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From Colonies To TEQSA: Vortices And Thermals Of Legislative Change

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About the Author

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Abstract

This paper situates, through Constitutional law, the reach of Commonwealth powers into fields of State governance in Australia. Particular attention is given to the changing ambit of the corporations power with the 2011 enactment of the Tertiary Education Quality and Standards Agency Act (TEQSA). The Australian constitutional system was founded on the principle of federalism, a legal-political system whereby power is shared between Commonwealth and State governments. The passing of the TEQSA Act has established an Australia-wide, standards-based, regulatory framework for national consistency in higher education. This Act was passed under the authority of the constitutional corporations power.

Due attention is given to High Court of Australia determinations showing how the corporations power has reached further and further into State governance, including that of education, thus affecting public policy. By this legal narrative, I propose that the law is acting as a sword, while casting the favours of a regulatory shield, and potentially impinging on academic rights as corporate citizens, as education is caught in the vortices and thermals of legislative change.

Introduction

From colonies to TEQSA, 19th to 21st centuries, the federal balances in Australia have changed, catching education in the vortices and thermals as one legal decision influences another and another. In 2011 the *Tertiary Education Quality and Standards Agency Act (TEQSA)*¹ became law issuing wide regulatory powers reaching into every State and Territory. This enactment, made possible under the Australian Constitution corporations power,² accordingly established an Australia-wide, standards-based, regulatory framework for national consistency in higher education. To understand how the TEQSA Act could affect the business of universities and academics Australia-wide, this present discussion provides an overview of the constitutional basis for the changing reach of Commonwealth powers into fields of State governance. Due attention is given to High Court of Australia determinations evidencing today's extensive reach of the corporations power into the field of education.

In this specific context I propose that the law is acting as a sword of action, while casting the favours of a regulatory shield, thereby impinging on the rights of academics as corporate citizens. Under TEQSA's regulatory framework academic life and work becomes increasingly regulated by a set of input/output-standards, driven by the provision of evidence against nationally prescribed thresholds for teaching and learning, research, and governance, all of which an academic must perform with increasing levels of *excellence* to justify their value as educators – in the name of the education enterprise. The chief commissioner of the Tertiary Education Quality and Standards Agency, Carol Nicoll explains:

TEQSA's regulatory framework is defined by a set of threshold standards which are currently a combination of inputs, processes and outcomes. The TEQSA Commission would like to see providers increasingly demonstrating their capacity to meet the threshold standards through

evidence relating to outcomes – and not only in relation to teaching and learning – but also in relation to research, to academic governance and other areas of the educational enterprise.³

If educational providers are to ‘demonstrate their capacity’ as Nicoll states and TEQSA demands, then at the micro-level this demonstration will, of necessity, be coming from the academics themselves, and will inevitably have an effect on what they do in a day and how they do it. I will return to this point later in the paper. Firstly, how does the constitutional system work to substantiate widespread legislation regarding academic work?

Constitutional Systems

Australia shares a commonality with other OECD countries of increased regulation of higher education responding to a globalised economic marketplace. Indeed, the global trend to over-arching government regulation of higher education is well recognised in the era of increasing massification and internationalisation of education. The need for economic and social progress, concern for imbalances in provider quality, and levels of risk-management in a competitive global environment, are primary public policy drivers for legislative change. How has Australia responded constitutionally to this?

The Australian constitutional system was founded on the principle of federalism, a legal-political system whereby power is shared between central and regional governments, which in Australia is between a Commonwealth Parliament and six State Parliaments and separate judiciaries: NSW, Victoria, Tasmania, South Australia, Western Australia, Queensland; and two Territories: Northern Territory and Australian Capital Territory. Apart from Queensland each of the Commonwealth and State parliaments are bicameral. Commonwealth laws are made under constitutional heads of power, and if the High Court finds these powers wanting in any specific legislation then that law will be found invalid. State legislation may also be found invalid if it is inconsistent with that of the Commonwealth.⁴

To achieve an understanding of how the Commonwealth Parliament in Australia could find its authority to legislate nationally for the 173 higher education institutes, public universities and private providers, thereby cutting across existing State legislation, requires some understanding of the fundamental workings of Constitutional law in Australia with particular application, in this instance, to the changing ambit of the *corporations power*. The history of the Australian Constitutional system since 1900 shows the changing scope of Constitutional heads of power, some becoming so broad that they reach far into what was considered to be the sanctity of the States. In this context, the discussion is offering consideration of changing federal balances of power and how Commonwealth legislation can ultimately affect higher education in a way that can reach into the core of academic life.

To set the scene, I will look at processes and principles encapsulated as the guiding policy of the founding framers of this federal constitutional arrangement, and how these principles have changed over time via processes of judicial construction of the High Court of Australia. Ultimately, in the headlights of TEQSA there is concern for possible effects of expanded regulatory powers on academics as corporate citizens.

Universities in the Thermals and Vortices of Corporations Power

A ‘thermal’ is an upward current of warm air enabling birds and gliders to gain height. As law and politics coalesce for change, perhaps the history of western education can be mapped in the liberal humanist light of progressivism as a series of legislative and public policy thermals. However, let us not ignore the vortices, the whirling masses of air and water that suck everything in the vicinity towards the centre. This discussion casts the centre of the vortex as the Commonwealth, which over the past century or more holds an increasing dominance in the federal balances of power.

Today, the constitutional corporations power is considered as ‘a potent weapon in the Commonwealth’s economic armoury’.⁵ The commercialisation and corporatisation of universities, and broad scope of the corporations power under the Commonwealth Constitution section 51(xx),⁶ have led to significant changes in university education, with legislative regulation directed to the heart of academic responsibilities. Carol Nicoll asserts:

No provider, whether a university or private provider, will maintain or improve quality *until every staff member, in particular individual academics*, understands that they have a level of *responsibility*, a real *accountability* for the quality of the student experience and for student outcomes. It is not enough that there is an understanding of this accountability by the Vice-Chancellor, the Rector or the University Quality Manager.⁷ (Emphasis added).

It can be said that *responsibility* and *accountability* to academic standards are not new demands in the academic environment, but what differs here is that in Australia the States have been by-passed in favour of a national system, and increasingly the academics must be accountable to the system of accountability itself. Prior to the enactment of the TEQSA Act, States and Territories had specific legislative requirements for educational providers within their jurisdiction.⁸ The National Protocols, under the *National Protocols for Higher Education Approval Processes 2007*, was duly legislated in States and Territory for local implementation. Each university had its own governance system legislated in a range of enactments with AUQA⁹ as the over-arching audit body for quality consistency.

Under the TEQSA Act this system has changed. Commencing in January 2012, TEQSA has established a national, standards-based, regulatory framework enabling a centralised, muscular, regulatory arm to reach deeply into the academic work of higher education.¹⁰ All university performance is now regulated and evaluated nationally against a Higher Education Standards Framework,¹¹ including the Higher Education Threshold Standards,¹² and Australian Qualifications Framework (AQF),¹³ no doubt all seeking approbation for their oversight of national consistency in higher education. Universities and other tertiary providers are required by law to meet the legislated standards with insistence upon obligations to ‘excellence, diversity and innovation ... to meet Australia’s social and economic needs for a highly educated and skilled population’.¹⁴ Non-compliance has serious consequences with TEQSA authorising compliance monitoring with wide investigative powers,¹⁵ enforcement including criminal and civil penalties for offences.¹⁶

The TEQSA Act provides a regime proclaimed as ‘a sensible rationalization of regulatory oversight’¹⁷ following the outcome of a major review of higher education in 2008 led by Emeritus Professor Denise Bradley AC. The Bradley Review¹⁸ found that Australia was losing ground when compared to international benchmarks of participation and success in higher education of other OECD countries, and has lower targets for growth in the education market, concluding that ‘while the system has great strengths, it faces significant, emerging threats which require decisive action’. The report makes 46 recommendations for reforms ‘to the financing and regulatory frameworks for higher education’.¹⁹

From these recommendations, the new legislation of TEQSA reaches not only into corporative activities of educational institutions, but also into the very heart of academic work itself. This legislative change was made possible, constitutionally, following the gradual broadening of Commonwealth powers over the 20th century, particularly following two specific cases, the 1920 *Engineers* case²⁰ and the 2006 *Work Choices* case²¹ (to be further discussed). Gradually a wider reach of Commonwealth powers into industrial relations along with the redefined ambit of the corporations power becomes evident. The TEQSA Act stipulates legislative reliance on s 51(xx) (corporations power)²² and s 51(xxxix) (incidental powers),²³ and s 122 (territories)²⁴ of the Constitution,²⁵ and ‘*any other Commonwealth legislative power ... to establish a Corporation*’²⁶ (emphasis added). I suggest that legal drafters have been very smart here. The scope and ambit of Constitutional power has reached an unprecedented breadth.

Founding Processes and Principles

The characterisation of a corporation will be discussed shortly in context of these expanding powers, but firstly, how did the Australian legal system arrive at this situation where the federal balance of power is now so strongly favouring the Commonwealth over the sanctity or autonomy of States that the whole of the tertiary education sector can be governed and regulated from and by central federal powers? Drawing from the principle that to know where one is, or where one is going, one needs to know where one has come from, this question will now be addressed.

Constitutional powers did not arrive fully formed in Australia:²⁷ there is a traceable genealogy to Federation, which narrative is relevant here. The States once organised as colonies²⁸ with military-style governance under a Governor vested with authority for social, legal and economic life, gradually received legislative

status from the UK Imperial Parliament.²⁹ Establishment of responsible government³⁰ followed the 1850 *Australian Constitutions Act*³¹ confirming legislative status of the Australian colonies, but it was not until the 1870s that there was growing recognition of the need for a Commonwealth seat of government. Debate ensued on how to develop federation with a Constitution to synchronise matters such as trade and commerce, and defence,³² while ensuring the colonies retained a high degree of self-governance.

The road to federation was a significant democratic project, which would take years to come to fruition through a number of legislative enactments and intercolonial events, including a series of conventions from 1883 to 1898, attended by those who became known as the ‘founding framers’³³ to determine a constitutional model to provide federal balance.³⁴ ‘The intent of the founders was clear: to curtail strictly the scope of national power’.³⁵ To this end, the founding framers looked to both the Westminster system of government and United States’ federalism,³⁶ to preserve strong colonies.

The collective aim of the founding framers was to design a Constitution for a federated form of responsible government, with Commonwealth legislative powers coming from Constitutional authority and residual State powers. There is little focus on individual rights,³⁷ yet the whole is underpinned by concepts of ‘freedom’ as a normative principle, reflecting the laissez-faire liberalism of British economic, political and social thought emerging through 17th to 19th centuries. Such were the teachings of John Locke³⁸ and Adam Smith,³⁹ the non-interventionist utilitarian approaches to law and politics of Jeremy Bentham⁴⁰ and John Stuart Mill.⁴¹ all of which have a profound effect on the way education has hitherto been approached as a site of freedom and individualism in the progressive quest for knowledge.⁴²

Fundamental Law and Judicial Construction

The founding framers saw their progressive project come to fruition in 1900,⁴³ with a legally entrenched Constitution representing a *grundnorm*, or paramount law for Australia,⁴⁴ as confirmed by Justice Windeyer, ‘the Constitution is not an ordinary statute: it is a fundamental law’.⁴⁵ It then remained for this fundamental law to be interpreted through High Court of Australia determinations evidencing a dynamic process, with the High Court as ‘the ultimate guardian of the Constitution’.⁴⁶

While maintaining the federal balances of power may not be the prime concern of judicial interpretation, note the reasoning of Justice Kirby in the 2006 *Work Choices* case: ‘It is always valid to test a legal proposition by reference to the consequences that would flow from its acceptance’, and, ‘the use of s 51(xx) ... carries with it, if valid, a very large risk of destabilising the federal character of the Australian Constitution’.⁴⁷

Given that the process of statutory interpretation, as advised by Brennan CJ, in 1996, is that, ‘Implications ... exist in the text and structure of the Constitution and are revealed or uncovered by judicial exegesis’,⁴⁸ and noting the words of Alfred Deakin in 1890, ‘We should fail in our duty if we did not embody in our draft such distinct limitations of federal power as would put the preservation of state rights beyond the possibility of doubt’,⁴⁹ it is interesting to review later commentary that casts doubt upon such preservation. In a recent High Court judgement, French CJ stated, ‘The financial dominance of the Commonwealth Government in relation to the States was no doubt anticipated by some delegates, although almost certainly not to the degree which has eventuated ...’.⁵⁰ And Sir Harry Gibbs saw the Constitution in serious decline from original intentions, noting with Classical import, ‘*Facilis descensus Averno* (Virgil *Aeneid* VI, 126), Easy is the descent to Avernus’.⁵¹

Legal commentator Greg Craven is in ‘no doubt that the course of the Australian states since federation has been one of decline, roughly matching the spiraling trajectory of croquet as a mass sport’;⁵² and he speaks of ‘the utter failure of the founders’ plan to preserve the patrimony of the states.’⁵³ Notably, Justice Callinan opined, ‘There is nothing in the text or structure of the Constitution to suggest that the Commonwealth’s powers should be enlarged, by successive decisions of this Court, so that the Parliament of each State is progressively reduced until it becomes no more than an impotent debating society’.⁵⁴ Yet enlargement of Commonwealth powers is precisely what happened.

Corporations Power: From Reserved Powers to Averno

How could such changes occur from well-preserved State powers to the suggested descent to 'Averno'⁵⁵ and what affect might this have on education? Enacting the founding framers' plan, the early High Court of Australia⁵⁶ was concerned to preserve the sanctity of States by characterising Commonwealth laws in a way that kept States and Commonwealth immune from one another;⁵⁷ a kind of mutual, reciprocal, prohibition on the use of powers was produced: but could it last? The early High Court upheld a 'reserved powers doctrine', as seen in the case of *Huddart Parker*⁵⁸ with respect to the corporations power. The effect of the reserved powers doctrine was that powers in States would remain reserved with an 'implied prohibition against direct interference'⁵⁹ by the Commonwealth, although this was not expressly provided in the Constitution.

Significantly for changing balances of power, the *Engineers* case of 1920⁶⁰ ushered in a new era of High Court thinking regarding the Constitution, with profound effects on State autonomy. Past doctrines of 'implied immunities' and 'reserved powers' were 'exploded and unambiguously rejected',⁶¹ as the High Court focused on literal textual interpretations. Higgins J expounded that 'when we find what the language means, in its ordinary and natural sense, it is our duty to obey that meaning, even if we think the result to be inconvenient or impolitic or improbable'.⁶² Consequently, industrial disputes in industries that are under control of State enterprises yet 'extending beyond the limits of any one State',⁶³ came under the ambit of Commonwealth powers⁶⁴ – a High Court interpretation that, as time passed, became significant for the expanding reach of Commonwealth powers.

Another New Era

Federal balances of power were changing from the 1920s. The High Court farewelled the founding framers' ideal of a *laissez-faire*, federal compact, protective of States. Gone were the days of implied meanings; ushered in was the principle of interpreting the words of the Constitution in their 'ordinary and natural sense'.⁶⁵ The way was then opened for wider Constitutional reach into State legislative domains as evidenced by the eventual passing of TEQSA. But the leap from *Engineers* to TEQSA was across a broad terrain and decades of time. Something must have happened along the way to make the passing of TEQSA possible?

That 'something' was the landmark *Work Choices* case.⁶⁶ If *Engineers* heralded a watershed moment of expanding Commonwealth powers in 1920, 86 years later *Work Choices* would be an avalanche. Some commentators judged the majority decision in *Work Choices* to be extraordinary for its determination to extend the scope of Commonwealth corporations power, its 'fallout' seen by Professor Craven as 'the constitutional equivalent of a dirty bomb',⁶⁷ but seen by others as predictable given the history of judicial interpretations of the corporations power.

In *Huddart Parker* Higgins J had cautioned against too broad an interpretation in characterising the corporations power: 'If the argument for the Crown is right, the results are certainly extraordinary, big with confusion', thereby listing a set of 'horribles' that could eventuate.⁶⁸ Echoes of Justice Higgin's 'horribles' were to surface a century later, in Justice Kirby's dissenting opinion in *Work Choices*, where His Honour saw possibility for the Commonwealth to foster, 'optional or "opportunistic" federalism in which the Federal Parliament may enact laws in almost every sphere of what has hitherto been a state field of lawmaking...'.⁶⁹ Was this the suggested *descent to Averno*?⁷⁰

The effect of *Work Choices*⁷¹ was to significantly widen Constitutional reach by bringing the TEQSA Act under the corporations power, s 51(xx),⁷² and invoking incidental powers, s 51 (xxxix),⁷³ to regulate corporations *and their employees*: taking the ambit of power beyond the previously considered scope of trading and financial activities of corporations to include *stakeholders and academics* employed by the corporation, according to the *object of command test* of Gaudron J in *Pacific Coal*,⁷⁴ endorsed as law by the majority in *Work Choices*.

Today universities are defined as *trading and financial corporations*,⁷⁵ and over the decades High Court determinations have considered and reconsidered the corporations power to determine its characteristics, limits, ambit and scope. The early view in *Huddart Parker* that s 51(xx) corporations power⁷⁶ could *not* regulate intrastate activities of foreign, financial and trading corporations was unanimously overturned

in 1976 in *Concrete Pipes*,⁷⁷ although the outer limits were not defined. In the following decades up to *Work Choices* and the passing of TEQSA, the scope of constitutional corporations was by no means settled by the High Court. The purposes test was upheld in the 1978 *St George* case,⁷⁸ with the minority view of Barwick CJ preferring a broader activities test, pointing the way forward to *Adamson*⁷⁹ in 1979, and *Tasmanian Dam*⁸⁰ in 1983 when a trading corporation was found to have a ‘sufficiently significant proportion’ of trading in its current overall activities, bringing *prior* activities within the ambit of corporations power, and overturning the purposes test in *St George*.

Work Choices settled these different approaches by adopting the *object of command test*, affirming Gaudron J in *Pacific Coal*.⁸¹ This is highly relevant to the passing of the TEQSA legislation five years later. In obiter, Her Honour Gaudron J had extended the scope of incidental powers,⁸² endorsing the broad plenary interpretation of the corporations power:

I have no doubt that the power conferred by s 51(xx) of the Constitution extends to the regulation of the activities, functions, relationships and the business of a corporation ... 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*.⁸³ (Emphasis added).

The majority in *Work Choices*⁸⁴ upheld this expanded scope extending to regulation of internal relationships. Another new era had begun in Australia. However, Justice Kirby reading the corporations power s 51(xx) as subject to industrial relations under s 51(xxxv),⁸⁵ adjudged in dissent that the decision would ‘radically ... reduce the application of State laws in many fields that, for more than a century, have been the subject of the States’ principle government activities’.⁸⁶ Echoing Justice Higgins’ ‘horribles’,⁸⁷ Justice Kirby listed many fields, which ‘might potentially be changed, in whole or in part, from their traditional place as subjects of State law and regulation, to federal legal regulation, through the propounded ambit of the corporations power’.⁸⁸ Among them was education.

Beyond Work Choices: TEQSA

The percipient words of Kirby J came to pass with the *Tertiary Education Quality Standards Agency Act*⁸⁹ bringing tertiary education into the ambit of the corporations power to establish a Commonwealth regulatory regime for the corporatised university and its *external and internal relationships*. In legislative response to the previously discussed Bradley Review,⁹⁰ the objects of the TEQSA Act include provision of national consistency in the regulation of higher education using a standard-based quality framework, regulating risk management to protect Australia’s reputation and enhance its international competitiveness.⁹¹ To ensure such objects can be met ‘to create a smarter future for Australia’⁹² regulatory agencies are set up to manage quality standards. As a national higher education regulator ‘TEQSA registers and evaluates the performance of higher education providers against the Higher Education Standards Framework, specifically, the Threshold Standards’.⁹³ An independent Higher Education Standards Panel ensures TEQSA’s standards are met, reporting to the Commonwealth Minister responsible for tertiary education and research.⁹⁴

To meet the legislated standards TEQSA agencies are authorised to undertake reviews and compliance assessments of providers with specific investigative powers including search and seizure. Providers and their internal and external relationships are implicated to the extent that non-compliance of registration and accreditation can be a criminal offence. Any set of regulations with such trenchant investigative powers will inevitably affect the employees and their conditions. Academics must now spend significantly more time and resources justifying and reporting on their academic standing, work quality and outcomes. Take research for example. It is not enough to *do research* in order to *generate new knowledge*. Now an academic must justify details of what they will do, why and how they will do it, how much money they will earn by doing it, then if they are lucky they will have some stamina left to *do it*. Regarding academic credentials, to teach on a degree, under the ‘Provider course accreditation standards’ an academic must hold a degree higher than the course level they are teaching, or be able to justify professional equivalence by submitting a dossier to satisfy the bureaucracy. Many highly competent and experienced lecturers have already found this to be an inordinately time-consuming task taking them away from the important

business of preparing and teaching courses, and thereby having the effect of undermining the very quality that TEQSA is trying to promote and achieve.

The question might be asked: why then do academics comply; or do they? The answer lies, it seems, in the heart of industrial issues: as their employment conditions change under the weight of regulatory requirements, with quite overwhelming increase in employer demands, often with insufficient support services or resources, they must run faster and harder to protect their employment. Under the shifting parameters and regulatory mechanisms, academics find they are having to protect their worth, by justifying their decisions, actions, improvements and performance, even their behavioural characteristics, not to their students, but to the regulatory mechanism itself. The very mechanism that is supposedly enhancing quality performance is actually undermining the academics' energies to perform with quality. An enormous amount of time, wellbeing and will-power is taken up by seemingly meaningless demands; 'they are worn out by it'.⁹⁵ Is this not a 'regulatory mess'?⁹⁶

Rights-based questions inevitably arise. As academic roles change are their rights as educators in academia being protected or eroded by this legislated system? Is the level of compliance sustainable? It remains to be seen whether a case will arise pursuant to TEQSA's far-reaching regulatory powers. For some, TEQSA represents a 'questionable constitutional status of the Commonwealth's monopolisation of regulation in this field',⁹⁷ and provides another example of 'continuing tension over Australian federalism, fuelled by the weakening of the States', which 'demands a solution of some kind'.⁹⁸

Conclusion

Solutions may not be easy to find, and there is no room in this paper to predict or offer strategies for academics other than noting the given paths of industrial action, or researching and disseminating the situation such is being done here. What this paper has raised is issues of regulatory compliance impinging on academic rights and effectiveness, as an outcome of extended Commonwealth powers reaching into the work of the corporatised university. The federal balances have changed since those early days: this is inevitable; and in the prescient words of Justice Kirby, 'Once a constitutional Rubicon ... is crossed there is rarely a going back'.⁹⁹

When Julius Caesar's army crossed the red river in 49 BCE it is said he uttered the phrase *alea iacta est*, the die is cast. Perhaps. On the other hand, tracing the constitutional changes from colonies to TEQSA, 19th to 21st centuries, reveals that while the vortices and thermals of legislative change catch education in the shifting federal balances of power, perhaps there could be other moves not yet played through the High Court – such as a re-examination of the defining characteristics of a corporation. If TEQSA enacts a legislative sword while casting the favours of a regulatory shield, one need ask for whose benefit does the legislation exist? Australia is protecting its reputation and international competitiveness as stated in the Act's objects, but what of the rights of those whose work makes the academic system possible: the academics themselves? This discussion has shown that TEQSA's powers are now broad enough to impinge on the fundamental rights of academics as corporate citizens. The ambit of the Constitutional corporations power ensures this.

The vortices and thermals of legislative change are catching higher education in their wake. Citizens have full powers to make political changes, but ultimately as cases come before it, the High Court of Australia remains the guardian of the Constitution and any inherent changes would appear to lie in their hands.

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Keywords: TEQSA Act; Constitutional law; corporations power; universities; regulatory framework.

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- 1 *Tertiary Education Quality and Standards Agency Act (TEQSA) 2011* (Cth).
- 2 *The Commonwealth of Australia Constitution Act 1900* (UK) (*Australian Constitution*) s 51 (xx) foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth.
- 3 Carol Nicoll, Carol Nicoll's vision for TEQSA, *The Australian Higher Education* (June 19 2013).
- 4 *Australian Constitution* s 109 Inconsistency of laws. When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.
- 5 Suri Ratnapala, *Australian Constitutional Law, Foundations and Theory* (Oxford University Press, 2nd ed, 2007) 250.
- 6 *Australian Constitution*, s 51(xx).
- 7 Carol Nicoll, How can higher education maintain and improve quality?, IMHE General Conference, *Attaining and Sustaining Mass Higher Education*, Paris 17-19 September 2012.
- 8 'There are now 37 public universities, two private universities and 150 or so other providers of higher education. The public universities derive significant proportions of their income from non-government sources and some private providers receive government subsidies. The public-private divide is no longer a sensible distinction'. Executive Summary recommendations and findings, *Review of Australian Education: Final Report 2009*.
- 9 Australian Universities Quality Agency.
- 10 *TEQSA* Pt 1, Div 2, Para 3 Objects (a)-(f).
- 11 *TEQSA* Pt 5, Div 1 Higher Education Standards Framework, Div 2 Compliance with the Framework.
- 12 *TEQSA* s 58(i) Threshold Standards: Provider Standards, Provider Registration Standards, Provider Category Standards, Provider Course Accreditation Standards; also Qualification Standards, Information Standards, Teaching and Learning Standards, and Research Standards.
- 13 The AQF provides a regulated framework of qualifications in education and training, from Levels 1 to 10, Certificate to Doctoral Degree; the second edition was published January 2013.
- 14 *TEQSA* Div 2, 3, Objects (c)(iii), (d).

- 15 TEQSA Pt 6 Investigative powers.
- 16 TEQSA Pt 7 Enforcement.
- 17 Carol Nicoll, above n 7.
- 18 Bradley Review: *Review of Australian Education: Final Report 2009*, above n 8.
- 19 Executive Summary recommendations and findings, *Review of Australian Education: Final Report*, above nn 8, 18.
- 20 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 ('Engineers').
- 21 *New South Wales v Commonwealth* (2006) 229 CLR 1 ('Work Choices'). *Work Choices* focused on changes to the *Workplaces Relations Act 1996* (Cth) amended by the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth), introducing a national, industrial relations law, overriding the previously shared Commonwealth-State industrial relations system under the Constitutional head of power s 51(xxxv) Conciliation and arbitration.
- 22 *Australian Constitution*, s 51(xx) Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth.
- 23 *Australian Constitution*, s 51(xxxix) Matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth.
- 24 *Australian Constitution*, s 122 The Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth, and may allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit.
- 25 TEQSA Pt I, Div 4, s8(a).
- 26 TEQSA Pt I, Div 4, s8(b).
- 27 Cf Justice Dixon's classical reference to the birth of the Commonwealth appearing as Athena, fully grown and armed, from the head of Zeus: 'Like the goddess of wisdom the Commonwealth *uno actu* sprang from the brain of its begetters armed and full of stature', cited in Katherine Lindsay, *The Australian Constitution in Context* (LBC Information Services, 1999) 54.
- 28 Colonies were the settled territories in Australia and New Zealand. After Federation, they became States: New South Wales, Victoria, Tasmania, South Australia, Western Australia and Queensland. New Zealand separated from New South Wales to become a separate colony in 1841.
- 29 *New South Wales Act 1823* (Imp); Tasmania (then Van Diemens Land) separated from the colony of NSW by proclamation in 1825. Imperial laws, Legislative Councils, and trial by jury applied in both colonies under the *Act to provide for the administration of justice in New South Wales and Van Diemen's Land, and for the more effectual government thereof 1828* (Imp). In Western Australia, Government was established by *An Act to provide for the Government of Western Australia 1829* (Imp), and Legislative Council was established by *Order in Council 1830* (Imp). In South Australia, Government was established by *South Australia Colonization Act 1834* (Imp), and the *Act for better Government of South Australia 1842* (Imp). In 1841, New Zealand separated from NSW to establish the Colony of New Zealand after signing the *Treaty of Waitangi* with the Māori people in 1840.
- 30 Responsible government, with executive responsible to the legislature, was established by Imperial enactments, 1854-89, with bicameral systems of government; Queensland changed to a unicameral system in 1922.
- 31 *Australian Constitutions Act 1850* (UK).
- 32 Inter-colonial cooperation on trade and commerce, with a unified customs tariff policy, caused debate between the colonies during the founding conventions. Need for a unified defence policy was motivated by French and German expansion into the South Pacific, provoking 'fears of invasion'. Cited in Sarah Joseph and Melissa Castan, *Federal Constitutional Law, A Contemporary View* (Lawbook Co, 3rd ed, 2010) 16-17.
- 33 Founding framers refers to those gentlemen from Australia and New Zealand who represented the colonies in the project of federation. They included, inter alia, Sir Edmund Barton, John Cockburn, Andrew Inglis Clark, Alfred Deakin, Sir Samuel Griffith, H B Higgins, Isaac Isaacs, Charles Kingston, Richard O'Connor, Sir Henry Parkes, John Quick, with New Zealand representatives Captain William Russell Russell and former NZ Prime Minister Sir John Hall, joined by Governor Sir George Grey and Sir Harry Albert Atkinson.
- 34 The 1883 Intercolonial Convention, in Sydney, was attended by the Australian colonies, New Zealand, and Fiji. A resolution was passed to form a Federal Union and establish a Federal Australasian Council: the resolution was enacted under the *Act to Constitute a Federal Council of Australasia 1885* (UK), with corresponding Acts to bring the Imperial Act into operation in the colonies: Victoria, Queensland, Tasmania, Western Australia in 1885, and South Australia in 1888. The 1890 Australasian Federation Conference, in Melbourne, was attended by leading politicians of the six colonies and New Zealand. In 1891, 1897, 1898, National Australasian Conventions were held in Sydney, to develop a draft constitution, which went to referendum in 1898, 1899, and 1900.
- 35 G Winterton, H P Lee, A Glass and J Thomson, *Australian Federal Constitutional Law Commentary and Materials* (Lawbook Co Casebook, 2nd ed, 2007) 10.
- 36 Several constitutional models were considered. 'The United States approach was seen as the better means for achieving this end'. Cited in G Winterton, H P Lee, A Glass and J Thomson, above n 35, 10.
- 37 Constitutional civil and political rights and freedoms are expressly provided in ss 41, 80, 116, 117; economic rights are provided under ss 92, 51(xxiiiA), 51(xxxi). The High Court has upheld implied political rights (guarantees of freedom) through interpreting the Constitution s 24, implied right to vote endorsed in *Roach v Electoral Commissioner* (2007) 233 CLR 162; and 'freedom of political communication' as decided in a series

- of cases including *Australian Capital Television v Commonwealth* (1992) 177 CLR 106; *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104; *Stephens v West Australian Newspapers* (1994) 182 CLR 211; *Lange v Australian Broadcasting* (1997) 189 CLR 52. Ch III of the Constitution provides an independent Federal Judiciary to exercise the rule of law: see *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.
- 38 John Locke, 1632-1704, British empirical philosopher, argued against Sovereign monopoly of power, advocating for individualism in property owning social class.
- 39 Adam Smith, 1723-1790, Scottish philosopher, was known for his analysis of economics, *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776).
- 40 Jeremy Bentham, 1748-1832, British Jurist and social philosopher, disagreed with William Blackstone's approaches to Judge-made law.
- 41 John Stuart Mill, 1806-1873, was an influential political economist and social theorist.
- 42 See Elizabeth Grierson, 'Freedom and Individualism and Law of Contract: Future proofing education' (PESA Conference 2011).
- 43 *Commonwealth of Australia Constitution Act 1900* (UK), received Royal Assent, 9 July 1900. The Act took effect on 1 January 1901; proclamation of the Commonwealth of Australia was pursuant to the *Australian Constitution* Preamble s 3.
- 44 *Grundnorm*: a basic norm, from which other rules and laws receive their legitimacy (Hans Kelsen, Jurist and legal theorist); or basic rule of recognition (H L A Hart, Professor of Jurisprudence Oxford).
- 45 *Victoria v Commonwealth* (1971) 122 CLR 353 ('Payroll Tax Case') [Windeyer J at 396]. His Honour was Justice of the High Court of Australia from 1958 to 1972.
- 46 Sarah Joseph and Melissa Castan, above n 32.
- 47 *New South Wales v Commonwealth* (2006) 229 CLR 1 ('Work Choices') [Kirby J at 541-542].
- 48 *McGinty v Western Australia* (1996) 186 CLR 140 [Brennan CJ at 168-169].
- 49 Alfred Deakin, cited in G Winterton, H P Lee, A Glass and J Thomson, above nn 35, 36, 10.
- 50 *Williams v Commonwealth and Ors* (2012) HCA 23 [French CJ at 59]. Chief Justice French concludes the 'financial dominance' is, 'particularly in the field of taxation, the use of conditional grants under s96 and the erroneous reliance upon the appropriations provisions of the Constitution as a source of spending power' [at 59].
- 51 Sir Harry Gibbs, 'The Decline of Federalism' (1994) 18 *University of Queensland Law Journal* 1, cited in G Winterton, H P Lee, A Glass and J Thomson, above nn 35, 36, 49, 19. *Avernus* (Greek) 'without birds', in Virgil means the entrance to the underworld at which all fall to their death.
- 52 Greg Craven, *Conversations with the Constitution: not just a piece of paper* (UNSW Press, 2006) 76.
- 53 *Ibid* 77. The basis for Craven's opinion here is that the founding framers thought the Senate probably would divide along party lines rather than state, which contention he gleans from Deakin in the *Convention Debates*, Sydney, 1891, 585.
- 54 *Work Choices* [Callinan J at 779].
- 55 Sir Harry Gibbs, above n 51.
- 56 Sir Samuel Griffith CJ, one of the founding framers, led the first High Court of Australia; and in 1906, founding framers, H B Higgins and Isaac Isaacs were appointed, with Isaacs J becoming Chief Justice in 1930, then the first Australian-born Governor-General.
- 57 This is notwithstanding that under the *Judiciary Act 1903* (Cth) s 17(1), State Supreme Courts are vested with Federal jurisdiction in Chambers for a matter in which the High Court does not have exclusive jurisdiction under Ch III of the Constitution. Examples of early High Court cases include *D'Emden v Pedler* (1904) 1 CLR 91 with an outcome reflecting s 109 of the Constitution, Inconsistency of Laws; and *Federated Amalgamated Government Railway & Tramway Service Association v New South Wales Railway Traffic Employees Association* (1906) 4 CLR 488 ('Railway Servants').
- 58 *Huddart Parker and Co Pty Ltd v Moorhead* (1909) 8 CLR 330 ('Huddart Parker').
- 59 *R v Barger* (1908) [Griffith CJ, Barton and O'Connor JJ, at 78]. The majority judgment is no longer regarded as 'good law'.
- 60 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 ('Engineers').
- 61 *Strickland v Rocla Concrete Pipes* [Barwick CJ at 485].
- 62 *Engineers* [Higgins J at 161].
- 63 *Engineers* [Knox CJ, Isaacs, Rich and Starke JJ at 154].
- 64 *Australian Constitution* s 51(xxxv) Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State.
- 65 *Engineers* [Higgins J at 161].
- 66 *New South Wales v Commonwealth* (2006) 229 CLR 1 ('Work Choices').
- 67 Greg Craven, 'Struggle ahead for the States' (16 November 2006) *The Australian* 10.
- 68 *Huddart Parker* [Higgins J at 409-410].
- 69 *Work Choices* [Kirby J at 225], cited in Sarah Joseph and Melissa Castan, above nn 32, 46, 112-113.
- 70 Sir Harry Gibbs, above nn 51, 55.
- 71 *Work Choices* focused on changes to the *Workplaces Relations Act 1996* (Cth) amended by the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth), introducing a national, industrial relations law, overriding the previously shared Commonwealth-State industrial relations system under s 51(xxxv) Conciliation and arbitration.
- 72 *Australian Constitution*, s 51(xx) Corporations.

- 73 *Australian Constitution*, s 51(xxxix) Incidental powers.
- 74 *Re Pacific Coal* [Gaudron J at 375], below nn 81, 83.
- 75 For example, the legal definition of RMIT University 'is a body politic and corporate by the name Royal Melbourne Institute of Technology'. *The Royal Melbourne Institute of Technology Act 2010*, Part 2, Div 1, 4(2)(b).
- 76 *Australian Constitution* s 51(xx) Corporations.
- 77 *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468 ('Concrete Pipes').
- 78 *R v Trade Practices Tribunal; Ex parte St George County Council* (1974) 130 CLR 533 ('St George').
- 79 *R v Judges of Federal Court and Adamson; Ex parte Western Australian National Football League and West Perth Football Club* (1979) 143 CLR 190 ('Adamson').
- 80 *Commonwealth v Tasmania* (1983) 158 CLR 1 ('Tasmanian Dam').
- 81 *Re Pacific Coal Pty Ltd; Ex Parte Construction, Mining and Energy Union* (2000) 203 CLR 346 ('Pacific Coal').
- 82 In addition to *Australian Constitution*, s 51(xxxix) Incidental power, all head of power have an implied incidental power, with an indirect, but sufficient, connection to the core head of power.
- 83 *Pacific Coal* [Gaudron J at 375].
- 84 Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ in the majority; Kirby and Callinan JJ in the minority.
- 85 *Australian Constitution* s 51(xx) Corporations; and s51(xxxv) Conciliation and arbitration.
- 86 *Work Choices* [Kirby J at 224].
- 87 *Huddart Parker* [Higgins J at 409-410].
- 88 *Work Choices* [Kirby J at 224].
- 89 *Tertiary Education Quality and Standards Agency Act 2011* (Cth) (TEQSA).
- 90 *Review of Australian Education: Final Report 2009* (Bradley Review, above nn 8, 18, 19).
- 91 *Tertiary Education Quality and Standards Agency Act 2011* (Cth) (TEQSA), Div. 2, 3, Objects.
- 92 TEQSA homepage: at <<http://www.teqsa.gov.au/>>.
- 93 TEQSA Higher education standards framework: at <<http://www.teqsa.gov.au/>>.
- 94 TEQSA *ibid*.
- 95 Professor Stephen Parker, 'Time to trade in a well-worn university model' 2 *Campus Review* (October 2012).
- 96 David Dixon, 'TEQSA, the AQF and the regulatory threat to Australian legal education' (n d) University of New South Wales.
- 97 David Dixon, *ibid*.
- 98 Cheryl Saunders, *The Constitution of Australia, A Contextual Analysis* (Hart Publishing 2011) xi.
- 99 *Work Choices* [Kirby J at 614].