

Commonwealth Power Over Higher Education: implications and realities*



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This paper explores the Commonwealth's power over universities. First it considers the extent of Commonwealth constitutional power as a matter of strict law and second it considers that constitutional power within a wider legal, administrative and practical context. The paper reaches four general conclusions: (i) the Commonwealth enjoys significant direct constitutional power over higher education; (ii) the Commonwealth has significant power to influence and form higher education policy indirectly through conditional funding of universities; (iii) notwithstanding its direct legislative power and its capacity for indirect financial influence, critically the Commonwealth presently lacks the cohesive constitutional power necessary to regulate the universities directly and comprehensively, although this may change in light of an impending decision of the High Court; (iv) in light of this analysis, any genuine attempt at national higher education legislation or regulation by the Commonwealth would, at present, have to be based upon significant cooperation with the States.

This paper explores the extent of the power of the Commonwealth over higher education generally and universities in particular. Within this general purpose, it seeks to do two things: first, to consider the extent of Commonwealth constitutional power as a matter of strict law; and second, to consider that constitutional power within a wider legal, administrative and practical context. Achievement of this second aim involves placing the legal aspects of Commonwealth power within a context of legislative and policy reality.

In broad terms, the paper reaches four general conclusions. The first is that the Commonwealth enjoys some significant direct constitutional power over the area of higher education. The second is that the Commonwealth possesses a very significant power to influence and form higher education policy indirectly, primarily through the mechanism of conditional funding to higher education institutions. The third, and critical, conclusion is that notwithstanding its direct legislative power and its capacity for indirect financial influence, the Commonwealth presently lacks the cohesive constitutional power necessary to regulate the higher education sector directly in any comprehensive way — although this position may change in light of an impending decision of the High Court. The final conclusion reached is that, in light of this analysis, any genuine attempt at national higher education legislation or regulation by the Commonwealth would, at least at the present, have to be based upon a significant degree of cooperation with the States.

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Context

At least three important contextual factors condition the exercise of Commonwealth power in connection with higher education. The first is historical. The Commonwealth never was intended to possess legislative power over Universities, these being regarded as falling within the general residue of power preserved by the Constitution to the States. Indeed, falling outside all the enumerated powers of the Commonwealth contained in section 51, universities are something of a classic instance of continuing State power.¹ The reality of federal involvement in higher education is that it is an unintended consequence of the failure of the financial settlement under the Constitution, which left the Commonwealth flush with funds, and the States with insufficient revenue to meet their policy obligations, including those posed by Universities.²

The second point is that the apparent ambitions of the Commonwealth in relation to higher education clearly comprise only a part of a much wider centralising direction. This wider direction includes incursions into such fields as industrial relations, school education, health, defamation, taxation and the control of ports. Collectively, these initiatives represent the most intense attempt to centralise power within the Australian federation since the Second World War.³

The third point is practical in nature. In considering the extent of Commonwealth power over any particular subject matter, including higher education, there inevitably will be a fundamental difference between the conclusion that the Commonwealth enjoys substantial as opposed to total power. The reason for this is that, once power over a particular subject is divided, even into relatively unequal parts, the regulation of that subject matter will be exponentially more complicated. This is the so called 'mosaic effect', whereby cohesive regulation is rendered problematic by a pattern of scattered responsibility. The practical result in the present context is that the more gaps that exist within Commonwealth power to regulate higher education, the less practical a Commonwealth-based national scheme will become, even accepting the existence of very significant Commonwealth constitutional power.

The range of Commonwealth legislative and regulatory ambitions

One important preliminary question here concerns the identity of those aspects of higher education that the Commonwealth Government might wish to regulate. Clearly, the capacity of the Commonwealth to regulate 'higher education' will depend entirely upon those aspects of the sector that it does indeed wish to control. The general point here is that the Commonwealth's ambitions seem to be highly elastic. Thus, on the basis of its published discussion papers,⁴ two points may be made. First, the Commonwealth appears to wish to regulate as much of the higher education industry as its constitutional powers, expansively understood, will allow. Second, within this wide ambition, the Commonwealth recognises that difficulties attend the regulation of several topics.

¹ For example, the Founding Fathers had no doubt that despite the fact that universities were corporations, they were not trading corporations, and so fell outside the corporations power contained in section 52(20): see the comments of Isaacs J. in *Huddart Parker and Co. Pty. Ltd. v. Moorehead* (1909) 8 C.L.R. 330, 394. The Constitution preserves to the States all powers not conferred specifically upon the Commonwealth: see *Constitution*, section 107.

² As to which see generally Saunders (1986).

³ The classic exposition of the Howard Government's new federalism is contained in the address of Prime Minister John Howard on 11 April 2005 to the Menzies Research centre entitled 'Reflections on Australian Federalism': <http://www.pm.gov.au/news/speeches/speech1320.html>

⁴ The most relevant publications are DEST (2004) and DEST (2005)

Again on the basis of its discussion papers, a number of specific topics would appear to be subject to Commonwealth ambitions. The first is the accreditation and establishment of higher education institutions, including universities (DEST 2004:15; DEST 2005:18–20). The second is the governance of higher education institutions, including the constitution of their councils and other governance bodies (2004:10–11; 2005:10–11). The third is overall control of their teaching and syllabus arrangements, including teaching quality and degree offerings.⁵ The fourth is control of the overall research profile of universities, including their basic research directions, priorities and funding.⁶ The fifth is the ownership and management of university land, including its enjoyment, sale and other disposition (2004:10; 2005:5–6, 14). The sixth is the control of the commercial operations of higher education institutions, including the business forms of those operations, and the parameters for their deployment (2004:11; 2005:7–9). The seventh comprises the reporting and accountability regimes for higher education institutions, including regimes relating to finance, teaching quality and other academic activities (2004:12–13; 2005:12–13). The eighth matter concerns the general law as it applies to higher education universities, comprehending everything from workers' compensation legislation to freedom of information regimes (2004:10, 11, 13; 2005:14–15). Finally, the Commonwealth clearly is interested in the possibility of a national higher education regime, including the creation of a national higher education authority and the enactment of over-arching higher education legislation (2004:18–21; 2005:18–21).

This summary should not be regarded as stating exhaustively the extent of Commonwealth ambitions in respect of higher education, or as suggesting that the degree of Commonwealth focus is uniform across the range of subjects. All that is suggested is that each topic is, currently, a matter of Commonwealth interest. It also should be noted that Commonwealth constitutional capacity will vary significantly depending upon which area of higher education is involved, as will be seen presently.

The strict constitutional capacity of the Commonwealth

An assessment of the strict constitutional capacity of the Commonwealth effectively divides itself into three parts. The first concerns a bundle of constitutional powers that undoubtedly permit the Commonwealth directly to regulate certain aspects of the higher education sector, although they very clearly do not allow the Commonwealth to regulate its totality. The second concerns a single constitutional power of the Commonwealth that sometimes is put forward as allowing direct regulation of all or most of the field of higher education – claims which will be seen to be exaggerated. The third matter concerns the Commonwealth's established power to shape higher education, not through direct legislation, but through the making of grants of financial assistance to higher education institutions upon terms and conditions. This power is prodigious, but not without its limitations.

The starting point for any consideration of the Commonwealth's constitutional power over higher education must be to note that it possesses no specific power over such subjects as 'education', 'higher education' or 'universities' in general. The absence of such a specific power

⁵ Emerging chiefly through agendas relating to quality assurance and accountability (2004:12-13; 2005:12-13).

⁶ The Commonwealth already exercises substantial control over the research priorities of Universities through the activities of such national bodies as the Australian Research Council and the National Health and Medical Research Council. The Commonwealth's strategic influence over research priorities is perhaps best expressed in its establishment of National Research Priorities, substantially effected in a university context through the Australian Research Council: see Department of Education, Science and Training, *The National Research Priorities and their Associated Priority Goals*. <http://www.dest.gov.au/NR/rdonlyres/AF4621AA-9F10-4752-A26F-580EDFC644F2/2846/goals.pdf>.

inevitably means that any attempt by the Commonwealth to legislate in this field will be attended by significant challenges.

(i) Specific powers concerning higher education

As noted above, the Commonwealth Parliament does enjoy certain narrow, specific powers that indisputably confer legislative capacity in relation to particular aspects of higher education. The most obvious is section 51(xxiiiA),⁷ which among other things grants power to the Commonwealth in respect of the provision of benefits to students. Some existing pieces of Commonwealth legislation — notably, parts of the *Higher Education Funding Act* — owe much of their constitutionality to this provision. This power, however, is very limited, and does not go beyond the provision of benefits to authorise the making of wider legislation to the general advantage of students. Notably, the power is not expressed in the much broader form of a capability to make laws generally ‘to the benefit of students’, and thus does not permit the regulation of such matters as, for example, teaching or university governance.⁸

A less obvious, but relevant Commonwealth power, is the so-called implied power from nationhood.⁹ This power, discerned by the High Court as a necessary implication from the Constitution, permits the Commonwealth to exercise limited executive (and some legislative) power, where the existence of that power is intrinsic to the existence of Australia as a nation state. Thus for example, the creation of the CSIRO as a body of national scientific research presumably would be justified by reference to this power (see Zines 1992:258). Similarly, the power might permit some limited control over aspects of higher education by the Commonwealth, most notably in relation to the establishment of a national research agenda, or some similarly national purpose. This said, the power has been strictly confined by the High Court by reference to the imperative of maintaining the federal balance, and has been narrowly interpreted in this context (Zines 1992:259). It certainly would not extend to a comprehensive or substantial regulation of the higher education sector as a whole on the basis of some suggested need for cohesive national control.

Other powers possessed by the Commonwealth may be tangentially relevant. One example would be section 51(xxix) the external affairs power, which broadly permits the Commonwealth to implement international agreements, or at the very least obligations loosely imposed under such agreements.¹⁰ Its relevance in the present context, however, is limited in the short term by the absence of appropriate international conventions imposing relevant obligations,¹¹ and in the long term by the implausibility of such conventions ever being concluded in a degree of specificity sufficient to authorise significant legislative activity in relation to higher education.¹² Another broadly relevant power section 51(ii) the taxation power, the use of which obviously could influence the shape of the higher education sector through the grant of concessions or the imposition of enhanced rates of taxation,¹³ but which hardly represents a cohesive basis for the development of higher education policy.

⁷ Inserted after referendum by the *Constitution Alteration (Social Services) Act 1946*.

⁸ The section merely confers power in respect of a class of activities, rather than a power to make laws for a range of purposes: see *Higgins v. Commonwealth* (1998) 79 FCR 528.

⁹ As expressed by the High Court in such cases as *Victoria v. Commonwealth and Hayden* (1975) 134 CLR 338; *Davis v. Commonwealth* (1988) 166 CLR 79.

¹⁰ *Commonwealth v. Tasmania* (the Dams Case) (1983) 158 1; *Richardson v. Forestry Commission* (1988) 164 CLR 261.

¹¹ Article 28 (1) of the *United Nations Convention on the Rights of the Child* does very vaguely bind Australia to “Make higher education accessible to all on the basis of capacity by every appropriate means.”

(ii) Major suggested power — the corporations power, section 51(xx)

The corporations power currently is being put forward as the primary potential basis for the regulation by the Commonwealth of the higher education sector. The relevant portion of that provision allows the Commonwealth Parliament to make laws regarding “trading corporations”.¹⁴ There are two relevant questions regarding the application of the corporations power to higher education institutions generally, and to universities in particular. The first is whether they are indeed trading corporations, and so fall within the ambit of the provision. The second relates to which activities of higher education institutions as trading corporations legitimately may be regulated by the Commonwealth under section 51(xx).

To take the first question, universities obviously are corporations for the simple reason that they overwhelmingly are incorporated under their own legislation, enacted by the relevant State parliaments. The issue, therefore, is whether or not they are ‘trading’ corporations. It is quite clear that the Framers of the Australian Constitution never intended that universities should be regarded as trading corporations, a fact reflected in the comments of Sir Isaac Isaacs during the Convention Debates. It is, however, equally clear that they are today regarded by the nation’s courts as constituting such corporations. This follows from the fact that the test of a trading corporation developed by the High Court in such decisions as *Tasmania v. Commonwealth* turns not upon the nature or character of a corporation (on which basis universities presumably would be ‘educational’ rather than ‘trading’ corporations) but rather upon whether or not a corporation conducts “significant” or “substantial” trading activities.¹⁵ Here, it is quite clear that any modern university inevitably will conduct significant trading activities, whether through running bookshops, the sale of notes, the provision of student accommodation or otherwise. Consequently, it is beyond doubt that all Australian universities are trading corporations in a constitutional sense, and this was confirmed by the Federal Court in the specific context of the University of Western Australia in *Quickenden* in 2001.¹⁶

An altogether harder question relates to the range of activities of universities and other higher education institutions that the Commonwealth may regulate on the admitted basis that they are trading corporations. The difficulty here arises by virtue of the fact that it seems from the judgements of the High Court that merely because a corporation is a trading corporation, it does not follow that the Commonwealth will be able to regulate the entirety of its activities. The general approach followed in cases such as *Dingjan*¹⁷ is that only those activities connected — on a very generous understanding — with the trade of a trading corporation will be regulable activities under section 51(xx). In practice, this category of activities has included the actual trading activities of a trading corporation; other activities very broadly undertaken for the purposes of trade; and even activities of third parties (such as unions), where those actions have a substantial effect upon the trade-related operations of a trading corporation. Beyond these clear categories of activity, the Commonwealth will only be able

¹² A law must implement a stipulation of a treaty, not merely legislate upon its general subject: *Victoria v Cth* (1996) 187 CLR 416.

¹³ It is established that the taxation power may be exercised by reference to consideration entirely extraneous to taxation:

R. v Barger (1908) 6 CLR 41. It thus would be theoretically possible for commonwealth to impose taxes upon universities (as corporations) that did not comply with particular Commonwealth policies.

¹⁴ See e.g. DEST 2005:8, 11, 15, 19.

¹⁵ See e.g. *State Superannuation Board v. Trade Practices Commission* (1982) 150 CLR 282; *Commonwealth v. Tasmania* (1983) 158 1.

¹⁶ *Quickenden v. O’Connor* (2001) FCA 303.

to regulate the activities of a trading corporation under section 51(xx) if there is a sufficient connection between the law in question and the character of a corporation as a 'trading corporation'. The reality of this somewhat opaque test might more simplistically be rendered as meaning that the extended activities of a trading corporation will have to display a real 'business' or 'corporate' character before they may be regulated under section 51(xx).

Applying these judicial criteria to the case of universities, it is perfectly clear that there will be a sizeable proportion of the activities of those institutions that could be readily regulated by the Commonwealth Parliament, either as comprising trade as such, or as comprising activities broadly undertaken for the purposes of the trade. Such activities will include the entry into consultancies for profit, the conduct of public events for profit, and a wide range of commercial arrangements, including such matters as investment, borrowing, and student accommodation.

By way of contrast, the actual provision of education through teaching and the awarding of degrees, and all the processes attending¹⁸ that process such as examinations, assessment and quality assurance, will be much harder to fit within any concept of trade or trade-related activities. Putting the matter at its simplest, there would seem to be two profound difficulties in so regarding such activities. First, the higher educational process self-evidently contains many fundamental non-commercial elements — instructional, pedagogical, scholarly and assessing — which together sit very uneasily with any notion of a simple 'trade' or 'trade-related' paradigm. Second, the Commonwealth's own intense regulatory intrusions into what might be termed the higher education relationship might well be such as to deny to many of its components any real connection with 'trade', a possibility noted by the Federal Court in *Quickenden*.

Indeed, it would be reasonable to assume on the basis of existing authority that, as a matter of constitutional reality, the Commonwealth would face extreme difficulty in attempting to regulate those aspects of the operations of universities that are not easily characterised as trading activities, activities undertaken for the purpose of trade, or activities having a special business or corporate character within the *Dingjan* test. Realistically, this category of activities would include all or most of those relating to governance, teaching and research. The working conclusion, therefore, must be that while the corporations power presently gives the Commonwealth Parliament a significant power to regulate the broadly commercial and corporate activities of universities, it confers only a very limited power in relation to their wider educational undertakings. Beyond this, it certainly confers no power for the achievement of such wider Commonwealth regulatory objectives as the creation of a wide-ranging national higher education authority, or the enactment of comprehensive national higher education legislation.

All this, however, is subject to one fundamental caveat. Presently before the High Court is the challenge of the States to the Commonwealth's *Work Choices* legislation.¹⁹ That legislation seeks to regulate a whole variety of aspects of what might be termed the 'industrial envelope' of trading corporations, with many of these aspects falling well-beyond the category of trade and trade-related activities that traditionally form the heart of the corporations power. The only basis upon which the *Work Choices* legislation could be upheld in its entirety by the Court would be that the Commonwealth's corporations power did

¹⁷ *Re Dingjan: Ex parte Wagner* (1995) 183 CLR 323.

¹⁸ *Quickenden v. O'Connor* (2001) FCA 303.

indeed extend to the regulation of all the activities of trading corporations, including those entirely divorced from the trading activities of such corporations, and from any aspect of their corporate character.²⁰ This is precisely the submission of the Commonwealth in the *Work Choices* case, and if it is accepted, it would greatly expand the Commonwealth's power to regulate higher education. Put simply, the Commonwealth would be able directly to regulate all activities of universities as trading corporations, including such activities as teaching and research. The limited relevance of the corporations power to regulation of Australian higher education therefore may undergo a very sudden and dramatic revision over the next six months.

(iii) Commonwealth power in respect of funding

In practical terms, the Commonwealth's funding power is an enormously important one in the context of higher education. Section 81 of the Constitution allows the Commonwealth Parliament to appropriate money "for the purposes of the Commonwealth". It is now more or less established that this phrase denotes such purposes as the Commonwealth sees fit,²¹ so that the Commonwealth effectively is empowered to appropriate money by way of grant to such entities as it deems proper. 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. The relevant effect of this in the field of higher education are, first, that the Commonwealth may make grants of financial assistance to universities and other entities of higher education: and second, may impose upon such grants intricate contractual conditions requiring the performance of a wide range of duties that may or may not relate directly to the subject matter of the grant.

To a limited extent, the Commonwealth also may use its incidental power²² to give such schemes a legislative form, although the exercise of Commonwealth legislative power in this way is both complex and limited, and the whole question of the capacity of the Commonwealth to legislate in pursuance of appropriations and financial agreements is far from resolved.²³ Nevertheless, one theory of that capacity underlies at least parts of such legislation as the *Higher Education Funding Act* and the *Higher Education Support Act*. The net result is 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.

(iv) Two complications

The first complication in relation to Commonwealth power over higher education is comprised in section 51(xxxi). This provides that where the Commonwealth Parliament makes a law for the compulsory acquisition of the property of any State or person (potentially including the property of a university), the law in question must provide for acquisition on just terms: or in other words, for fair monetary compensation. This provision might have some application to a range of the more extreme options in relation to Commonwealth control over higher education, such as the passage of a Commonwealth law purporting to transfer universities

¹⁹ As embodied in the *Workplace Relations Amendment (Work Choices) Act* 2005.

²⁰ This analysis is based on Craven (2006).

²¹ *Davis v. Commonwealth* (1988) 166 CLR 79.

²² Constitution, section 51(xxxix).

²³ See e.g. *Victoria v. Commonwealth* (1975) 134 CLR 338.

(along with university property) from their present status as State statutory corporations, to that of statutory corporations of the Commonwealth. The most obvious reason for this would be that, under the various pieces of State university legislation around Australia, the States continue to have a complex proprietary relationship with many categories of university land.²⁴ The result of this would be that 'conversion' of universities into legislative creatures of the Commonwealth, with the consequent extinction of any relevant State interests in their land, might involve a compulsory acquisition of those interests under section 51(xxxi).

The second complication is, in some senses, a positive one from the perspective of the Commonwealth, in that it does indeed involve a constitutional provision that could provide an effective means by which the Commonwealth might obtain legislative power over higher education and the universities. The difficulty is that employment of this means necessarily would involve the cooperation of the States.

The provision concerned here is section 51(xxxvii) of the Constitution, under which the parliaments of the States may refer power over particular subject matters to the parliament of the Commonwealth. The obvious possibility in the present context would be a referral of power by all the States over higher education, universities, or some other appropriate subject. This clearly would provide the Commonwealth with the legislative power required. The option is, however, attended by at least two serious difficulties. The first is that its deployment would require the active cooperation of the States, something in short supply in the current poisonous atmosphere of Commonwealth–State relations. A second problem is the potential revocability of a reference of power, with most constitutional authorities opining that a State can withdraw reference,²⁵ with the consequent possibility that it might at some future date undermine a Commonwealth legislative regime over higher education. Given the political and policy realities, however, this probably is more of a theoretical than a practical consideration.

Notwithstanding these two potential difficulties, the invocation of the reference power is in principle the most effective possible means by which the weaknesses of the Commonwealth regulatory power over higher education could be supplemented so as to produce a comprehensive national regime. One obvious approach would be for the reference power to be used, not to confer some broad power over 'higher education', but quite surgically by way of 'spot references', granting the Commonwealth specific powers at whichever points its own capacities were regarded as being most weak. It certainly is true that the reference power provides the most obviously effective means by which the Commonwealth could pursue what might be called a 'mega-agenda' in relation to higher education: the creation of a fully-articulated national higher education authority, and the enactment of truly national, regulatory higher education legislation.

²⁴ See e.g. *Melbourne University Act 1958 (Vic.)*, sections 41A, 41B; *Queensland University of Technology Act 1998 (Qld.)*, section 48.

²⁵ See e.g. *Graham v. Paterson* (1950) 81 CLR 1, 18 (Latham C.J.).

Legal Conclusions

The general legal conclusions to be reached here are those already anticipated in the introduction to this paper. The first is that the Commonwealth has extensive powers regarding higher education. The second is that these powers are not presently sufficient to allow a substantial Commonwealth takeover of the higher education sector, although this conclusion may need to be revised in light of the result of the Work Choices litigation.

To this it might be objected that the Commonwealth has no need of formal legislative powers so long as it can rely upon its financial muscle. It certainly is true that the Commonwealth possesses vast financial power, and that it can achieve a great deal in the field of higher education by the exercise of fiscal pressure. Nevertheless, it needs to be accepted that financial power always will be inferior to legislative competence in a number of ways.

First, the deployment of that power typically will be by such executive means as contracts and agreements, which will not be the subject of parliamentary enactment or direct parliamentary scrutiny, and thus involves a deeply unaccountable and non-transparent exercise of governmental power. Second, such exercises of executive power have drawbacks from the point of view of an incumbent Commonwealth Government, as their lack of legislative status means that they may be readily changed by any future government without the need for repeal and amendment. Third, it is constitutionally difficult for the Commonwealth to base detailed administrative and policy schemes merely upon the foundations of financial arrangements, and it is particularly difficult to base any legislative or quasi-legislative schemes upon such arrangements. Fourth, the regulation of higher education indirectly by means of financial power is a classic example of dysfunctional federalism, involving a divided accountability for the sector, with the Commonwealth exercising fiscal dominance but the States retaining legislative control. Fifth, the regulatory apparatus resulting from fiscally-based control inevitably is opaque, complex and difficult to understand. The final difficulty is one of psychology: so long as the Commonwealth merely is the paymaster rather than the formal regulator, it never can consider itself to be in strategic control of the higher education sector.

It is, perhaps, a useful exercise in light of the various legal positions that have been expressed in this paper to undertake a brief constitutional roll call of the regulatory aspects of higher education in which the Commonwealth Government presently seems to be interested, and to consider the extent of its constitutional power over each area. To begin with, in terms of accreditation and establishment of higher education institutions, the Commonwealth possesses no obvious constitutional power to control such processes, and it is in particular quite clear that the corporations power would not easily extend in that direction. Moreover, it may be noted (as conceded by the Commonwealth) that it would be practically difficult to regulate such activities by virtue of an exercise of the Commonwealth's financial power. This field of activity, therefore, falls to the States, unless they should chose to refer it to the Commonwealth under some appropriate arrangement, or until the corporations power is significantly expanded by judicial interpretation, as shortly may (or may not) be the case.

In terms of governance of universities, the Commonwealth again possesses no direct power, and it likewise would be exceedingly difficult to argue successfully that the corporations power in its traditional formulation allows the Commonwealth to regulate the distinctive governance arrangements of universities as universities. Of course, these arrangements may

well be substantially controlled through the attachment of conditions to grants of Commonwealth financial assistance, as they to some extent presently are, but this approach will be subject to all the caveats expressed above concerning the use of financial assistance as a regulatory tool. Much the same may be said of the teaching and syllabus arrangements of universities, neither of which easily could be the subject of direct legislation by the Commonwealth (even under the corporations power), although they can be indirectly affected by the grant of conditional financial assistance. Similar views may be expressed concerning the regulation of the overall research profile of universities, subject to the proviso that a narrow degree of high-level national direction might be justified by virtue of the national implied power. Again, all of these conclusions are subject to whatever expansionist interpretations of the corporations power might be adopted in the Work Choices case, and it is undeniable that acceptance by the High Court of the contention that all acts of a trading corporation may be regulated under that power would bring virtually the totality of the operations of universities within the control of the Commonwealth (Craven 2006).

As regards the ownership and management of university land, the commercial aspects of such activities certainly could be regulated by the Commonwealth under the corporations power. Non-commercial aspects, such as those relating to planning, would remain a matter for the States. The wider commercial operations of higher education institutions — comprising such matters as student accommodation, borrowing, and the conduct of for-profit activities — undoubtedly may be regulated by the Commonwealth pursuant to the corporations power. Reporting and accountability regimes in relation to such commercial activities also would be authorised under that power, with wider reporting and accountability requirements (for example, in relation to teaching and research) effectively needing to be based upon Commonwealth–university financial arrangements. As regards the application of the general law to universities, in such areas as State taxation, environmental protection, workers’ compensation and freedom of information, the Commonwealth may legislate to the extent that this would comprise the regulation of commercial and corporate activities, but not otherwise. The only effective means for the Commonwealth to regulate beyond this ambit would be by means of conditions attached to its own assistance, although there would be obvious legal difficulties were those conditions to conflict with the relevant provisions of a State’s general laws.

Finally, the Commonwealth has no obvious legislative power to ordain an overall national apparatus of higher education regulation. In particular, the Commonwealth would not appear to possess an independent head of legislative power to create a comprehensive national body of higher education regulation and accreditation, nor would it possess such power as would be necessary to ground general national higher education legislation. All of this merely goes to reinforce the general conclusions already reached: that the Commonwealth has a significant, but limited legislative power in respect of higher education, with its greater power being found in its capacity to fund upon conditions. The latter power, however, is subject to its own, particular limitations. Once again, however, all is subject to the position reached on the corporations power by the High Court in Work Choices. An adverse result for the States in that case inevitably would lead to the conclusion that the corporations power (together with the incidental power) would justify the creation of national regulatory body for the purpose of overseeing constitutionally regulable corporations.

Strategic Constitutional Analysis

The object of this section of the paper is to put the preceding constitutional analysis into a context of policy, politics and practicality. Here, a number of important points need to be made.

The first is to reinforce the fundamental conclusion already reached in this paper: that the Commonwealth's direct legislative powers in relation to higher education and universities (presently) are relatively confined. Indeed, it would be fair to say that there has been a something of a concerted attempt by the Commonwealth, both through its published papers and the public pronouncements of its officers, to talk-up aspects of its power, and in particular the corporations power. These attempts are, however, rather transparent. No individual power of the Commonwealth, including the corporations power, would at the present day effectively ground comprehensive higher education legislation.

Again, as has been concluded above, the real capacity of the Commonwealth in relation to universities and higher education is a financial one to provide grants upon conditions. This is a real and enormous power, which can be and has been used to demand a wide-ranging suite of concessions from higher education institutions in return for funding. For the reasons already outlined, however, a power to influence through funding, is not the same thing as a power to directly and comprehensively regulate by legislation possessing the force of law.

Flowing from these conclusions is the vital point that the Commonwealth presently would not be able to achieve substantial legislative control of the higher education sector through its own unilateral action, the logical corollary of which is that it would require the cooperation of the States to reach this goal. This illustrates a central reality of the current constitutional—policy matrix regarding higher education, that the States are indeed critical players, notwithstanding the Commonwealth's contempt, the sector's disregard and their own substantial lack of focus and financial commitment. Indeed, the Commonwealth's current overstatement of its constitutional position may be regarded as a softening-up exercise towards the end of extracting State compliance.

In reality, the States could cooperate to provide the Commonwealth with a national higher education regulatory capacity in a number of ways, of which two are the most obvious. The first and most direct would be for the States to refer power to the Commonwealth over an appropriate subject matter — higher education, universities, or some aspect of each — under section 51(xxxvii) of the Constitution, and for the Commonwealth to legislate in reliance upon that referral. The States would be able to insert into the referral sufficient legislative limitations to protect their own interests, and potentially those of universities. A more complex approach, and one that would accord the Commonwealth less and the States correspondingly more control, would be for the Commonwealth and the States to enter into a cooperative legislative scheme for the regulation of higher education. Again, probably the simplest version of such a scheme would be for the Commonwealth to pass such legislation in respect of the Australian Capital Territory under section 122 of the Constitution ('the territories power') and for the States to adopt and apply that legislation to their own higher education institutions. Such an approach (or a modification thereof) logically could extend both to the creation of a national higher education authority, and the substantive enactment of national legislation regulating the higher education sector.

Thus, if the Commonwealth is serious about pursuing a legislative national higher education framework in the absence of judicial expansion of its powers it necessarily will have to accept the reality that Commonwealth–State cooperation is indispensable, whether that cooperation is to be secured by threat or seduction. Logically, this would involve cooperation both in terms of process and product. By way of process, some version of a cooperative legislative approach, as outlined above, would need to be adopted. As regards product, a cooperative legislative process should produce a cooperative legislative outcome, which proceeds upon the assumption that higher education does indeed comprise a partnership between Commonwealth, State and sector, in which subtly differing and interlocking interests are recognised and accommodated, rather than existing as a Commonwealth regulatory ‘lake’.

Just as the Commonwealth needs to understand that cooperation will be indispensable to the achievement of any satisfactory national or quasi-national outcome, so the universities must better understand their own relationships within the Commonwealth–State–Sector triangle. Thus, in times of relatively slight State funding for universities, there can be a tendency for them to discount the States as players in the higher education game. The reality, however, is that the States will be vital players in any outcome from the present debate, if only because their grudging acceptance of Commonwealth legislative directions will be indispensable. Among other consequences of this reality is the fact that any university or universities seeking to influence the direction of Commonwealth policy will be well advised to press their views strongly with the government of their home State, with which the final capacity to extract legislative concessions probably will lie.

For their part, the States also must put aside years of comparative neglect and recognise the importance of universities to themselves as polities. A starting point is to note that universities represent massive repositories of historic State investment. In more contemporary terms, they are major drivers of State education and training sectors, and a crucial element in the direction of wider State employment markets. They are critical to industrial research and development within a State, and significant contributors to State policies and innovation. It is a matter of vital interest to the States that these financial and intellectual investments and capacities be preserved as items of State infrastructure.

Finally, all players must realise that they are not the only participants in this particular constitutional game. Most notably, it will be the High Court of Australia that ultimately will determine whether and to what extent the Commonwealth possesses the necessary legislative power to wrest control of the higher education sector from the States. Here, the Court traditionally has been deeply disposed to expand Commonwealth power, and the States could not be sanguine that the Court will take a narrow view of the corporations power in the Work Choices litigation, and derivatively of its application to the higher education sector. Were the Court to take a determinedly broad view of that power, the States would lose their present partial veto over Commonwealth control of higher education, in favour of pervasive control by Canberra. High Court decisions are notoriously difficult to predict, but a Commonwealth victory in Work Choices is more probable than not. Certainly, there is every evidence that the Commonwealth takes a bullish view of the Court’s likely course.

This optimism, however, may conceivably be misplaced. The Court has shown some signs of nervousness towards the potential scope of the corporations power at least since the late nineties.²⁵ Moreover, there is reason to suspect that the Court might not be particularly anxious to engineer the conferral of power upon a single sphere of government (the Commonwealth) to control the chief institutional intellectual apparatus of Australian society. Moreover, the Court currently is going through an intensely conservative phase of its own jurisprudence, which is not obviously favourable towards dramatic centralisation of power. Such factors suggest that the Commonwealth at this stage would be unwise to place an overly optimistic interpretation upon its powers, and the States foolish to discount their own capacities to resist Commonwealth incursion.

Conclusions

The overall conclusion to emerge from this analysis is that, if it be desired to create a system of national regulation for Australian higher education, that system ought to be founded upon cooperation between the States and the Commonwealth. In the absence of sufficient legislative power of its own, the Commonwealth will require some form of State supporting legislation to create such a system. Logically, any resulting legislative scheme should recognise the fundamental reality of higher education within Australia as a tripartite partnership between the Commonwealth, the States and universities. A failure to do so, and in particular any attempt by the Commonwealth to rely upon an insufficient foundation of constitutional power, will produce an outcome that is problematic legally, administratively and politically. Even were the Commonwealth to gain total constitutional power over universities as trading corporations, the ideal result would be a cooperative outcome that recognised the magnitude of Commonwealth investment, while also recognising the reality of the universities as items of State culture and infrastructure.

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²⁵ An example is the decision in *Dingjan*.