

Universities in a State: The Federal Case Against Commonwealth Control of Universities

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EXECUTIVE SUMMARY

- The Commonwealth Education Minister, Brendan Nelson, has suggested that the federal government assume full legal responsibility for universities.
- At the current time, though most university government funding comes from the federal government, for Constitutional reasons the states are primarily responsible for university accreditation and governance.
- The Commonwealth wants to eliminate these obstacles to its policy agenda.
- The Commonwealth argues in favour of policy consistency.
- However consistency is not a virtue if policies are identical but bad in every state.
- Unfortunately the Commonwealth has a history of bad higher education policies which have created problems across the country while being 'consistent'.
- Federalism quarantines bad policy.
- Federalism allows policy experimentation, which the Commonwealth implicitly admits by copying aspects of Victorian policy.
- State governments are better able to monitor universities than the Commonwealth, and have less clustered legislative agendas to make necessary changes.
- Centralised power over universities creates threats to academic freedom that are much reduced by the current division of power.
- History shows that where national consistency is valuable it can be achieved through cooperation between governments, without creating long-term shifts in power or preventing states from withdrawing if things go badly.

The history of Commonwealth policy expansion shows that money often talks more loudly than the Constitution itself.

Introduction

With universities, the Commonwealth government has itself an exceptional pay less, get more deal. While its share of university revenues heads steadily down, the weight of rules, requirements and reporting heads steadily up. Even when it offers more money, as it did in Education Minister Brendan Nelson's 2003 university reform package, the Commonwealth is like a customer in a fast food store, paying a little extra to supersize its meal. The Australian Vice-Chancellors' Committee (AVCC) counts a dozen new bureaucratic burdens in the Nelson package.¹ But just as junk food addicts keep going back for more, the Commonwealth's appetite for power is not yet satisfied. It is now suggesting that it no longer share responsibility for universities with the states, but instead take complete control itself.²

Such a move faces Constitutional obstacles, and the easiest way around these is to get the states to cooperate. While the Commonwealth says it will call for submissions on the issue, participants in this process would be well-advised to copy their paper to the relevant State Ministers. For once, they are more important political players than the Commonwealth Minister. But should the decision to transfer power over universities to the Commonwealth be the last higher education decision state education ministers ever make?

The Commonwealth and the Constitution

Champing at the Constitutional bit

The words 'education', 'university', 'academy' or 'college' appear nowhere in Australia's Constitution, which sets out the subjects on which the Commonwealth government can legislate. The Constitution's silence gives the states power to legislate for higher education. All universities, public and private, in the Australian states derive their power to award degrees from state legislation. The public universities have detailed state statutes, setting out their aims and objects, governance structures, how money and property are to be managed, and other matters. They must report to their state governments on their activities, and be audited by state Auditors-General. State governments also have the power to accredit new courses and universities.

The only mention of higher education in the Australian Constitution, albeit an indirect one, appears in a sub-section dealing with social welfare. Along with authorising the Commonwealth to provide maternity allowances and child endowment, it includes 'benefits to students' in the Commonwealth's list of powers.³ Clearly, in the context of a provision that is mostly to do with welfare, this covers Youth Allowance and other student income support schemes. Tuition subsidies are a less obvious fit, but students do benefit from them. Certainly the Higher Education Support Act 2003, the legislative basis of the Nelson reforms, asserts that this is the case. The phrase 'as a benefit to students' appears several times in the Act, linking the legislation to the Constitution.

Specific constitutional mention is not, however, the only way the Commonwealth government acquires power over universities. The history of Commonwealth policy expansion shows that money often talks more loudly than the Constitution itself. The Constitution lets the Commonwealth give grants to the states, on condition that the money is spent how the Commonwealth decides. Through these 'tied grants' the Commonwealth has made decisions never envisaged by the men who wrote the Constitution in the late 19th century.⁴

For many years universities were funded via these conditional grants to the states. In the early 1990s the Commonwealth cut out the state middle man and began financing higher education directly. While undoubtedly bureaucratically convenient, this change takes us into less certain legal territory. On one argument, the federal government under its constitutional power to have money 'appropriated for the purposes of the Commonwealth' can spend on anything it deems to be a purpose of the Commonwealth. On another view, these purposes are restricted to subjects found elsewhere in the Constitution, such as the 'benefits to students' provision.⁵

If funding purposes are restricted to areas authorised by the Constitution, what is the basis of research funding? 'Benefits to students' is an unpromising source of authority. Much university research is connected tenuously if at all to the curriculum, and it distracts academics and administrators from teaching.⁶ It is not a benefit to most students. Research on matters related to other constitutional powers of the Commonwealth would, however, be within the powers granted by the Constitution. While adding significantly to the list of research topics, this could not stretch to the many strange and obscure university research projects that give such entertaining material to tabloid newspaper columnists. Their Constitutional source may lie in the 'implied nationhood' power that High Court judges have found in the Constitution. This allows the Commonwealth, in the words of Justice Mason, to 'engage in enterprises and activities peculiarly adapted to the government of a nation which cannot otherwise be carried on for the benefit of the nation.'⁷ Justice Brennan gave as examples 'initiatives in science, literature and the arts'.⁸ These are imaginative readings of the Constitution, but to date Commonwealth research funding policy has not been challenged in the courts.

Exercising extensive power over universities requires another step—attaching conditions to grants. In the case of universities, the most consequential condition has been the ban on universities charging Commonwealth-supported students tuition fees (partially lifted by the Nelson reforms). By cutting off this alternative source of finance it has made it much harder for universities to say 'no' to any other Commonwealth requirement, no matter how burdensome or unreasonable.

Despite currently exercising far-reaching control over universities, the Commonwealth knows that its Constitutional position has weaknesses, or potential weaknesses. It cannot know for certain whether the existing funding and regulatory structure would survive intact a High Court challenge, if one were made. It must have serious doubts about alternative Constitutional regulatory foundations, such as the corporations power.⁹ More immediately, the Constitution creates obstacles to the Commonwealth's policy ambition. These obstacles are all variations on the same basic problem—money is very influential, but it does not provide unqualified power. Money only works as a policy instrument if it is offered and accepted, and that is not a mechanism that can cover all higher education activity. Some aspects of policy are inherently outside it, such as the accreditation and management of universities that do not seek Commonwealth funding. The immunity self-financing private higher education institutions have from Commonwealth regulation clearly concerns the federal government.¹⁰ Canberra's power may also be threatened by the growing financial independence of public universities.

The most important trend in Australian higher education over the last 15 years has been the growth in fee-paying students, mostly from overseas but also now including tens of thousands of Australians. Together, they now make up more than a third of all students enrolled in Australian universities. It is unlikely that the Commonwealth has the same power over them as it does over Commonwealth-supported students. Full fee-paying students get no benefit from the Commonwealth; to the contrary they must cross-subsidise inadequately Commonwealth-supported students. Under existing Constitutional law, it is not clear that the Commonwealth can attach conditions when it provides no benefits. This is not a hypothetical issue. It is likely to arise later in 2005 when the Commonwealth attempts to prohibit the charging of fees not directly related to the course, such as those normally levied for amenities and services.¹¹ This is the Commonwealth's planned method for implementing its 'voluntary student unionism' policy. Universities may be able to challenge this legislation in the High Court if the government makes it apply to fee-paying students.

Then there is the possibility that a university, or a state if that form of funding were re-introduced, could reject a conditional grant. If money is refused there is nothing the Commonwealth can do. Admittedly such refusal is unlikely. Public university Vice-Chancellors regularly protest against Commonwealth requirements but invariably capitulate rather than forgo their money. No state government wants to be responsible for their universities losing money; through 2004 they were changing university statutes in line with Commonwealth guidelines so that those universities qualified for small increases in

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federal funding. Yet the right to knock back Commonwealth money remains as a constraint on federal government power. It could at least be used as a political tactic by universities, if they showed more nerve and unity than Vice-Chancellors normally display.

How the Commonwealth can increase its power

The Commonwealth would like more power over higher education, but what options does it have? The Commonwealth could try to amend the Constitution to acquire legal power over universities. With government control of the House of Representatives and the Senate from 1 July 2005 there are no parliamentary obstacles to calling a referendum. Yet referendums tend to be expensive failures, with only eight of the 44 proposals put to the people since 1901 being approved by the requisite majority of voters in a majority of states. No new power has been added to the Constitution by referendum since 1967.¹² A cheaper alternative, also allowed for under the Constitution, is for the states to refer their own power over universities to the Commonwealth.¹³ This is the idea that Dr Nelson is now investigating through a series of discussion papers.

Such a referral would not in itself eliminate the complexity, transaction costs and inconsistency complained of in the Commonwealth's initial discussion paper, *Rationalising Responsibility*, and which are the public rationale for change. Referred powers are concurrent powers, powers that both the Commonwealth and the states can exercise. Though in the event of inconsistency Commonwealth laws prevail, the Commonwealth would have to 'cover the field' to eliminate any state involvement in the regulation of universities, other than general laws that apply to universities as enterprises operating in the states.¹⁴ Yet it is unlikely that the states would trust the Commonwealth enough to allow it to 'cover the field'. The states would probably want to retain some power over research, so that they could regulate controversial areas of inquiry (such a genetic modification) and control research projects they were funding. Labor-controlled states (all of them now, but presumably not indefinitely) would be very reluctant to hand power over student associations to the Commonwealth, which would probably use that power to eliminate funding of student political activity. So we could end up with expanded but not complete Commonwealth control, and universities still having to deal with two political masters.

There is also the possibility that some states will refer their powers but not others. Initial state government reactions to Dr Nelson's first discussion paper suggest that this is a real possibility. NSW Education Minister Andrew Refshauge gave in-principle support to the idea, while Queensland Premier Peter Beattie was very sceptical, criticising various aspects of Commonwealth higher education policy and asking 'why would we trust the federal government with the future of young Queenslanders?'.¹⁵ Unless Dr Nelson can get all the state governments to agree to the same referral of powers inconsistency will still exist.

We should not forget that the Commonwealth already achieves some of its otherwise unconstitutional goals by other means. The Ministerial Council on Education, Employment, Training and Youth Affairs (MCEETYA) has been used to establish much greater than in the past (though not complete) consistency among the states in accreditation policy, and to establish the Australian Universities Quality Agency (AUQA), which carries out quality audits of universities every five years. And, as noted, in 2004 states changed their university statutes, in areas to do with governance, so that their universities would be eligible for additional Commonwealth funding. It is a reminder that while the federal system constrains the Commonwealth, it does not prevent national policymaking where there is sufficient consensus.

Is policy consistency a good thing?

Single versus multiple policymakers

Rationalising Responsibility argues that policy consistency between states is a good thing, and gives examples. It notes that, at least before recent legislative changes, there was 'little national consistency' in how university governing bodies were organised.¹⁶ It says that the

implementation of national protocols on approval of higher education institutions and courses varies between states. ‘This could result’, it goes on, ‘in confusion for consumers, and costs to providers seeking to operate in more than one State and Territory.’¹⁷

In the first example, governance, the paper argues for policy consistency to improve university operations. When *Rationalising Responsibility* complains that ‘there was a wide variety of arrangements and little national consistency’ in governance it seems to be a roundabout way of saying that there were not consistently good governance arrangements. As it said earlier in the same paragraph, the governing bodies of some universities had ‘bitter internal divisions, an inability to respond quickly to change, and a lack of the skills necessary to oversee major commercial undertakings’.¹⁸

Consistency itself, however, cannot solve any of these problems. Legislation could be identical for all states but still hopelessly flawed, turning consistency into a curse. An advantage of a federal, potentially inconsistent, system is that not every jurisdiction needs to be dysfunctional at the same time. Bad policy is quarantined, protecting the jurisdictions where it does not apply. *Rationalising Responsibility* tactfully does not name NSW and its chronic university governance problems, but what if Australia had consistently followed NSW practice? Everyone else would have been worse off than if they had enacted ‘inconsistent’ good legislation. Federalism manages policy risk more effectively than centralism.

Another important advantage of ‘inconsistent’ federal policymaking is that it allows for experimentation and policy learning. Individual states can try new policies, and if successful they become models for other states. Moreover, the states have a greater capacity to learn from experience and act on it. No state has more than ten universities to watch, while the Commonwealth has 39. Much of the Commonwealth’s knowledge of the universities it funds comes from once-a-year meetings and what turns up in its media monitoring service. Its statistics are often months and sometimes years out-of-date. Quick and comprehensive feedback it is not. The states, by contrast, can keep track of their universities more effectively, by virtue of physical and social proximity, extra time per university, and more concentrated political pressure.

Even when the Commonwealth Minister makes a decision, it can be hard to get it onto an already clustered legislative agenda. There are no great electoral pressures to deal with university policy. A June 2004 Newspoll found that of the 89% of respondents who thought education was an issue governments should be doing more about, only 15% nominated universities as the most important.¹⁹ With such low political priority, universities will struggle to find a place on a federal parliamentary schedule that is considerably busier than those in the states. Over the last three full non-election years the Commonwealth has averaged 157 Acts a year, compared to 107 in Victoria, 77 in Queensland and 73 in Western Australia. It would not be surprising if the Commonwealth decided that it had no time for local nuances and circumstances, and simply introduced standard legislation for every university.

In its original reform statement the Commonwealth implicitly acknowledges a positive effect of policy experimentation when it says that its governance policy builds on Victoria’s.²⁰ Without Victoria’s example, the Commonwealth’s policy would have been less-informed than it turned out to be, given that the Commonwealth bureaucracy has little experience with governance issues and they were not central to the consultation process prior to the governance reforms being announced. Indeed, the Commonwealth only changed the governance arrangements of the university it is responsible for, the Australian National University (ANU), after Victoria had already reformed its universities. Conversely, unsuccessful policy experiments can also be useful in providing guidance as to what not to do.

A new Commonwealth policy experiment—but a federal experiment, as the Commonwealth is one legislator among many in university governance—is reducing the size of the ANU’s governing Council to 15, well below the maximum 22 set out in Commonwealth guidelines, and significantly smaller than the Councils or Senates of other major universities. This has been achieved by cutting most substantially those members not appointed by the government itself. Just under half of the appointments

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to the ANU Council are made by the federal government. This contrasts with a more typical proportion of two-thirds non-government appointees.

This change means that as well as the Commonwealth government having enormous legislative and financial power over the ANU, it is close to having a working majority on the ANU Council of people who owe their appointments to the Minister. However there is a university-based Nominations Committee that limits the Minister's choices.²¹ In Victoria, by contrast, the Education Minister (acting on her own or through advice to the Governor) appoints a smaller share of the total membership but has no restraints on who she can appoint. In Victoria, advertisements have appeared in newspapers to widen the selection pool for Council members; a marked contrast to the club-like Nominations Committee at the ANU. Observation over time will help us decide whether one of these systems is better, or whether it makes no substantial difference. But if we did not have this variety, we would never know. Policy experiments could only be sequential, not simultaneous.

Is the Commonwealth competent?

The policy consistency argument could only be persuasive if we assume not that consistent policy is necessarily desirable, but that the Commonwealth is a consistently better policymaker than the states. Unfortunately, the Commonwealth's record as a higher education policymaker gives us no confidence that this is the case. Just within the Nelson reform package itself, there are several instances of policies that do not inspire faith in the Commonwealth's policymaking capacities.

Take for example the FEE-HELP loans scheme, which lends money to students who pay full fees. If the student is an undergraduate, he or she is liable for a surcharge of 20% on the loan. So if the annual course fee was \$10,000, a debt of \$12,000 would be incurred. If, however, the student is a postgraduate, he or she is not liable for any surcharge, and would owe only \$10,000.²² This is anomalous enough, but a further loophole enables postgraduate full-fee students to engineer themselves a subsidy. It works like this. To encourage early repayment, the Commonwealth offers a 10% bonus. So a postgraduate student who already had the \$10,000 fee could nevertheless take out a FEE-HELP loan. If the student then repaid that loan before its annual indexation for inflation he or she would need to pay only \$9,090.90, pocketing the 10% 'early' repayment bonus of \$909.10 from the hapless taxpayer.²³ In the past, policy favoured undergraduates, on the assumption that postgraduates received subsidies as undergraduates and can better afford fees from their workforce earnings. It seems absurd to reverse this, and subsidise postgraduates instead.

Or take the method by which the Commonwealth decides how much will be invested in each student it supports. Under the new system, annual per student discipline-based subsidies range from \$1,472 for each law student to \$15,996 for each agriculture student. These figures are not based on any empirical evidence as to actual costs of delivering courses or market failures warranting subsidies. They have their origins in several late 1980s studies of how universities allocated their funds. This starting data was of low quality. As the commentator Gavin Moodie has said, 'the studies were not of cost drivers let alone of what should be disciplines' funding levels, but of historical patterns of funding levels which in turn were the product of earlier government funding decisions.'²⁴ At around the same time, HECS charges for students were introduced, initially at a flat rate. In 1997 the Howard government introduced 'differential HECS', charging students at different rates depending on which discipline they studied. The broad considerations in setting the rates were 'the actual cost of the course taken and the likely future benefits to the individual...'²⁵ The charges themselves, however, were back-of-the-envelope calculations.

Under the Nelson package government subsidies are no longer the only income universities receive for HECS students. There is also a student charge. The maximum student charge is one old semi-arbitrary number (differential HECS) plus 25%, a new semi-arbitrary number. Because the disciplines vary in how much of their total nominal per student revenue comes from the student, the final increase in university income per student ranges from about 20% in low-subsidy law to around 7% in high-subsidy

dentistry and medicine. There is no obvious reason why law faculties should earn an additional 20% while medical or dentistry faculties should earn only 7% more. In short, the resource allocation system for Commonwealth-supported students is based on figures that are little better than numbers picked out of the air. And the Commonwealth has the temerity to say that some universities have a 'lack of the skills necessary to oversee major commercial undertakings'!

Or, finally, take the system for allocating Commonwealth-supported places. A naïve observer might assume that we should put university places where students want to study. Instead, however, the policy aim is 'to equalise projected average higher education participation rates in 2008 for 17-25 year olds across the States and Territories'. Also, 200 places are to be allocated to Tasmania to serve its 'special regional development needs'.²⁶ Tasmania aside, this is a 'consistent' policy. But there are not consistent patterns of demand for university education, and so the net result will be high unmet demand in some states and surplus places in others. For 2004, unmet demand in all states except Queensland and Victoria was concentrated in borderline applicants, people in the bottom 60% of applicants.²⁷ 2005 data by applicant academic performance is unavailable at the time of writing, but offers in Victoria of 74 per 100 applicants are lower than in NSW (79) or Tasmania (85), suggesting that the latter states are making offers to weaker prospective students.²⁸ Yet because of already high university participation rates Victoria received a low number of new places, and Queensland received fewer places than NSW, which has less unmet demand from able students. Tasmania, meanwhile, will probably have to import students from Victoria to fill all its places.

There is a consistency of sorts underlying these policies. But it is not the kind of consistency Australia's higher education system needs. The danger in consistency is that under a centralised system policy could be consistently bad, rather than of varying quality under a federal system. A federal structure minimises risks and maximises policy experimentation. Over the long-run, federal—as opposed to federal government—policy results are likely to be superior, even if in specific places at specific times state governments make a mess of things.

Consistency in accreditation

While there is no obvious need for consistency in university governance or in policies aimed at university management, arguably matters like accrediting higher education institutions and courses are in another category. As the higher education system expands, and more institutions exist than prospective students or employers of graduates can reasonably be expected to know of, there is a case for mandating common minimum standards. Otherwise, students could be duped into enrolling at sub-standard universities or colleges, and employers fooled into hiring graduates without proper qualifications. The current National Protocols for Higher Education Approval Processes, agreed by the states and the Commonwealth through the MCEETYA process in 2000, are designed to avoid these problems and establish standard procedures for accreditation.²⁹

The Protocols make life difficult for shonky operators, and that is a good outcome. The problem is that they make life difficult for legitimate operators as well. The legislation flowing from the Protocols entrenches a single basic model of what constitutes a 'university'. All new universities must resemble the old public universities, teaching and researching across a range of fields. This makes starting new universities very difficult. The research requirement adds significantly to costs, as unlike teaching it requires expenditure that is unlikely to generate equivalent short-term—or even long-term—revenues. It is unlikely that any new private universities will be established in Australia while these rules exist. At best, we will see only niche entrants operating at the fringes of the system. In effect, the Protocols are a major barrier to entry in the higher education industry.

So national consistency has a sting for students. The protectionist Protocols keep potential rivals to lower-status 'institutes', 'academies' or 'colleges', substantially undermining their market appeal. In the United States non-research universities like the University of Phoenix have created large markets focused on the needs of people upgrading their work skills. Phoenix had 150,000 students in 2002 and was making profits, sure

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signs that it fills a niche left vacant by publicly subsidised universities.³⁰ The Protocols prevent institutions like the University of Phoenix establishing themselves in Australia under their current titles. The result is less choice for students, and less competitive pressure on other universities to offer relevant, quality courses.

Without enforced national consistency, one or more states can break ranks, to the benefit of students within their jurisdiction. South Australian Premier Mike Rann is already hinting at this by supporting Dr Nelson's ideas for relaxing the Protocols, because he wants a branch of the American Carnegie Mellon University to open in Adelaide.³¹ But could this variety cause problems for others? *Rationalising Responsibility* suggests that different standards may confuse brand 'Australia' in the international market.³² However this is unlikely. As the University of Melbourne's Vice-Chancellor, Glyn Davis, has pointed out, existing public universities are already running Phoenix-like operations. They do this by operating teaching-only sites or campuses, often catering mainly to overseas students. Can anyone seriously believe that students are attracted to the universities that do this, such as Central Queensland University or James Cook University (to name two that have outposts in far away Melbourne), because of their research achievements? The presence of these 'teaching shops' does not seem to have prevented huge growth in the overseas student market. Nor did the pre-2000 lack of consistent regulation. National consistency imposes real costs to ward off hypothetical dangers.

Threats to academic freedom

Despite their legal and financial vulnerabilities, universities have preserved much of their academic freedom. Within their financial constraints, they decided what to teach and research, who to admit, and how to disseminate their research findings. Though nobody believes that universities always made wise choices in these matters, outside of the government there has been no strong push for greater intervention. Implicit in the 'university autonomy' and 'academic freedom' mantras is the realisation that government bureaucracies are ill-equipped to make complex course content decisions or to judge applicants' suitability for university study. They lack in-house expertise and cannot match the local knowledge available at universities. Their incentive structures orient them toward political rather than educational goals.

Though the idea of academic freedom remains uncontested at the philosophical level, it is being challenged by Commonwealth policy decisions. Alongside limited increases in universities' power to set student contribution levels and enroll full-fee students is a broader trend of increasing—or attempts to increase—bureaucratic or Ministerial interference in areas previously left largely to the universities themselves. As the old saying goes, it is death by a thousand cuts.

In the original Higher Education Support Bill 2003, the Commonwealth tried to insist that selection of subsidised students be based on 'merit', with exceptions for educationally disadvantaged applicants.³³ In itself, this would do no more than put standard practice into law. The provision's significance was not in what it set out to do, but in the fact that it was the Commonwealth trying to do it. It would have set a precedent for Commonwealth control of university admissions, with uncertain implications for the future. American universities have used racial preference in admissions; who is to say that a future Australian government would not do the same? The Australian left is critical of merit selection, for its role in reproducing social inequality (because children from advantaged families and private schools do well in Year 12).³⁴ Admission by lottery used to be suggested as a remedy. The admissions provision was eventually made near meaningless by the Senate's insertion of 'in the provider's view' of merit. Yet the fact that the government even attempted to put the provision in suggests little concern about its precedent value. There is no apparent awareness that centralised power is not always used in ways its creators intend.

The final Higher Education Support Act 2003 gave the Minister power to de-fund what he called 'cappuccino courses'.³⁵ Degrees in the paranormal, surfboard riding, golf course management and aromatherapy were offered as examples of courses that ought not be funded. We all have our views about what constitutes a worthwhile course.

Personally, I don't think there would be much loss if every cultural studies department in the country closed tomorrow. Other people's blood boils at the very thought of the neo-classical economics taught in economics faculties. But do we want these decisions politicised? Do we want left-leaning Arts faculties opening under Labor governments and closing under Liberal governments, and vice-versa for market-leaning Commerce faculties? We already have some protections against sustained academic silliness—few students will waste their time and money on courses seen to lack credibility, academic trends see orthodoxies come and go, and universities want to protect their reputations. Further guards against dubious degrees should come from directly funding students with vouchers or through independent accreditation agencies, not Ministerial veto.

Dr Nelson has also created controversy by rejecting research grants recommended to him by the Australian Research Council (ARC).³⁶ The ARC works by receiving research grant applications from academics, sending them out for peer review, and ranking them based on the results of that peer review. The ARC has not been without controversy itself. *Herald-Sun* columnist Andrew Bolt, for instance, didn't think much of a large grant for the author of such works as *Feminising Syphilis* and *Are Small Penises Necessary for Civilisation?*³⁷ More seriously, University of Wollongong academic Gregory Melleuish has criticised the apparent favouring of race and gender topics in Australian history. But the basic idea of keeping research funding at arms length from government is a sound one, reflecting limits on state knowledge, a preference for intellectual diversity rather than Ministerial partiality, and the need for critical study of government policy. Especially as the criteria for Dr Nelson's grant rejections were not announced, this decision encourages research applicants to fit their research proposals into the bounds of what they think the Minister will accept.

Under the current Constitutional position, there are limits to how far the Commonwealth can go in controlling what universities can do. Its increasing influence comes from attaching ever more onerous conditions to the funding it provides. The Commonwealth cannot control admissions for full-fee students, courses it does not fund, or research produced privately. Where the Commonwealth provides no funds, universities preserve their autonomy. The danger in giving the Commonwealth full Constitutional control over universities is that there would then be no constraint. It could control *everything* universities do. Academic freedom would be at the discretion of the Minister.

Of course state governments have this power now. The difference is that it is very unlikely that *all* state governments would act in the same way at the same time to diminish academic freedom. The federal system is a virtual guarantee that there will be academic freedom somewhere in the country at all times, and the knowledge that restrictions on academic freedom would see researchers move interstate diminishes the value in even attempting state-based restrictions. The possibility of international movement, though real for academics in internationally focused disciplines who are able to move their families, is less of a constraint on the Commonwealth.

Many small mistakes are better than one big mistake

Like much of higher education policymaking over the last few years, *Rationalising Responsibility* reflects a bureaucratic worldview. This isn't just traditional bureaucratic empire building, though it is hard not see an element of that in all the new activities requiring additional public servants and resources. It is the bureaucrat's fear of being blamed when something, somewhere, somehow goes wrong. All these rules and regulations are designed to stop that happening—to clean up dysfunctional University Councils, to eliminate dubious universities, to get rid of silly-sounding courses, not to fund offbeat research.

While understandable in the context of a bureaucrat's experience (you have to some sympathy for them as they face Socialist Left Senator Kim Carr's inquisitorial dirt-gathering in Senate Committee hearings), this is not the right way to look at university policymaking or management. Errors and mistakes are the inevitable consequence of trying something new, or of circumstances changing while practices stay the same. The

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right response is not to try to prevent them from ever happening, but to ensure that there is feedback alerting us to problems, incentives to fix them, and the flexibility to do so. Unfortunately, centralising decision-making in Canberra would put key decisions in the hands of the government most deaf to feedback, with the weakest incentives to fix problems, and the least flexibility in dealing with them.

This is why transferring power over universities from the states to the Commonwealth would be a big mistake. In an attempt to avoid the many small mistakes made by universities and their respective state governments it would build-in far more serious systematic flaws; flaws already evident in the poor quality of Commonwealth higher education policymaking. If it were not for state fiscal constraints, the more obvious policy change would be to devolve university policy back to them, rather than to take away what they still have. State governments are unlikely to have stood by for so long with major problems uncorrected, especially if other states were moving to improve their university systems. Given current limits on state taxing powers, we can't go back to the individual states funding universities. But we can avoid making the policy system any worse, and reject this Commonwealth claim for still more power.

Endnotes

- ¹ Australian Vice-Chancellors' Committee, *Achieving the Vision for Australia's Universities: Making Backing Australia's Future and Backing Australia's Ability work* (Canberra: AVCC, 2004), pp.13-14.
- ² Department of Education, Science and Training, *Rationalising Responsibility for Higher Education in Australia: An Issues Paper* (Canberra: DEST, 2004). Further papers are due for release in March 2005.
- ³ Section 51(xxiiiA). This was added at a referendum in 1946.
- ⁴ Section 96.
- ⁵ Section 81, see the discussion in Kevin Booker, Arthur Glass and Robert Watt, *Federal Constitutional Law: An Introduction* (Sydney: Butterworths, 1998), pp. 116-119.
- ⁶ On the tensions between research and teaching see my book *The Unchained University* (Sydney: CIS, 2002), pp.50-54, 144.
- ⁷ Booker et al, *Federal Constitutional Law*, p. 128.
- ⁸ Cited in Leslie Zines, *The High Court and the Constitution* (4th edition), (Sydney: Butterworths, 1997), p.255.
- ⁹ Legally, universities are corporations so there is some scope for regulating them via section 51(xx) of the Constitution. However, it is hard to see how that could provide enhanced legal authority for funding research, and following the *Incorporation* case it would not deal with the issue of establishing new universities, a key political concern: see the discussion of the corporations power in Booker et al, *Federal Constitutional Law*, pp.75-89.
- ¹⁰ DEST, *Rationalising Responsibility*, p.13.
- ¹¹ This is the 'voluntary student unionism' legislation. The latest version is the *Higher Education Support Amendment (Abolition of Compulsory Up-front Student Union Fees) Bill 2003*.
- ¹² Guy Aitken and Robert Orr, *The Australian Constitution* (3rd edition), (Canberra: Australian Government Solicitor, 2002), pp.155-156. And even that was the elimination of Aborigines as an exception to a general power allowing the Commonwealth to make laws for the people or any race for whom it is deemed necessary to make special laws. Otherwise, we have to back to 1946 for a substantive new power.
- ¹³ Section 51(xxxvii).
- ¹⁴ Section 109 of the Constitution covers inconsistency.
- ¹⁵ Stefanie Balogh and Steven Wardill, 'Federal funding "too low" for universities take over', *The Courier-Mail* (21 December 2004), p.6.
- ¹⁶ DEST, *Rationalising Responsibility*, p.11.
- ¹⁷ As above, p.15.
- ¹⁸ As above, p.11.
- ¹⁹ Dusseldorp Skills Forum, 'Opportunities for Youth Study', prepared by Newspoll June 2004.
- ²⁰ Department of Education, Science and Training, *Our Universities: Backing Australia's Future* (Canberra: DEST, 2003), pp.13-14.
- ²¹ See the *Australian National University Act 1991*, section 10.
- ²² See section 137-10, *Higher Education Support Act 2003*.
- ²³ See section 151-5, *Higher Education Support Act 2003*.

- ²⁴ Gavin Moodie, 'Australian Tertiary Education', <http://www.gu.edu.au/vc/ate/>
- ²⁵ Amanda Vanstone, *Higher Education Funding Report for the 1997-99 Triennium* (Canberra: DETYA, 1996), p.10.
- ²⁶ DEST, 'Model for the Distribution of New Higher Education Places', available at <http://www.dest.gov.au/highered/csp/model.htm> The Tasmanian places were a pay-off to Senator Brian Harradine.
- ²⁷ My calculations from Australian Vice-Chancellors' Committee, 'Applications for Undergraduate Higher Education Courses, 2004', <http://www.avcc.edu.au/content.asp?page=/publications/stats/unmet>
- My calculations of state-based unmet demand differ from the AVCC's summary calculations because I have considered only the top 40% of school leavers as 'able'. The raw data is in the AVCC's Appendix.
- ²⁸ Australian Vice-Chancellors' Committee, 'Demand for university courses' (2005), www.avcc.edu.au, student statistics page.
- ²⁹ The protocols can be found here: http://www.dest.gov.au/highered/mceetya_cop.htm. Dr Nelson has issued a discussion paper on the protocols, *Building University Diversity: Future approval and accreditation processes for Australian higher education* (Canberra: DEST, 2005).
- ³⁰ For a description of these for-profit universities, see David Kirp, *Shakespeare, Einstein and the Bottom Line: The Marketing of Higher Education* (Cambridge, Mass.: Harvard University Press, 2003), esp. ch. 13.
- ³¹ Sophie Morris, 'Rann backs teaching-only unis', *The Australian Financial Review* (5 March 2005).
- ³² DEST, *Rationalising Responsibility*, p.15.
- ³³ Section 19-35.
- ³⁴ Eg Simon Marginson, in *Education and Public Policy in Australia* (Melbourne: Cambridge University Press, 1993), p.243, argues for weakening the 'selection function'.
- ³⁵ Section 36-15. There are parallel provisions to avoid loans going to these courses in section 104-10.
- ³⁶ Dorothy Illing, 'Grant chiefs at odds over Nelson veto', *The Australian Higher Education Supplement*, 15 December 2004.
- ³⁷ Andrew Bolt, 'Grants to grumble', *Herald-Sun* (19 November 2003).

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