop Distributive and Allied Employees Association*³⁴ where a union had established a special interest and been granted standing, Kirby J stated:

He, and the ACTU, have a direct interest to attempt to prevent the drawing of such money from the Treasury without lawful approval of a parliamentary appropriation for that purpose. Such an interest, whilst raising public law considerations, probably involves in this case the kind of mercantile and economic “special interests” often given weight in decisions on standing in private litigation.³⁵

There has also been a question as to whether a state attorney general has standing under s 81. This has been resolved in favour of the state attorney general.³⁶

One potential way for a citizen to gain access to the courts is via a relator action through a state (or Commonwealth³⁷) attorney general. In DOGS³⁸ this technique was used to challenge Commonwealth funding under s 96 for private schools as a breach of s 116 of the Constitution. It was run as a relator action through the Attorney General of Victoria. The then Attorney General of South Australia has subsequently described the reasons for his decision to not grant the fiat to run the case on behalf of that State:

The application seemed to me to raise two issues. First, did the argument possess sufficient legal merit to justify the case proceeding? Second, was it in the public interest that such a challenge should be pursued? As to the public interest issue, I consulted the Minister of Education. It was the South Australian Government’s policy to grant financial assistance

to non-government schools and the government supported the provision of such assistance by the Commonwealth. The Minister of Education took the view that if I was entitled to refuse the fiat, I should do so. To me, however, the public interest issue was not quite as simple as merely deciding whether Commonwealth aid to non-government schools was in the public interest. There was the further consideration whether, if there was any real doubt as to the constitutional validity of the grants, it was not in the public interest to have the matter resolved. In the end I refused the fiat on the grounds of insufficient merit and did not have to resolve the public interest issue. Cabinet was not consulted. That view of the merits was vindicated when, the Attorneys-General of Victoria and Tasmania having granted the fiat, the High Court rejected the challenge by a six to one majority.³⁹

This passage gives some insight into the processes and reasoning behind a state attorney general's decision to not intervene on behalf of citizens, and accordingly how difficult it may be to obtain standing via fiat.

Finally, it should be noted that the Commonwealth legislation does not necessarily stand alone, for example, states amended their university acts to give effect to the governance protocols, and similarly states and territories have adopted from time to time MCEETYA agreements in their statutes. If it is the condition which offends a plaintiff (as opposed to the grant of the money) a successful challenge will not necessarily remove it, if it has also become a matter of state law.

D *The Corporations Power*

The examination of conditional funding described in the first part of this paper graphically demonstrates just how much economic and political control the Commonwealth has over education, even over public schools, despite providing only about 10 per cent of public school funding.⁴⁰ Could it obtain even more direct *legal* power?

Section 51(xx) of the Constitution gives the Commonwealth power to make laws with respect to foreign corporations and trading and financial corporations formed within the limits of the Commonwealth. The breadth of the s 51(xx) power has been graphically illustrated in *New South Wales v Commonwealth of Australia*; *Western Australia v Commonwealth of Australia*⁴¹ (the *Work Choices* case). It is at least possible that a Federal Government may seek to legislate directly over existing educational institutions using this power, and indeed the previous Government threatened to do so in relation to universities in the 2007 budget.

The *Work Choices* decision affirms that the corporations power is not limited to the foreign, trading or financial aspects of foreign, trading or financial corporations but also allows the regulation of, *inter alia*, employer-employee relations within foreign, trading or financial corporations. However, the decision goes beyond that because it allows laws to be made whose objects of command are trading financial or foreign corporations. Laws can be passed which are not limited to trading financial or foreign activities of such corporations or to any notion that the laws only operate in relation to internal matters within the corporation.

The extent of the power was highlighted in Kirby J's dissenting judgment where he talks about the impact of the majority judgment on education and other fields:

The States, correctly in my view, pointed to the potential of the Commonwealth's argument, if upheld, radically to reduce the application of State laws in many fields that, for more than a century, have been the subject of the States' principal governmental activities. Such fields include education, where universities, tertiary colleges and a lately expanding cohort of private schools and colleges are already, or may easily become, incorporated. Likewise, in healthcare, where hospitals (public and private), clinics, hospices, pathology

providers and medical practices are, or may readily become, incorporated. Similarly, with the privatisation and out-sourcing of activities formerly conducted by State governments, departments or statutory authorities, through corporatised bodies now providing services in town planning, security and protective activities, local transport, energy, environmental protection, aged and disability services, land and water conservation, agricultural activities, corrective services, gaming and racing, sport and recreation services, fisheries and many Aboriginal activities. All of the foregoing fields of regulation might potentially be changed, in whole or in part, from their traditional place as subjects of State law and regulation, to federal legal regulation, through the propounded ambit of the corporations power.⁴²

What then are the limits on the use of the corporations power in relation to education?

The first is that s 51(xx) cannot be used to establish a corporation, unless an earlier High Court decision is reversed. This was the decision in *New South Wales v Commonwealth*⁴³ which held that s 51(xx) does not allow the Commonwealth to enact legislation in regard to the establishment or incorporation of a company. This prevents the Commonwealth using s 51(xx) to pass a law establishing a university or a school or for that matter an Australian Technical College (ATC). These much heralded though somewhat underwhelming institutions have their legislative base in the *Australian Technical Colleges (Flexibility in Achieving Australia's Skills Needs) Act 2005* (Cth). This Act does many things of a financial nature, and even talks about the 'establishment' of ATCs in s 4. The one thing it does *not* do is actually provide for the incorporation of an ATC, that would have to occur under other legislation, such as the *Corporations Act 2001* (Cth) which in turn is partly supported constitutionally by a reference of power from the states. If the Commonwealth used that reference to support legislation which a state did not support, it would run the risk that the state might withdraw the reference entirely. Under the Constitution such references of power are not permanent.

All this is well known to the Commonwealth:

The Commonwealth's corporations power does not give it the power to establish a university. While it may allow the Commonwealth to assume some accreditation functions (for example, to recognise an established body as a university and to accredit courses and providers), this would only be in respect of constitutional corporations.⁴⁴

A second constraint on the use of the corporations power is that it does not apply to all corporations, only to those that are foreign, trading or financial. A university has successfully argued that the *Workplace Relations Act 1996* (Cth) applies to it because it is such a constitutional corporation: thus in *Quickenden v Commissioner O'Connor of the Australian Industrial Relations Commission*⁴⁵ the University of Western Australia was held to be a trading corporation:

For it is plain that the other activities cited are trading activities and are a substantial, in the sense of non-trivial, element albeit not the predominant element of what the University does. The University was not established for the purpose of trading and at another time, closer to the time of its creation, it may not have been possible to describe it as a trading corporation. But at the time relevant to this case and at present, it does fall within that class.⁴⁶

The other activities referred to included university investments, buying, selling and renting of property, provision of student accommodation and sale of publications. Black CJ and French J thought it was questionable whether higher education contribution scheme (HECS) payments added to the trading categorisation, but the judges did not need to decide this, because they

otherwise found that the university was a trading corporation. Since that case, there has been a significant growth in universities charging fees to domestic and international students. Given the dominant position that universities now hold in relation to the ten billion export income in education per year⁴⁷ it would be very difficult to argue that any Australian university is not a trading corporation. What of schools and TAFE?

The first point is an obvious one, if schools and TAFE form part of a state crown they cannot be s 51 (xx) corporations, regardless of the level of trade they may be engaged in. If they are separately established as corporations either by a specific act or incorporated under an Act such as the *Corporations Act 2001* (Cth) or are private schools or colleges the situation may be quite different, and similar analysis as to the meaning of 'trading' that the Federal Court applied in *Quickenden* would have to take place. Even if schools and colleges are not charging domestic fees they may still be involved in the export trade in educational services described by Marginson⁴⁸. If the school is a systemic one the analysis will turn to the system itself and whether *it* is a corporation and one that trades, as opposed to one whose predominant objectives are charitable or religious and whose trading is merely trivial. It is likely that many private schools in Australia are trading corporations, and for these, especially given the level of Commonwealth funding, there is at least a possibility that a Commonwealth government could establish an entirely separate education system using the corporations power. Indeed if the Commonwealth government made belonging to a Commonwealth private schools system a condition of receiving Commonwealth funding they could completely control and run all aspects of the private school system including curriculum, assessment, management and staffing.

If the Commonwealth imposed a further obligation on these corporations to raise a proportion of their funds through activities that would fall within the concept of trading this would assist in ensuring that such schools were also constitutional corporations. Schools not incorporated would readily incorporate under the *Corporations Act 2001* (Cth) to gain access to such funding, and accordingly the gap in constitutional power would be overcome for practical purposes. This would bring approximately 30 per cent of school students⁴⁹ under the direct legal *and* economic control of the Commonwealth. It is not being suggested here that this is a necessarily a good or bad thing, but rather that there exists, at least for a significant part of the school sector and other private providers at the VET and higher education levels the possibility that the Commonwealth could move to a position of complete dominance.

IV CONCLUSIONS

The analysis earlier in this paper detailed just how extensive and pervasive Commonwealth control now is in education at *all* levels. It gets more so as a student progresses through the system culminating in extensive regulation of all aspects of universities, including their management, their employees and their students, despite the fact that universities are established under state and territory laws with the exception of the Australian National University. It was always more likely to be extensive at the university level because the states have largely, though not entirely, vacated that funding field. Nevertheless, the analysis above also demonstrates that even state school systems face extensive regulation despite receiving a relatively small amount from the Commonwealth government as direct funding.

There are no signs that a federal Labor Government will wind back federal intervention in education, though there are some early indications that it may take a more co-operative approach to the imposition of conditions and that it is undoing requirements to offer AWAs at the VET and

university levels. At the school level Labor party policy supports a national schools curriculum and, within a few weeks of taking government had taken the first steps to establish a National Curriculum Board by appointing its chair in January 2008.⁵⁰ In vocational education and training Labor policy is to commit \$2.5 billion to 'setting up Trades Training Centres in all of Australia's 2,650 high schools'.⁵¹ Statements from the Labor Party suggest that the Howard Government's Australian Technical Colleges may well go back into the state sector, or even the Catholic or private sectors.⁵²

Labor policy states: 'TAFE is, and will remain, the responsibility of State and Territory Governments under Commonwealth-State Agreements'.⁵³ Nevertheless the policy then goes on to describe a number of Commonwealth initiatives including an industry led training system and the establishment of Skills Australia.

At the university level the Government has commissioned a Higher Education Review previously described. The initial *Discussion Paper* has little to say about Commonwealth / State relations in the higher education sector, though it does point to the complications of needless bureaucracy where both the Commonwealth and a state are involved, this becomes a particular problem where the university also contains a vocational education component.⁵⁴

The Labor party is aware of criticisms relating to the overuse of conditional funding. Its advisory group recommends that:

...the conditionality currently present in many SPPs should be reduced, particularly where the conditions have nothing to do with the purpose of the program, such as flagpoles in schools or putting industrial relations conditions on program funding.⁵⁵

Others too have criticised the dangers in the conditionality. The Committee for Economic development of Australia (CEDA) commissioned a report by Professor Pincus. He gets to the nub of the matter:

Another possibility - more a probability - is that the states will be come to rely more heavily on specific purpose payments (SPPs). These are currently subject to review by treasurers, under COAG. To the extent that such payments accord with the principles of coordination and competition set out above, then they pose no great threat to the long-term vitality of the states. (The payments contemplated in the COAG statement of 20 December 2007 are of this type, offering payment on achievement of outcomes or outputs that the states would, in any case, generally want to achieve.)

But SPPs can be used to induce the states to spend on things they would not want to spend their own money on, and for which there is no valid coordination or competition purpose. At that point, the expansion of SPPs represents centralisation by stealth - and can pose a long-term threat to the satisfactory operation of the Australian federal system.⁵⁶

At the time of writing all state and territory governments (except Western Australia) and the Commonwealth government are Labor governments. This, and the fact that the Prime Minister was a senior state bureaucrat (Queensland), may strengthen the possibilities for a more co-operative model in the short term because of an overriding philosophical sameness. However this is not a long term and sustainable strategy to address the constitutional risks imposed by creeping federalism.

This paper has examined the situation in the three educational levels and has revealed direct interference in matters which constitutionally and traditionally belong at the state level. That is not to say that they should always remain so placed, or even that leaving those matters at the state level is necessarily a good thing in an increasingly globalised world. The appropriate

distribution of power within education needs far more debate: specifically, within the field of education, a case might be made for the transfer of regulation, control and funding over VET and universities to the Commonwealth. Such an approach recognises the national interest in vocational and professional education and training, especially in time of national skills shortages. A further approach designed to eliminate bureaucracy is to allow education which is presently heavily funded by the Commonwealth to be exclusively regulated by the Commonwealth. This last approach is a much more ‘piper / tune’ argument, suggesting that those who provide the funds for various levels of education should also be the regulators of those levels. The obvious problem with this approach is that it ultimately gives significant power to the Commonwealth because it remains the dominant tax collector.

The fundamental difficulty in the approach to date is that those big questions are not being asked in education, sufficient public debate is yet to occur and the Commonwealth, by stealth, has been moving into new fields. Accordingly, it is not so much what has been done but how it has been achieved. The difficulty of constitutional change in Australia is very obvious, nevertheless, that is *precisely* what is needed, and it has been achieved in Australia in the past where the political parties have reached agreement on the changes needed prior to a referendum.

The cases on standing discussed earlier show how difficult it is to challenge Commonwealth conditional payments. Those cases also tell us that a condition does not have to be within the constitutional powers of the Commonwealth. One possible constitutional amendment could be to require the Commonwealth to satisfy a national interest test before it could impose a condition, and to then give standing to citizens to challenge the grant. Another possibility would be to allow conditions to be imposed that only relate to an enumerated power in the Constitution.

The overwhelming thirst for money from schools, TAFE and universities from a cashed up Commonwealth has revealed a propensity by the states and the universities to agree to a range of conditions, which in many cases represent direct interference with matters not traditionally within the ambit of the Commonwealth. In such an environment state governments are becoming increasingly irrelevant, and are active, and at times, willing participants in a gradual transfer of power to the Commonwealth. The *Work Choices* decision further reveals that this process may be merely at its infancy because it confirms earlier decisions which transfer effective and significant power to the Commonwealth *without* a referendum.

Keywords: constitution; grants, education, schools, TAFE, university.

ENDNOTES

1. *The King v The University of Sydney* [1943] HCA 11.
2. Ibid.
3. Council of Australian Governments, *Intergovernmental Agreement on the Reform of Commonwealth-State Financial Relations* (1999) <http://www.coag.gov.au/intergov_agreements/docs/reform_of_comm-state_financial_relations.cfm> at 2 November 2008.
4. Ministerial Council on Education, Employment, Training and Youth Affairs (MCEETYA), *National Goals for Schooling in the Twenty-First Century* (1999) <http://www.dest.gov.au/sectors/school_education/policy_initiatives_reviews/national_goals_for_schooling_in_the_twenty_first_century.htm> at 2 November 2008.
5. Ministerial Council on Education, Employment, Training and Youth Affairs (MCEETYA), *National Safe Schools Framework* (2003) <http://www.dest.gov.au/sectors/school_education/publications_resources/profiles/national_safe_schools_framework.htm> at 2 November 2008.

6. More detail on national benchmarks, performance measures and targets is contained in Part 2 of the Regulations: *Schools Assistance (Learning Together Achievement Through Choice and Opportunity) Regulations 2005* (Cth).
7. More detail on student reports is contained in Part 2.3 of the Regulations: *Schools Assistance (Learning Together Achievement Through Choice and Opportunity) Regulations 2005* (Cth).
8. There have been few constitutional cases relating to education. One such case is *Attorney-General (Vic); Ex rel Black v Commonwealth* ([1981] HCA 2) where it was held that grants made to non-government schools (including religious schools) did not offend s 116 of the Constitution which prohibits the establishment of a religion.
9. Julia Gillard, *Skills Australia Bill 2008* Second Reading Speech, House of Representatives, *Hansard* Wednesday, 13 February 2008, 13.
10. Controversial provisions included by the Howard Government in this sub-section relating to the obligation on TAFE to offer AWAs were removed by s 281 of *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008* (Cth).
11. For Table A and a number of other providers the audit will be performed by the Australian Universities Quality Agency (AUQA): Chapter 5 of the Higher Education Provider Guidelines made under HESA 238-10.
12. The Australian Vice Chancellors' Committee obtained advice in 1999 that the version of the bill at that time may have been unconstitutional. *Opinion* from Minter Ellison in *AVCC Submission to the Senate Employment, Workplace Relations Small Business and Education Committee Inquiry into the Higher Legislation Amendment Bill 1999*, Parliament House, Canberra, 1999, 1. One argument is that VSU may involve the imposition of a condition without a reciprocal benefit: A Norton, 'Commonwealth Control of Universities' (2005) 12 *Agenda* 99, 102.
13. For tuition assurance see the *Higher Education Provider Guidelines*, Chapter 2 made under HESA s 238-10(1).
14. *Higher Education Provider Guidelines*, Chapter 4 made under HESA s 238-10(1).
15. The *National Governance Protocols* were contained in the *Commonwealth Grant Scheme Guidelines* made under HESA s 238.10.
16. The *Higher Education Workplace Relations Requirements* were contained in Chapter 7.25 of the *Commonwealth Grant Scheme Guidelines* made under HESA s 238.10
17. Denise Bradley, Peter Noonan, Helen Nugent and Bill Scales, *Review of Australian Higher Education Discussion Paper* (June 2008) <http://www.dest.gov.au/sectors/higher_education/policy_issues_reviews/reviews/highered_review/#Review_of_Australian_Higher_Education_Discussion_Paper_June_2008> at 2 November 2008.
18. PH Lane, *Lane's Commentary on the Australian Constitution* (2nd ed, 1997), 649.
19. G Craven, 'Commonwealth Power over Higher Education: Implications and Realities' (2006) 1 *Public Policy* 1, 7 (citing *Davis v Commonwealth* (1988) 166 CLR 79).
20. *Ibid* 7.
21. *Ibid* 7 (citing *Victoria v Commonwealth* (1975) 134 CLR 338).
22. *Victoria v Commonwealth* (1926) 38 CLR 399; *South Australia v Commonwealth* [1981] HCA 2.
23. *South Australia v Commonwealth* (1942) 65 CLR 373.
24. *Attorney-General (Vic) (at the Relation of Dale) v Commonwealth* [1945] HCA 30.
25. *Attorney-General (Vic); Ex rel Black v Commonwealth* ([1981] HCA 2).
26. *Ibid* [54].
27. *Ibid* [6].
28. Murphy J took a very wide view: 'A citizen's right to invoke the judicial power to vindicate constitutional guarantees should not, and, in my opinion, does not, depend upon obtaining an Attorney-General's consent. Any one of the people of the Commonwealth has the standing to proceed in the courts to secure the observance of constitutional guarantees. Objections to wide standing have no merit.', *ibid* [45].
29. *Ibid* [6].
30. *Citing Australian Conservation Foundation Inc v The Commonwealth* (1980) 146 CLR 493, 526-528.
31. *Combet v Commonwealth* [2005] HCA 61.
32. *Ibid* [97].
33. *Ibid* [300].

34. *Shop Distributive and Allied Employees Association* [1995] HCA 11.
35. *Combet v Commonwealth* [2005] HCA 61, [312], [313], footnote 279.
36. *Victoria v Commonwealth* [1975] HCA 52, however Stephen J could not find standing: ‘The State itself has no concern with the mode of expenditure of federal revenue unless it be associated with some claim to surplus revenue of the Commonwealth under s. 94 of the Constitution ...’ ([12]).
37. Relator actions in constitutional litigation are not common, and rarely granted by the Federal Attorney-General as noted in *Re McBain* [2002] HCA 16, 156: ‘This Court was informed that the last fiat granted by a Federal Attorney-General in such proceedings was given more than a decade ago. The spectacle of the Attorney-General appearing, in partly contradictory interests, in connected proceedings before the Court, is rarer still. No precedent could be cited where this had previously happened.’
38. *Attorney-General (Vic); Ex rel Black v Commonwealth* ([1981] HCA 2).
39. Honourable L.J. King AC QC, ‘The Attorney-General, Politics and The Judiciary’ (Paper presented at the Fourth Annual Colloquium of the Judicial Conference of Australia, Melbourne, 13 November 1999). The recently repealed Section 33-17 of HESA provided for reduction to grants if universities failed to comply with the National Governance Protocols 15 and the Higher Education Workplace Relations Requirements (HEWRRs).¹⁶ This section has been removed by the Higher Education Support Amendment (Removal of The Higher Education Workplace Relations Requirements And National Governance Protocols Requirements And Other Matters) Act 2008 (Cth). It should be noted that while this section has been repealed many of the effects of the governance protocols are now incorporated in relevant university legislation and aspects of the HEWRRs may well be contained in university enterprise bargaining agreements. In other words these protocols may still have a further life well after their formal removal.
40. Simon Marginson, ‘Federal/state Relations in Education and the 2006 Work Relations Case’ (Institute of Public Administration Australia (IPAA) & Academy of Social Sciences Australia (ASSA) Policy Roundtable on Federalism, Canberra, 17-18 May 2007) 5 <http://www.cshe.unimelb.edu.au/people/staff_pages/Marginson/Fed_state_Marginson.pdf> at 2 November 2008.
41. *New South Wales v Commonwealth of Australia; Western Australia v Commonwealth of Australia* [2006] HCA 52 (14 November 2006)
42. *Ibid* [579].
43. *New South Wales v Commonwealth* (1990) 8 ACLC 120.
44. The Hon Brendan Nelson MP, *Building Better Foundations for Higher Education in Australia: A Discussion about re-aligning Commonwealth State Responsibilities* (2005), 20.
45. *Quickenden v Commissioner O’Connor of the Australian Industrial Relations Commission* [2001] FCA 303 (23 March 2001).
46. *Ibid* [51].
47. Marginson, above n 41, 8.
48. *Ibid*.
49. Marginson states that private schools educate 30% of school students and that the federal government now provides more than half the moneys received by private schools: *ibid* 5.
50. The Prime Minister and the Deputy Prime Minister, ‘First Steps towards a National Curriculum’ (Joint Press Release, 30 January 2008) <http://www.pm.gov.au/media/Release/2008/media_release_0050.cfm> at 2 November 2008.
51. B McMullan, ‘Federal/State Relations: Labor’s 10-point Plan Media Statement’ (Press Release, 6th September 2007) and see also Australian Labor Party, *Skilling Australia for the Future* (2007) 17 <http://www.alp.org.au/download/now/campaign_launch_skills_policy.pdf> at 2 November 2008.
52. S Smith, ‘Federal Labor Outlines Education Plans for Townsville Media Statement’ (Press Release, 5th September 2007).
53. Australian Labor Party, above n 61, 11.
54. Bradley, Noonan, Nugent and Scales, above n 19, 67, 68
55. B McMullan, ‘The Reform Challenge For Federal/State Relations Media Statement’ (Press release, 31st July 2007).
56. Jonathan Pincus, *Six Myths of Federal-State Financial Relations* (2008) Committee for Economic Development of Australia <http://ceda.com.au/public/research/federal/six_myths_federal_state.html> at 2 November 2008.