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## Commonwealth Power over Higher Education

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# Commonwealth Power over Higher Education

George Williams and Sangeetha Pillai

## Abstract

The regulation of higher education in Australia is undergoing major change, with a largely State-based system being forced to make way for a new national scheme. To this end, in June 2011, the Tertiary Education Quality and Standards Agency Act 2011 ('TEQSA Act') was passed by Federal Parliament. It establishes the Tertiary Education Quality and Standards Agency ('TEQSA') – a new and independent national regulatory body responsible for oversight of the higher education sector.

TEQSA marks the first step of a ten year federal reform agenda for higher education and research designed to 'boost Australia's national productivity and performance as a knowledge-based economy'. The Commonwealth decided to increase its regulatory footprint following the 2008 Review of Higher Education by Professor Denise Bradley. The Review found that significant structural reforms to the financing and regulatory framework of the sector were required in order for Australia to compete globally.

This shift raises important constitutional questions as to the extent to which the Commonwealth can impose a new scheme of regulation on the higher education sector, and universities in particular. In 2006, Professor Greg Craven reached four broad conclusions about the scope of Commonwealth power in this field:

(i) the Commonwealth enjoyed 'significant direct constitutional power over the

area of higher education’;

(ii) the Commonwealth had power to indirectly ‘influence and form higher education policy’, primarily through the ‘conditional funding of universities’;

(iii) notwithstanding these conclusions, the Commonwealth lacked the ‘cohesive constitutional power necessary to regulate the higher education sector in any comprehensive way’; and

(iv) as a practical matter, ‘any genuine attempt at national higher education legislation or regulation by the Commonwealth would ... have to be based upon a significant degree of cooperation with the States’.

Five years later, these conclusions are worthy of reconsideration. Craven’s analysis predates the High Court decisions in *New South Wales v Commonwealth* (Work Choices Case), which applied a broad interpretation of the Commonwealth’s corporations power in s 51(xx) of the Constitution, and *Pape v Commissioner of Taxation* (‘Pape’), which upset the previously assumed view that the federal appropriations power in s 81 could be applied to spend money on any topic whatsoever.

The TEQSA Act relies primarily upon the corporations power, and so in this article we focus on the decision in the Work Choices Case, and the scope that the Commonwealth now has under s 51(xx) to enact legislation for the higher education sector, and universities in particular. We address this issue after outlining the relevant history of the regulation of higher education in Australia.

# COMMONWEALTH POWER OVER HIGHER EDUCATION

GEORGE WILLIAMS\* AND SANGEETHA PILLAI\*\*

## I INTRODUCTION

The regulation of higher education in Australia is undergoing major change, with a largely State-based system being forced to make way for a new national scheme. To this end, in June 2011, the *Tertiary Education Quality and Standards Agency Act 2011* ('*TEQSA Act*') was passed by Federal Parliament. It establishes the Tertiary Education Quality and Standards Agency ('TEQSA') – a new and independent national regulatory body responsible for oversight of the higher education sector.

TEQSA marks the first step of a ten year federal reform agenda for higher education and research designed to 'boost Australia's national productivity and performance as a knowledge-based economy'.<sup>1</sup> The Commonwealth decided to increase its regulatory footprint following the 2008 Review of Higher Education by Professor Denise Bradley.<sup>2</sup> The Review found that significant structural reforms to the financing and regulatory framework of the sector were required in order for Australia to compete globally.

This shift raises important constitutional questions as to the extent to which the Commonwealth can impose a new scheme of regulation on the higher education sector, and universities in particular. In 2006, Professor Greg Craven reached four broad conclusions about the scope of Commonwealth power in this field:

- (i) the Commonwealth enjoyed 'significant direct constitutional power over the area of higher education';
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- (iii) notwithstanding these conclusions, the Commonwealth lacked the 'cohesive constitutional power necessary to regulate the higher education sector in any comprehensive way'; and
- (iv) as a practical matter, 'any genuine attempt at national higher education legislation or regulation by the Commonwealth would ... have to be based upon a significant degree of cooperation with the States'.<sup>3</sup>

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<sup>1</sup> Commonwealth of Australia, *Transforming Australia's Higher Education System* (2009) 9.

<sup>2</sup> Commonwealth of Australia, *Review of Higher Education: Final Report* (2008) xi ('Bradley Review').

<sup>3</sup> Greg Craven, 'Commonwealth Power Over Higher Education: Implications and Realities' (2006) 1(1) *Public Policy* 1, 1.

<sup>4</sup> *New South Wales v Commonwealth (Work Choices Case)* (2006) 229 CLR 1 ('*Work Choices Case*').



in s 51(xx) of the *Constitution*, and *Pape v Commissioner of Taxation* ('*Pape*'),<sup>5</sup> which upset the previously assumed view that the federal appropriations power in s 81 could be applied to spend money on any topic whatsoever.

The *TEQSA Act* relies primarily upon the corporations power, and so in this article we focus on the decision in the *Work Choices Case*, and the scope that the Commonwealth now has under s 51(xx) to enact legislation for the higher education sector, and universities in particular. We address this issue after outlining the relevant history of the regulation of higher education in Australia.

## II THE REGULATION OF HIGHER EDUCATION IN AUSTRALIA

Australia's higher education sector is made up of 37 public universities and two private universities, all of which are self-accrediting. A self-accrediting provider is 'an institution authorised by government to accredit its own awards'.<sup>6</sup> In addition, the sector includes one Australian branch of an overseas university, three non-university self-accrediting higher education providers, and more than 150 non self-accrediting higher education providers.<sup>7</sup> Non self-accrediting providers range in size, are mainly private and generally offer specialised education in diverse fields including 'business, information technology, natural therapies, hospitality, health, law and accounting'.<sup>8</sup> Non self-accrediting higher education institutions receive accreditation from the States and Territories in which they operate, with each State and Territory maintaining a register listing the providers in its jurisdiction.<sup>9</sup>

Decision making, regulation and governance for higher education providers are currently shared between the Commonwealth, States and Territories and the institutions themselves. Universities enjoy a reasonably high level of autonomy, but must still operate within the parameters of their establishing legislation. For the vast majority of Australian universities, this is a matter of State or Territory law – notable exceptions being the Australian National University which is established under Commonwealth legislation, and the Australian Catholic University, which is established under corporations law and has establishment acts in New South Wales and Victoria.<sup>10</sup>

As Craven noted in 2006, universities were not intended by the framers of the Australian Constitution to be a subject of Commonwealth legislative power, and were assumed instead to fall within the scope of State power.<sup>11</sup> The Commonwealth has nevertheless long played a role in the regulation of universities, and of higher education generally. This has been underpinned by specific federal legislative capacity conferred by provisions of the *Constitution* such as s 51(xxiiiA), which allows it to legislate for 'the provision of ... benefits to students', the corporations power under s 51(xx) and, to a

<sup>5</sup> *Pape v Commissioner of Taxation* (2009) 238 CLR 1.

<sup>6</sup> Commonwealth of Australia, Department of Education, Employment and Workplace Relations (DEEWR) *Higher Education in Australia*, <<http://www.goingtouni.gov.au/Main/CoursesAndProviders/ProvidersAndCourses/HigherEducationInAustralia/Default.htm>> at 25<sup>th</sup> October 2011.

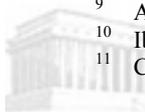
<sup>7</sup> Commonwealth of Australia, Department of Education, Employment and Workplace Relations (2011) *Higher Education: Overview* <<http://www.deewr.gov.au/HigherEducation/Pages/Overview.aspx>> at 25<sup>th</sup> October 2011.

<sup>8</sup> *Ibid.* Theological colleges may also qualify under the term. See also Australian Qualifications Framework (2011) *AQF Register of AQF Qualifications and Authorised Issuing Organisations* <<http://www.aqf.edu.au/RegisterAccreditation/AQFRegister/tabid/174/Default.aspx>> at 25<sup>th</sup> October 2011.

<sup>9</sup> Australian Qualifications Framework, see above n 8.

<sup>10</sup> *Ibid.*

<sup>11</sup> Craven, see above n 3, 2.



lesser extent the implied nationhood power, the external affairs power (s 51(xxix)) and the taxation power (s 51(ii)).<sup>12</sup> However, as Craven notes, the Commonwealth's incursion into the field of higher education is largely 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'.<sup>13</sup>

Since 1974, the Commonwealth has adopted the primary responsibility for funding higher education, with federal funding currently managed through the *Higher Education Support Act 2003* (Cth). In order to be eligible for grants under this legislation, an institution must be approved as a higher education provider under the Act. Approved higher education providers are then subject to federal quality and accountability requirements.<sup>14</sup> It has been long recognised that the Commonwealth's power to grant money, whether that be via the States under s 96 of the Constitution or directly through a federal appropriation, includes the power to grant this money conditionally.<sup>15</sup> As a result, the assumption of responsibility for the financing of higher education has meant that – in addition to its limited direct legislative powers – the Commonwealth has enjoyed a kind of de facto power to exert significant practical influence over the field of higher education through the application of fiscal pressure.<sup>16</sup>

The regulation of higher education has given rise to interlinked responsibilities between the Commonwealth and the States and Territories. Their individual roles are now far from clear cut. The National Guidelines for Higher Education Approval Processes, which govern the regulation of higher education providers, were formulated by the Ministerial Council on Education, Employment, Training and Youth Affairs, which is made up of representatives of the Commonwealth, State and Territory Governments. The National Protocols made effective by these guidelines are given force by virtue of the enactment of enabling legislation in each Australian jurisdiction.<sup>17</sup> Some States, such as Victoria, Western Australia and Queensland, have also made significant financial investments in the infrastructure of their universities,<sup>18</sup> and have taken an active interest in higher education policy within their jurisdictions. Others, such as New South Wales, have appeared more content to accept the Commonwealth as both the 'primary funding source and driver of policy in higher education'.<sup>19</sup>

### III THE COMMONWEALTH'S HIGHER EDUCATION AMBITIONS

In 2006, Craven suggested that the Commonwealth appeared keen to 'regulate as much of the higher education industry as its constitutional powers, expansively understood, will

<sup>12</sup> Ibid, 4-7.

<sup>13</sup> Ibid, 2.

<sup>14</sup> *Higher Education Support Act 2003* (Cth) s 13-1

<sup>15</sup> See, eg, *Victoria v Commonwealth (Second Uniform Tax Case)* (1957) 99 CLR 575, 609 (Dixon CJ).

<sup>16</sup> See Craven, see above n 3, 9.

<sup>17</sup> Ministerial Council for Education, Early Childhood Development and Youth Affairs (MCEEDYA), *National Guidelines for Higher Education Approval Processes: Guidelines for establishing Australian universities* (2007) 3.

<sup>18</sup> Brendan Sheehan, *New Standards Agency Loosens Grip of States* (27 April 2011) The Australian <<http://www.theaustralian.com.au/higher-education/opinion-analysis/new-standards-agency-loosens-grip-of-states/story-e6frgcko-1226045177213>>.

<sup>19</sup> NSW Government, *Submission to the Review of Australian Higher Education (Submission No. 347)* 5-6.



allow'.<sup>20</sup> In particular, he noted that the Commonwealth appeared to harbour ambitions to control:

- the 'accreditation and establishment of higher education institutions, including universities';
- the 'governance of higher education institutions, including the constitution of their councils and other governance bodies';
- teaching and syllabus arrangements overall, including quality control of teaching and degree offerings;
- the 'overall research profile of universities, including their basic research directions, priorities and funding';
- the 'ownership and management of university land, including its enjoyment, sale and other disposition';
- the 'commercial operations of higher education institutions, including [their business forms] and the parameters for their deployment';
- the 'reporting and accountability regimes for higher education institutions, including regimes relating to finance, teaching quality and other academic activities'; and
- 'the general law as it applies to higher education universities', encompassing as wide a range of topic areas as possible.<sup>21</sup>

Craven also noted that the Commonwealth appeared to be 'interested in the possibility of a national higher education regime, including the creation of a national higher education authority and the enactment of overarching higher education legislation'.<sup>22</sup> He concluded, however, that the Commonwealth's capacity to establish such a regime was hindered by the absence of a sufficiently broad head of power to support such overarching legislation.<sup>23</sup> At the time, the High Court decision in the *Work Choices Case* was pending, and Craven acknowledged that a decision in favour of the federal government could 'greatly expand the Commonwealth's power to regulate higher education', such that 'the Commonwealth would be able directly to regulate all activities of universities as trading corporations, including such activities as teaching and research'.<sup>24</sup> The *Work Choices* legislation<sup>25</sup> was ultimately upheld by the High Court in its entirety.

In 2008, the Commonwealth Government initiated the Review of Higher Education, led by Professor Denise Bradley, to investigate whether the higher education sector was 'structured, organised and financed to position Australia to compete effectively in the new globalised economy'.<sup>26</sup> The Bradley Review found that, while Australia's education system 'ha[d] great strengths', major reforms to the financing and regulatory frameworks for higher education were necessary in order to enable Australia to compete globally.<sup>27</sup> The review suggested a number of reforms, including that the Commonwealth legislate or otherwise provide for:

- national targets (to enable benchmarking against other OECD countries) for the attainment of degree qualifications and the participation of low

<sup>20</sup> Craven, see above n 3, 2.

<sup>21</sup> *Ibid.*, 3.

<sup>22</sup> *Ibid.*

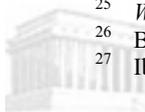
<sup>23</sup> *Ibid.*, 6.

<sup>24</sup> *Ibid.*, 7.

<sup>25</sup> *Workplace Relations Amendment (Work Choices) Act 2005* (Cth).

<sup>26</sup> Bradley Review, see above n 2, xi.

<sup>27</sup> *Ibid.*



socio-economic status students, and monitoring of institutional performance (according to institution specific targets);

- accreditation for all higher education institutions, and tightening of the criteria for the title of 'university' and the right to offer research degrees;
- increased funding across a variety of areas, and shifting of primary funding and overall regulatory responsibilities to the Commonwealth Government; and
- the establishment of an independent national tertiary education regulatory body.<sup>28</sup>

In response, the Commonwealth Government announced in 2009 its intention to work towards the following structural reforms to the higher education system:

- increasing the percentage of 25-34 year olds with bachelor degrees to 40% by 2025;
- providing Commonwealth supported places for all domestic students accepted in to an eligible, accredited higher education course at a recognised public higher education provider;
- phasing out caps on student enrolments at universities; and
- the establishment of a national regulatory and quality agency for higher education to regulate providers, carry out audits of standards and performance, quality assure international education and streamline current regulatory arrangements with a view to providing national consistency.<sup>29</sup>

Overall, the reforms proposed by the Commonwealth represent a move towards a more centralised regulation of higher education. This is reflected in the steps taken towards implementing these reforms. First, the Commonwealth has moved to establish TEQSA as a 'new national regulatory and quality assurance agency for higher education with the power to regulate university and non-university higher education providers and monitor quality against a Standards Framework developed by the Higher Education Standards Panel'.<sup>30</sup> TEQSA aims to 'join together the regulatory activity currently undertaken in the States and Territories with the quality assurance activities currently undertaken by the Australian Universities Quality Agency', thereby 'reduc[ing] the number of federal, state and territory quality assurance bodies from nine to one'.<sup>31</sup> Both the TEQSA Commissioners and members of the Higher Education Standards Panel will be appointed by the Commonwealth Minister for Tertiary Education in consultation with the Minister for Research.<sup>32</sup> In addition to the establishment of TEQSA, all higher education providers operating in Australia will be required to be registered on a national

<sup>28</sup> Ibid, xii-xiv.

<sup>29</sup> The Hon Julia Gillard MP, Speech delivered at the Universities Australia Conference, Canberra, 4 March 2009 <[http://www.deewr.gov.au/Ministers/Gillard/Media/Speeches/Pages/Article\\_090304\\_155721.aspx](http://www.deewr.gov.au/Ministers/Gillard/Media/Speeches/Pages/Article_090304_155721.aspx)>.

<sup>30</sup> Commonwealth of Australia, DEEWR, *Fact Sheet 1: Establishment of the Tertiary Education Quality and Standards Agency (TEQSA)* <[http://www.deewr.gov.au/HigherEducation/Policy/teqsa/Documents/FactSheet1\\_Establishment\\_%20of\\_TEQSA.pdf](http://www.deewr.gov.au/HigherEducation/Policy/teqsa/Documents/FactSheet1_Establishment_%20of_TEQSA.pdf)>.

<sup>31</sup> Ibid.

<sup>32</sup> Commonwealth of Australia, DEEWR, *Fact Sheet 3: The Tertiary Education Quality and Standards Agency (TEQSA) Commission* <[http://www.deewr.gov.au/HigherEducation/Policy/teqsa/Documents/FactSheet3\\_TEQSA\\_Commission.pdf](http://www.deewr.gov.au/HigherEducation/Policy/teqsa/Documents/FactSheet3_TEQSA_Commission.pdf)> at 25<sup>th</sup> October 2011; Commonwealth of Australia, DEEWR, *Fact Sheet 4: The Higher Education Standards Framework and Higher Education Standards Panel* <[http://www.deewr.gov.au/HigherEducation/Policy/teqsa/Documents/FactSheet4\\_Standards\\_and\\_Panel.pdf](http://www.deewr.gov.au/HigherEducation/Policy/teqsa/Documents/FactSheet4_Standards_and_Panel.pdf)> at 25<sup>th</sup> October 2011.



register, and will be subject to provider registration, qualification, information, teaching and learning and research standards under a national Higher Education Standards Framework.<sup>33</sup>

Second, the Commonwealth has proposed a review of funding for higher education. In the 2009-10 Budget, the government announced that, as part of its higher education reform package, performance based funding would be made available to universities. It stated that ‘targets and performance funding’ would be ‘key elements of the compacts between government and universities’, and that universities would be ‘required to negotiate targets against indicators of performance that have a direct line of sight to the government’s broader objectives’. Universities which achieved their targets would receive performance funding.<sup>34</sup> In the 2011-12 Budget, the Commonwealth built upon these commitments, pledging to invest \$609.9 million into ‘regional higher education and vocational education and training programs’.<sup>35</sup> In late 2010, the government commissioned the Higher Education Base Funding Review, headed by former South Australian Education Minister Dr Jane Lomax-Smith, to ‘make recommendations on the principles underpinning public investment in Australian higher education and inquire into the levels of funding that are appropriate to ensure that Australian higher education remains internationally competitive’.<sup>36</sup> The Review was submitted to the government in October 2011, but at the time of writing had yet to be released to the public.<sup>37</sup>

These moves raise questions about the Commonwealth’s capacity to legislate generally with respect to higher education. In the next section, we address this issue having regard to the *TEQSA Act*.

#### IV TEQSA ACT

The TEQSA legislation was introduced into federal Parliament on 23 March 2011, and passed on 22 June 2011. The objects clause of the Act states that it aims to:

- ‘provide for national consistency in the regulation of higher education’;
- ‘regulate higher education’ using a ‘standards based quality framework’ as well as ‘principles relating to regulatory necessity, risk and proportionality’;
- protect and enhance ‘Australia’s reputation for quality higher education and training services’, ‘Australia’s international competitiveness in the higher education sector’ and ‘excellence, diversity and innovation in higher education in Australia’;
- ‘encourage and promote a higher education system that is appropriate to meet Australia’s social and economic needs for a highly educated and skilled population’;

<sup>33</sup> Commonwealth of Australia, DEEWR, *The Four Elements of the New Quality and Regulatory Arrangements for Australian Higher Education* <[http://www.deewr.gov.au/HigherEducation/Policy/teqsa/Documents/HIEDArrangements\\_Diagram.pdf](http://www.deewr.gov.au/HigherEducation/Policy/teqsa/Documents/HIEDArrangements_Diagram.pdf)> at 25<sup>th</sup> October 2011.

<sup>34</sup> Commonwealth of Australia, DEEWR, *An Indicator Framework for Higher Education Performance Funding: Discussion Paper* (December 2009) 3.

<sup>35</sup> Australian Government, *2011-12 Australian Government Budget – Budget Paper No. 1* (10 May 2011), 1-32 <[http://www.budget.gov.au/2011-12/content/bp1/html/bp1\\_bst1-13.htm](http://www.budget.gov.au/2011-12/content/bp1/html/bp1_bst1-13.htm)> at 25<sup>th</sup> October 2011.

<sup>36</sup> Commonwealth of Australia, DEEWR, *Education Investment Fund: Base Funding Review* <<http://www.deewr.gov.au/HigherEducation/Policy/BaseReview/Pages/default.aspx>> at 11<sup>th</sup> November 2011.

<sup>37</sup> *Ibid.*



- ‘protect students undertaking or proposing to undertake higher education in Australia’ by ensuring high quality higher education is provided; and
- ‘ensure students undertaking or proposing to undertake higher education have access to information relating to higher education in Australia’.<sup>38</sup>

#### A Regulation and accreditation

The *TEQSA Act* regulates the provision of Australian higher education awards and overseas higher education awards that relate to courses of study provided at Australian premises.<sup>39</sup> It regulates the provision of these awards by higher education providers that are: (a) a constitutional corporation; (b) a corporation established by or under a law of the Commonwealth or a Territory; or (c) a person who conducts activities in a Territory.<sup>40</sup>

The Act requires regulated higher education providers to be registered with TEQSA before they can confer higher education awards.<sup>41</sup> Registered entities are then required to have their courses of study accredited by TEQSA before these courses can be offered in connection with a regulated higher education award.<sup>42</sup> In response to submissions by a number of universities,<sup>43</sup> and the recommendations of the Senate Education, Employment and Workplace Relations Legislation Committee,<sup>44</sup> the Act preserves the right of registered Australian universities to self-accredit courses of study.<sup>45</sup> TEQSA may restrict or remove a provider’s ability to self-accredit.<sup>46</sup> However, where it seeks to restrict a university, it must provide written notification of the proposed restrictions, citing reasons, to both the provider and the relevant State or Territory Minister, allow a ‘reasonable opportunity to make representations’, and have regard to any such representations.<sup>47</sup> Failure to register with TEQSA,<sup>48</sup> offering a regulated higher education award without being registered,<sup>49</sup> offering a higher education award other than as part of a course of study<sup>50</sup> and providing an unaccredited course of study,<sup>51</sup> along with breaching the conditions of registration or accreditation, are made criminal offences.

#### B Interaction with State and Territory regimes

Section 9(1) of the *TEQSA Act* states that a regulated higher education provider is ‘not required’ to comply with a State or Territory law that purports to regulate the provision of higher education. Exceptions exist with respect to State or Territory legislation that establishes the higher education provider,<sup>52</sup> regulates who may carry on

<sup>38</sup> *TEQSA Act*, s 3.

<sup>39</sup> *Ibid*, s 6.

<sup>40</sup> *Ibid*, s 5.

<sup>41</sup> *Ibid*, s 4.

<sup>42</sup> *Ibid*.

<sup>43</sup> Commonwealth of Australia, Senate Education, Employment and Workplace Relations Legislation Committee, *Report on the Tertiary Education Quality and Standards Agency Bill 2011 and Tertiary Education Quality and Standards Agency (Consequential Amendments and Transitional Provisions) Bill 2011* (May 2011) (‘Senate Committee Report’), [2.6] – [2.12] <[http://www.aph.gov.au/senate/committee/eet\\_ctte/teqsa/report/report.pdf](http://www.aph.gov.au/senate/committee/eet_ctte/teqsa/report/report.pdf)> at 25<sup>th</sup> October 2011.

<sup>44</sup> *Ibid*, [2.16].

<sup>45</sup> *TEQSA Act*, s 45.

<sup>46</sup> *Ibid*, s 32(c).

<sup>47</sup> *Ibid*, s 33.

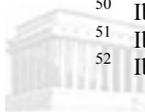
<sup>48</sup> *Ibid*, s 105.

<sup>49</sup> *Ibid*, s 106.

<sup>50</sup> *Ibid*, s 107.

<sup>51</sup> *Ibid*, s 112.

<sup>52</sup> *Ibid*, s 9(2).



an occupation, or is otherwise specified in ‘regulations made for the purposes of [s 9]’.<sup>53</sup> Also excepted are State and Territory laws that purport to regulate a matter of which higher education is only a part,<sup>54</sup> such as privacy laws, fair trading laws, auditor-general and ombudsman laws and laws relating to the professional accreditation and registration of teachers.<sup>55</sup> As the Senate Education, Employment and Workplace Relations Legislation Committee noted in its report into the TEQSA Bill, this ultimately means that under s 109 of the Constitution ‘the TEQSA legislation will supersede state law to the extent of any inconsistency’.<sup>56</sup>

A number of State Governments, in submissions to the Senate Inquiry, expressed dissatisfaction with what they saw as a lack of a consultative approach by the Commonwealth in seeking to take over important aspects of State regulation of the higher education sector. They were also concerned that the new regulatory scheme did not provide adequate avenues for State involvement.

Victoria’s submission provided in-principle support for the national registration of providers and courses by a national regulator, but set out significant concerns about the Bill’s failure to ‘take into account the need for all jurisdictions to collaborate on a national framework for regulation of the tertiary sector’, or to allow States the ‘ongoing ability to contribute meaningfully to the establishment of quality standards to ensure a competitive, innovative world-best tertiary education sector’.<sup>57</sup> Victoria was highly critical of the Commonwealth’s decision not to seek State and Territory agreement for the proposed regulatory model, the exclusion of State laws regulating the higher education sector in the Bill, and the lack of State or Territory influence in determining panel appointments for TEQSA and the Higher Education Standards Panel.<sup>58</sup> Western Australia substantially echoed these concerns, and refused to support passage of the Bill, stating that while it was in favour of a ‘national approach to higher education regulation and quality assurance’, the legislation ‘did not establish arrangements which were genuinely national in character, and which strike a balance between the roles of federal, state and territory government’.<sup>59</sup> South Australia expressed in principle support for the legislation, but emphasised that it had reservations about the independence of TEQSA and the Higher Education Standards Panel, stressing that it was ‘keen to ensure that the new regulatory arrangements reflect a genuine partnership between the Commonwealth, States and Territories to guarantee the quality and stability of the higher education sector in the future’.<sup>60</sup>

Victoria and Western Australia also stated that there was considerable uncertainty as to how cl 9 of the Bill (now s 9 of the Act) would operate with State and Territory law.<sup>61</sup> Both affirmed that education was constitutionally a State responsibility, and expressed doubts as to whether the Commonwealth’s constitutional powers – including

<sup>53</sup> Ibid.

<sup>54</sup> Ibid, s 9(3).

<sup>55</sup> See, eg, University of Sydney, *Submission to the Inquiry into the TEQSA Bill 2011 and the TEQSA (Consequential Amendments and Transitional Provisions) Bill 2011 (Submission No. 24)* 9.

<sup>56</sup> Senate Committee Report, see above n 43, [2.19].

<sup>57</sup> Victorian Government, *Submission to the Inquiry into the TEQSA Bill 2011 and the TEQSA (Consequential Amendments and Transitional Provisions) Bill 2011 (Submission No. 29)*, 1.

<sup>58</sup> Ibid, 2-3.

<sup>59</sup> Senate Committee Report, see above n 43, [2.104].

<sup>60</sup> South Australian Department of Further Education, Employment, Science and Technology, *Submission to the Inquiry into the TEQSA Bill 2011 and the TEQSA (Consequential Amendments and Transitional Provisions) Bill 2011 (Submission No. 9)* 2.

<sup>61</sup> Western Australian Minister for Education, *Submission to the Inquiry into the TEQSA Bill 2011 and the TEQSA (Consequential Amendments and Transitional Provisions) Bill 2011 (Submission No. 28)* 6; Victorian Government, see above n 57, 8-13.



the corporations power – could support either the TEQSA legislation or the Commonwealth’s broader agenda to cover the whole field of education and training.<sup>62</sup> Western Australia stated that ‘[a]n effective national regulation system will always need to be underpinned by complementary State legislation if the entire range of functions are to be covered’, and affirmed that it ‘shares other State and Territory concerns on the proposed TEQSA legislation and does not support the Commonwealth’s use of its corporations powers to override the State’s powers and responsibilities in relation to the regulation and quality assurance of the higher education sector’.

The Senate Committee, in its report, supported the passage of the Bill, but recommended that an Intergovernmental Agreement be negotiated between the federal, State and Territory governments. The Committee recommended that such an agreement should include ‘protocols for communication between TEQSA, state and territory governments to ensure that the process of registering new universities by TEQSA proceeds in parallel with the process of establishing universities through state and territory legislation’.

#### V CONSTITUTIONAL VALIDITY AND SCOPE OF THE TEQSA ACT

The constitutional concerns raised by a number of States in the Senate inquiry emphasise the need to carefully examine the validity of the *TEQSA Act*.<sup>63</sup> Section 8 of the Act spells out its constitutional basis, stating that the legislation relies on:

- (a) the Commonwealth’s legislative powers under paragraphs 51(xx) [the corporations power] and (xxxix) [the incidental power], and section 122 [the Territories power], of the Constitution; and
- (b) any other Commonwealth legislative power to the extent that the Commonwealth has relied, or relies, on the power to establish a corporation.

The Federal Parliament’s power over the Territories in s 122 of the *Constitution* has long been recognised by the High Court as being plenary.<sup>64</sup> There is thus no doubt that s 122 empowers the Commonwealth to regulate universities and other higher education providers located in the Territories in the manner envisaged by the *TEQSA Act*. However, the question of whether the corporations power in s 51(xx) of the *Constitution* is capable of providing a basis for the regulation of universities outside of the Territories is less certain.

##### A *The Scope of s 51(xx)*

Section 51 of the *Constitution* provides that:

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to – ...  
 (xx) Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth.

<sup>62</sup> Western Australian Minister for Education, *ibid*; Victorian Government, see above n 57, 2.

<sup>63</sup> These issues were also raised by G Williams, *Submission to the Inquiry into the TEQSA Bill 2011 and the TEQSA (Consequential Amendments and Transitional Provisions) Bill 2011 (Submission No. 5)*.

<sup>64</sup> See, eg, *R v Bernasconi* (1915) 19 CLR 629, 635 (Griffith CJ).



Section 51(xx) enables the Federal Parliament to regulate the three listed types of corporations ('foreign', 'trading' and 'financial'), known collectively as 'constitutional corporations'.

A key question in determining the scope of this power is which aspects or activities of a constitutional corporation may be regulated by the Commonwealth. In *Strickland v Rocla Concrete Pipes Ltd* ('Concrete Pipes Case')<sup>65</sup> and subsequent cases this was left unresolved by the High Court. The answer was finally settled in the *Work Choices Case*, in which the High Court, by a 5-2 majority, upheld the Federal Parliament's use of s 51(xx) to reshape the regulation of industrial relations brought about by the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth). The majority endorsed the reasoning of Gaudron J in *Re Dingjan; Ex parte Wagner*<sup>66</sup> and *Re Pacific Coal Pty Ltd; Ex parte Construction, Forestry, Mining and Energy Union* ('*Re Pacific Coal*'),<sup>67</sup> and confirmed that Commonwealth power under s 51(xx) extends to:

the regulation of the activities, functions, relationships and business of a corporation described in that subsection, the creation of rights, and privileges belonging to such a corporation, the imposition of obligations on it and, in respect of those matters, to the regulation of the conduct of those through whom it acts, its employees and shareholders and, also, the regulation of those whose conduct is or is capable of affecting its activities, functions, relationships or business.<sup>68</sup>

It is clear from this passage that, following the *Work Choices Case*, the Commonwealth's regulatory power over constitutional corporations is extremely wide. The description of s 51(xx) in the paragraph above provides an ample basis upon which to regulate universities and other higher education providers that qualify as constitutional corporations, in the manner envisaged by the *TEQSA Act*. There is no reason to think that the power would do other than extend to the full extent of the relationships between such universities and their employees and students, including as to matters such as the provision of courses and the awarding of qualifications. Insofar as the Act relies on the corporations power, it is capable of being passed under that power.

However, the *TEQSA Act* cannot actually apply to a university unless that university also qualifies as a constitutional corporation. The question of if and when a university qualifies as a constitutional corporation is, therefore, an important one. Where a higher education provider within a State is not a constitutional corporation, the regulatory regime in that State will continue to apply as it will not be displaced by the *TEQSA Act*.

## B Are Universities 'Trading Corporations' Under Section 51(xx)

### 1 Are Universities Corporations?

If a university created by State legislation is a constitutional corporation under s 51(xx), it will be because it is a 'trading' corporation rather than a 'financial' or 'foreign' corporation. A threshold question is whether the university qualifies as a corporation at all. This is a matter of whether the university is constituted as a corporation in the first place by the relevant State legislation creating the body.

<sup>65</sup> *Strickland v Rocla Concrete Pipes Ltd (Concrete Pipes Case)* (1971) 124 CLR 468.

<sup>66</sup> *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323.

<sup>67</sup> *Re Pacific Coal Pty Ltd; Ex parte Construction, Forestry, Mining and Energy Union* (2000) 203 CLR 346.

<sup>68</sup> *Ibid*, 375 (Gaudron J), affirmed in *Work Choices Case*, see above n 4, 114 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

At present, all universities constituted by State legislation are corporations, and so fulfil this requirement. As an example, s 4 of the *University of New South Wales Act 1989* (NSW) establishes the University, and s 5 provides that it 'is a body corporate under the name of the University of New South Wales'. Currently, all State establishment statutes adopt a similar formula.

It lies within the power of a State Parliament to reconstitute a university other than as a corporation. If this were done, the university could not be a trading corporation and so would not fall under the regime created by the *TEQSA Act*. It is worth noting States have adopted this approach in another field. Following the *Work Choices Case*, the Queensland Parliament for example enacted the *Local Government and Industrial Relations Act 2008* (Qld) so as to remove the corporate status of Queensland local governance bodies (with the exception of the Brisbane City Council) in order to take these bodies outside the scope of federal industrial law enacted under the corporations power. Thus, while all State established universities presently satisfy the threshold requirement of being corporations, there is no guarantee that this will always remain the case, particularly in light of the opposition voiced by some States to the exclusion of State influence from the regulatory regime imposed by the *TEQSA Act*. In addition, the Commonwealth could not itself legislate to reconstitute universities as corporations. The decision of the High Court in *New South Wales v Commonwealth (Incorporation Case)*<sup>69</sup> means that its power over constitutional corporations extends only to corporations that have already been 'formed'.

## 2 The 'Substantial Activities Test'

The current test for determining whether a corporation is a 'trading corporation' stems from *R v Federal Court of Australia; ex parte WA National Football League ('Adamson's Case')*.<sup>70</sup> This High Court decision stands for the proposition that determining whether a corporation is a 'trading corporation' involves characterising the corporation by reference to its *activities*, rather than by the *purpose* for which it was incorporated.<sup>71</sup> A majority of the Court<sup>72</sup> in *Adamson's Case* held that corporations engaged in a football league qualified as 'trading corporations' due to the significant level of their trading activities.

The level of trading activity required for a corporation to qualify as a trading corporation was not resolved in *Adamson's Case*. Specifically, the question of whether the corporation's trading activities need to be its *predominant* activities, or whether it suffices that they are a *substantial part* of its business was left open. This issue was addressed in *State Superannuation Board of Victoria v Trade Practices Commission ('State Superannuation Board')*,<sup>73</sup> where the majority (Mason, Murphy and Deane JJ) decisively rejected the idea that a trading corporation's trading activities needed to be predominant:

[T]here is nothing in *Adamson* which lends support for the view that the fact that a corporation carries on independent trading activities on a significant scale will not result in its properly being categorised as a trading corporation if other more extensive non-

<sup>69</sup> *New South Wales v Commonwealth (Incorporation Case)* (1990) 169 CLR 482.

<sup>70</sup> *R v Federal Court of Australia; ex parte WA National Football League ('Adamson's Case')* (1979) 143 CLR 190.

<sup>71</sup> Compare the prior decision of *R v Trade Practices Tribunal; Ex parte St George City Council* (1974) 130 CLR 533.

<sup>72</sup> Barwick CJ, Mason, Murphy and Jacobs JJ.

<sup>73</sup> *State Superannuation Board of Victoria v Trade Practices Commission* (1982) 150 CLR 282 ('*State Superannuation Board*').



trading activities properly warrant its being also categorised as a corporation of some other type.<sup>74</sup>

There have been very few High Court decisions in the quarter century since on the test to be applied in determining whether a body is a trading corporation, and the question has not surfaced at all in recent years.

The 'substantial activities' test is notoriously difficult to apply as it depends upon an intuitive judgement as to whether the trading activities of a body are sufficiently substantial. The High Court has not provided guidance as to what percentage of a corporation's total activities amounts to a substantial proportion, nor a clear definition of what amounts to a trading activity in the first place. The test also leaves open the prospect that a corporation may be a constitutional corporation at one point in time, but not at another as the proportion of its trading activities shifts from being substantial to insubstantial. The activities test must thus be applied on an ongoing basis in order to determine whether a body remains a constitutional corporation.

The substantial activities test is not an exclusive means of determining whether a corporation is a trading corporation. The High Court has left open an exception that allows application of a 'purposes' approach. In *State Superannuation Board*, Mason, Murphy and Deane JJ spoke of 'a corporation which engages in financial activities or perhaps is intended so to do', and envisaged that for 'a corporation which has not begun, or has barely begun, to carry on business' the 'purposes' test might be decisive.<sup>75</sup> In *Fencott v Muller*,<sup>76</sup> Oakland Nominees Pty Ltd was a shelf company with no current activities formed to facilitate a conveyancing transaction. Mason, Murphy, Brennan and Deane JJ held that it was a 'trading or financial corporation' by applying the 'purposes' test. They found that, in the absence of any current activities, the character of the corporation should be determined by the purposes for which it was created. However, leaving aside cases in which the corporation in question has yet to manifest any activities, current High Court authority dictates that the substantial activities test is to be applied.

### 3 The 'Substantial Activities Test' and Universities

It is clear that the fact that a university is created directly by State legislation as a corporation, rather than being incorporated under the relevant corporations law statute, is no barrier to it being classified as a trading corporation. In *Commonwealth v Tasmania ('Tasmanian Dam Case')*<sup>77</sup> a majority of the High Court held that the Hydro-Electric Commission, a government-controlled corporation created by the *Hydro-Electric Commission Act 1944* (Tas), was a constitutional corporation. Mason J emphasised that 'the connexion of the corporation with the government of a State will not take it outside s 51(xx)'.<sup>78</sup> He also found that the fact that the Commission's qualification as a trading corporation was not inhibited by the fact that it had a large policy-making role (which made its trading activities a less prominent feature of its overall activities) or that its operations were largely conducted in the public interest. The decisive factor was that the 'Commission [sold] electrical power in bulk and by retail on a very large scale'.<sup>79</sup>

The question of whether a university qualifies as a constitutional corporation has never been considered by the High Court. However, lower courts and tribunals have applied *Adamson's Case*, *State Superannuation Board* and the *Tasmanian Dam Case* to hold various not-for-profit organisations to be trading corporations. Examples include:

<sup>74</sup> Ibid, 304.

<sup>75</sup> Ibid, 304-305.

<sup>76</sup> *Fencott v Muller* (1983) 152 CLR 570.

<sup>77</sup> *Commonwealth v Tasmania (Tasmanian Dam Case)* (1983) 158 CLR 1.

<sup>78</sup> Ibid, 155.

<sup>79</sup> Ibid.



charities,<sup>80</sup> a church-owned corporation running private schools<sup>81</sup>, the Australian Broadcasting Corporation<sup>82</sup>, a residential services organisation<sup>83</sup> and the Aboriginal Rights League.<sup>84</sup> On the other hand, Spender J of the Federal Court found in *Australian Workers' Union of Employees, Queensland v Etheridge Shire Council*<sup>85</sup> that a particular local government authority did not qualify as a trading corporation under the substantial activities test.<sup>86</sup> The fact that other local government bodies with a greater percentage of trading activities would likely be held to be trading corporations highlights how the test depends on the particular circumstances of the body, and how an industry may well have some entities that qualify as trading corporations and others that do not. It is possible that this could be the case in the higher education sector.

The leading case with respect to universities is *Quickenden v O'Connor* ('*Quickenden*').<sup>87</sup> In this case, the Full Court of the Federal Court upheld a decision of Lee J that the University of Western Australia established by the *University of Western Australia Act 1911* (WA) was a trading corporation. At first instance, Lee J had calculated that the annual revenues generated by the University's trading activities were \$54.7 million dollars, or 18% of the University's total operating revenues, and held that this was sufficient to indicate that it had substantial trading activities.

In the Full Court, Black CJ and French J held that the University's activities, other than its provision of educational services, were 'a substantial, in the sense of non-trivial, element albeit not the predominant element of what the University does'.<sup>88</sup> Carr J also found that 18% of the University's total operating revenues was 'substantial and formed a significant proportion of its overall activities'.<sup>89</sup> It is worth noting that the appellant in the case argued that merely calculating the revenue raised by a corporation as a percentage of its total revenue is insufficient to properly determine whether the corporation's trading activities are 'substantial'. Carr J expressed some sympathy for this submission, but noted that a purely financial examination would be consistent with authorities such as *Adamson's Case* and *E v Australian Red Cross Society*.<sup>90</sup>

Activities found by the Court in *Quickenden* to constitute trading activities included: fees paid by overseas students, fees for accommodation services, parking fees and the sale of land and property. Black CJ and French J expressed doubt as to whether revenue derived under the Higher Education Contribution Scheme qualified as a trading activity,<sup>91</sup> while Carr J stated that it did qualify on the basis that attracting students was a competitive activity.<sup>92</sup> Ultimately, all justices concluded that it was unnecessary to decide this point.

The decision in *Quickenden* is a decade old, and is a decision reached by a lower court on whether the activities of a particular university, at a particular point in time, rendered it a trading corporation. As such, it cannot be regarded as conclusive authority

<sup>80</sup> *E v Australian Red Cross Society* (1991) 27 FCR 310; *Orion Pet Products Pty Ltd v RSPCA (Vic) Inc* (2002) 120 FCR 191.

<sup>81</sup> *Educang Ltd v Queensland Industrial Relations Commission* (2006) 154 IR 436.

<sup>82</sup> *Sun Earth Homes Pty Ltd v Australian Broadcasting Corporation* (1990) 98 ALR 101, 110-113 (Burchett J).

<sup>83</sup> *Kirinari Residential Services (Vic) & (NSW) Inc* (1996) 40 AILR 3-420.

<sup>84</sup> *Belcher v Aboriginal Rights League Inc* (1999) 45 AILR 4-045.

<sup>85</sup> *Australian Workers' Union of Employees, Queensland v Etheridge Shire Council* (2008) 250 ALR 485.

<sup>86</sup> *Ibid*, 500.

<sup>87</sup> *Quickenden v O'Connor* (2001) 109 FCR 243.

<sup>88</sup> *Ibid*, 261.

<sup>89</sup> *Ibid*, 273.

<sup>90</sup> *Ibid*, 272, (Carr J).

<sup>91</sup> *Ibid*, 261 (Black CJ, French J).

<sup>92</sup> *Ibid*, 272 (Carr J).



that all universities constituted by State legislation would now be characterised as trading corporations. That said, there is no reason to doubt the correctness of *Quickenden* in applying High Court authority as it currently stands. In the absence of further guidance from the High Court, the decision represents a reasonable application of the substantial activities test. Indeed, the conclusion in *Quickenden* would today be bolstered by the growth of commercial activities in the higher education sector in areas such as overseas student fees. If the question of the status of a university were to come today before any court other than the High Court, it is highly likely that the court would apply *Quickenden* to the same effect, subject to any differing factual circumstances of the university in question. However, following the *Work Choices Case*, there is reason to believe that if the question came before the High Court that it might reformulate the substantial activities test, or create an exception for bodies such as charities, educational institutions and local government authorities.

#### 4 *A New Test?*

In the *Work Choices Case*, the High Court was not asked to rule on what is or is not a trading corporation. Accordingly, no opportunity arose for the High Court to reconsider ‘what kinds of corporation fall within the constitutional expression “trading or financial corporations formed within the limits of the Commonwealth”’.<sup>93</sup> However, the majority judges suggested a willingness to do this, noting that ‘any debate about these questions must await a case in which they properly arise’.<sup>94</sup> While stressing that the issue of what constituted ‘trading or financial corporations’ did not arise in the case, the joint judgment of Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ noted that it was:

interesting to observe that [in the case of *Huddart, Parker & Co Pty Ltd v Moorhead*<sup>95</sup>] Isaacs J regarded... ‘those domestic corporations, for instance, which are constituted for municipal, mining, manufacturing, religious, scholastic, charitable, scientific, and literary purposes, and possibly others more nearly approximating a character of trading’ as falling outside the class of trading or financial corporations.<sup>96</sup>

The majority also drew attention to nineteenth century developments in corporations law, such as the enactment of the *Companies Act 1862* (UK), which they said was ‘taken as the model for equivalent legislation’ in several Australian colonies.<sup>97</sup> They noted that this legislation ‘sought to distinguish between ‘commercial undertakings’ and ‘what we may call literary or charitable associations’<sup>98</sup>, and cited UK authority to this effect.<sup>99</sup>

In a recent article, Nicholas Gouliaditis suggests that the majority may have been attempting to draw attention to the idea that:

the framers of the Constitution, in using the words ‘trading corporation’, would have been influenced by the concepts and classifications introduced by the 1862 UK Act, especially the distinction it seems to draw between companies formed for the acquisition

<sup>93</sup> *Work Choices Case*, see above n 4, 75 [58] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ). See also: 74 [55], 109 [158].

<sup>94</sup> *Ibid*, 75 [58] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

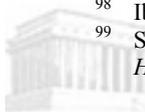
<sup>95</sup> *Huddart, Parker & Co Pty Ltd v Moorhead* (1909) 8 CLR 330.

<sup>96</sup> *Work Choices Case*, see above n 4, 86 [86] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

<sup>97</sup> *Ibid*, 92 [103] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

<sup>98</sup> *Ibid*, 91-92 [102] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

<sup>99</sup> See *In re Arthur Average Association for British, Foreign and Colonial Ships; Ex parte Hargrove and Co* (1875) LR 10 Ch App 542, 548 (Jessel MR).



of gain and companies formed for the purposes of promoting art, science, religion or charity.<sup>100</sup>

This view reflects comments made during the hearing of the *Work Choices Case*. In particular, Hayne J suggested that the question of whether there had been an ‘evolution of application of the term [trading and financial corporations]’ needed to be confronted directly, and that the pertinent question was ‘not what activities are or are not trading, but whether trading or financial corporations are defined by their activities or are to be identified otherwise’.<sup>101</sup> A willingness to revisit the question of what constitutes a trading corporation could perhaps also be inferred from comments made by Gummow J and Gleeson CJ during the hearing.<sup>102</sup> [Additionally, in his dissenting judgment, Callinan J stated that:](#)

[a] question left unanswered in this case is as to which corporations may be characterised as financial and trading corporations, a very big question indeed, and which will occupy, I believe, a deal of the time of the courts in the future.<sup>103</sup>

The High Court in the *Work Choices Case* demonstrated a willingness to revisit the definition of a trading corporation. If the question of whether a university is a trading corporation did arise, a number of responses are open to the Court, which since that time has also seen changes in its membership. It could:

- Apply the substantial activities test and the same reasoning as was used in *Quickenden* to hold that the university is a trading corporation;
- Apply the substantial activities test more rigorously to find that a higher proportion of activities must be trading activities in order for the university to be a trading corporation;
- Narrow what is understood as a trading activity in a way that excludes many university activities, such that universities are no longer likely to be classified as a trading corporation;
- Build on the exception to the substantial activities test recognised in *Fencott v Muller* to hold that certain types of corporations are to be assessed according to the purposes for which they were formed, such that a university created by State legislation for educational purposes may not be a trading corporation;
- Recognise an exception to the substantial activities test that excludes bodies formed for ‘religious, scholastic, charitable, scientific and literary purposes’; or
- Overrule the substantial activities test in favour of a ‘dominant purposes’ or other test.

All of the above avenues are open to the High Court, though some are much less likely to be adopted than others. It is unlikely, for example, that the Court will overrule the ‘substantial activities’ test altogether and institute a ‘dominant purposes’ test in its place. This would involve overturning long-standing High Court authority and could

<sup>100</sup> Nicholas Gouliaditis ‘The Meaning of “Trading and Financial Corporations”’: Future Directions’ (2008) 19 *Public Law Review* 110, 122.

<sup>101</sup> Transcript of Proceedings, *New South Wales v Commonwealth (Work Choices Case)* (High Court of Australia, HCA Trans 233, 10 May 2006).

<sup>102</sup> Gouliaditis, see above n 100, 120.

<sup>103</sup> *Work Choices Case*, see above n 4, 373 [892] (Callinan J).



prove poorly adapted to and impractical in the context of the present day 'regulatory environment where corporations are not formed for specific purposes'.<sup>104</sup>

A more likely possibility is that the court will redefine how the substantial activities test operates, such as by requiring it to be applied more rigorously, by narrowing the scope of what amounts to a trading activity or by creating an exception to the test for certain types of organisations. What is clear is that a range of possibilities remain at large, including that all, none or some of Australia's universities would be classed as a trading corporation. In light of the absence of a prior High Court decision on whether a university is a trading corporation, the lack of any recent High Court authority on the issue generally and the willingness of the High Court to invite a reconsideration of its substantial activities test, the answer must be regarded as uncertain.

## VI CONCLUSION

The changing regulatory environment of higher education in Australia is founded upon the Commonwealth's corporations power in s 51(xx) of the Constitution extending to State created universities. While the Federal Court's decision in *Quickenden* suggests that universities are likely to be trading corporations, and so fall within the ambit of that power as constitutional corporations, it is difficult to tell whether all universities meet this standard. Moreover, the current legal test set down by the High Court envisages that whether a particular university is a trading corporation may fluctuate over time as its activities change.

The status of universities as trading corporations, and so potential subjects of federal regulation, is by no means certain. This is in part due to the High Court never having addressed this issue specifically and the Court in the *Work Choices Case* evincing a willingness to revisit its test for determining the characteristics of a constitutional corporation. If the High Court did revise its test, it might lead to a result whereby some or all universities fall outside the scope of the federal corporations power. The likelihood of such a question arising before the Court is not remote – in the event that a higher education provider feels aggrieved by the operation of the TEQSA legislation its course of action may include challenging the capacity of that legislation to apply to the university. The question could also arise in an analogous setting were an educational provider in another sector, such as a private high school constituted as a corporation, to challenge its status as a constitutional corporation so as to escape the reach of a different federal scheme. Such a legal argument is a well trodden path for organisations in other fields seeking to fall outside the scope of federal regulation.

The TEQSA Act can also only apply to State established universities that continue to retain their status as corporations. It is possible, though unlikely to occur, that a State could pass legislation to reconstitute its universities other than as corporations. This would remove them from the ambit of the federal legislation because the institutions could no longer be classed as a constitutional *corporation*.

These uncertainties run counter to the aim of simplifying the regulatory framework for higher education by establishing a robust national regime. They may also have a spill-over effect into the federal funding of higher education institutions due to the High Court's decision in *Pape*. It is no longer the case, as Craven concluded in 2006, that the Commonwealth may exercise practical control over the field of higher education by invoking s 81 of the Constitution to 'appropriate money by way of grant to such entities as it deems proper' for 'such purposes as [it] sees fit'.<sup>105</sup> In *Pape*, the High Court clarified

<sup>104</sup> Gouliaditis, see above n 100, 130.

<sup>105</sup> Craven, see above n 3, 7.



that s 81 is not itself a source of power,<sup>106</sup> and that while appropriation is a precondition for expenditure, expenditure will only be valid if it is supported by some other source of legislative or executive authority.<sup>107</sup> Hence, if the Commonwealth is unable to regulate a higher education institution, it may also lack the power to fund it. This may have implications for the Higher Education Base Funding Review currently being undertaken by the Commonwealth.

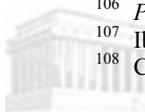
Craven suggested that, 'in the absence of judicial expansion of [Commonwealth] powers', 'Commonwealth-State cooperation' would be 'indispensable to the achievement of any satisfactory national or quasi-national outcome' with respect to the regulation of higher education.<sup>108</sup> There has since been recognition of the wide scope of the Commonwealth's corporations power. However, it remains uncertain as to whether this will enable the Commonwealth to achieve all of its regulatory and funding aims for the sector. Until one or more future High Court decisions clarifies this, it remains the case that the only certain path to a comprehensive regulatory scheme lies in federal-state cooperation.

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<sup>106</sup> *Pape*, see above n 5, 23, 45 (French CJ), 36 (Hayne & Kiefel JJ).

<sup>107</sup> *Ibid*, 49 (French CJ).

<sup>108</sup> Craven, see above n 3, 12.





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