

Federal/state relations in education and the 2006 Work Relations case

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Abstract

In Australia the federal and state/territory governments share provision and regulation in education. Federal/state roles have accumulated ad hoc, there are no binding agreements on a lasting basis, and there is a lack of synchrony between the legal, policy, administrative and funding frameworks. The states are strongest in the legal dimension and weakest in funding power. Arrangements also vary significantly between the different sectors. Federal/state relations have contributed to an unhelpful politicisation of policy and a national failure to tackle key lacunae in provision, for example in early learning, and training. However, following the High Court's decision in the November 2006 Work Relations case, which strengthened the legal position of the federal government, federal/state relations in education are expected to change markedly. The paper analyses the implications for higher education where the federal government has already signalled its desire for an expanded federal legal regime.

Introduction

Prior to the High Court of Australia's 14 November 2006 decision in the Work Relations case, in the federal/ state relationship in education there was a lack of synchrony between the legal, policy and financial frameworks. The federal/state relationship also varied substantially between the sectors of education. Its evolution has been driven by accumulating historical factors, economic conditions and political exigencies. It has never been the subject of a comprehensive settlement or division of labour, still less a binding overall agreement, between the two tiers of government.

The role of the states has been strong in legal terms and weak in financial terms. Legally the constitution left education in the state arena, though over time points of entry for federal involvement opened up, notably the power to create benefits to students created via referendum [section 51 (xxiii.a)] which underpins the Higher Education Funding Act, and the federal government has developed conditional grants

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to the states as a means of securing policy leverage. The states and territories retain the larger responsibility in policy and administration, especially in government schools and TAFE. Nevertheless the federal government's monopoly over income taxation and the resulting federal-state fiscal imbalance has ensured that the federal can intervene at will in education policy, 'cherry picking' policy issues as it sees fit, including matters that are firmly located in the domain of state administration.

From the second world war the growing economic power of the federal government vis a vis the states enabled an expansion of the federal role in education, beginning in the 1940s in higher education and research, the 1960s in schools and the 1970s in training (Marginson, 1997; Marginson, 2003). This has not been a linear growth: for example under the successive Howard governments the federal role in government schools and TAFE has receded while the role in private training and private schooling has grown and the federal government role in high education, the only sector where it is overwhelmingly dominant has remained constant. The outcome of the history however is that mixed federal/state arrangements have been established in all sectors of education, arrangements varying significantly by sector (see Table 1 below). The role of the federal government is strongest in public higher education and research, and in private schooling where, driven by electoral pragmatics, it has fashioned viable Catholic education systems and strong and diverse independent schools regardless of the policies of the states and the viability of state systems of public schooling.

The High Court decision on Work Relations (often described as the 'Work Choices' decision) has changed all of this. Exactly how much and in what ways remains to be seen and will probably take many years to unfold fully. What is clear at this stage is that the Work Relations decision opens the way to expansion of the role and powers of the federal government vis a vis the states, in education as in many other sectors of Australian economy and society. It is likely to bring the federal/state division of powers in law and policy in education closer to the financial division of powers. The High Court decision turned on a broad interpretation of the federal power to regulate 'trading corporations' in section 51 (xx) of the Australian constitution. Arguably, it has opened the full range of activities of tertiary education institutions to federal legal authority; with the possible exception of the creation of new tertiary institutions as will be discussed below. The implications for the rest of education are less clear, though it appears certain the corporations power will extend to for-profit early learning and childcare, and probable that it extends to non-profit independent private schools, and possibly further into education.

The paper looks briefly at overall funding and outcomes in education in comparative international context, which provides relevant background to the assessment of federal/state arrangements, and then comments on the latter by sector and overall. The implications of the Work Relations case decision for the higher education sector alone are further discussed in the final section of the paper. The matter has a greater immediacy in higher education because the federal government already operates as the principal governmental authority in that sector and has already signalled its intention to use the corporations power to change federal/state arrangements.

Funding and educational outcomes in Australia

Australia invests slightly below the Organisation for Economic Cooperation and Development (OECD) country average for education. Australia is a below average public spender on education, 4.3 per cent of GDP compared to an OECD country average of 5.2 per cent, and an above average private spender on education, via the universities, private training and private schools. In tertiary education in 2003, Australia spent 0.8 per cent of GDP in public source funding (OECD country average 1.1 per cent) and 0.8 per cent of GDP in private source funding (OECD 0.4 per cent). For more details see the OECD's *Education at a Glance* (2006, pp. 205-206).

Since 2003 private source funding for Australian tertiary education has moved past public source funding, a remarkable change from two decades ago. The shift to private source funding has compositional implications for expenditure. Part of private income is ploughed back 'into the business', i.e. into the costs of raising and servicing private revenues such as marketing and offshore offices for international student recruitment, leaving a lesser proportion available for teaching and research functions compared to an equivalent amount of public source funding. The Australian public/private funding split is similar to the USA but at a lower proportion of GDP and a lower level of GDP per head. The United States spent about \$360 billion USD in 2005 on higher education, compared about \$10 billion USD in Australia (2003 spending levels from OECD 2006, p. 206; GDP level for 2005 from World Bank 2007).

The main lacuna in the map of educational provision is in pre-school and early childhood education. Australian expenditure on early learning at 0.1 per cent of GDP compares to an OECD country average of 0.5 per cent, and the participation rate of 3-4 year olds in education is 42.4 per cent compared to an OECD average of 66.3 per cent (OECD 2006, pp. 207 & 266). Provision is especially weak in NSW.

Tertiary level participation in education in Australia is above the OECD average but the gap is narrowing. Upper secondary school participation is not particularly strong by international standards: in 2004, 77 per cent of 25-34 year olds in Australia had participated in upper secondary education compared to 77 per cent in the average OECD country and 97 per cent in Korea, 91 per cent in Canada, 89 per cent in Finland and 87 per cent in the USA, though the UK is lower than Australia at 70 per cent (OECD 2006, pp. 38-39). One in five Australians leave school at 15 and 16 years, and though some enter TAFE for short or longer durations, many others drop out. The strongest education nations keep almost every student going till the end of secondary school, using a fully extended secondary education as the foundation for the range of academic and vocational tertiary education options, including trades training. Secondary school retention continues to be an important issue for Australia.

Notwithstanding some claims that are made in public debate, average standards of educational achievement in Australian schools are well above the OECD average. But they are below the very top level, such as Korea and Finland, and again we find the

characteristic Australian 'tail' of underachievers. For example, the OECD PISA data on achievement of 15 years olds in mathematics show that the top 10 per cent in Australia average at 98.9 per cent of the top 10 per cent students in Finland and are just ahead of Canada, while the bottom 10 per cent in Australia are at only 91.1 per cent of the level of the equivalent students Finland and 95.2 per cent of those in Canada (OECD 2006, p. 72). The bottom group of achievers are also the students most likely to leave school early. To summarise, schooling leads to a less than fully literate underclass which tends to drop out of education early and is also less likely to find satisfactory employment. Some nations, such as Korea and the Scandinavian countries, seem to be able to avoid the production of this underclass. Canada also achieves a more universal outcome than does Australia. No doubt Australia's less than universal early learning coverage contributes to the formation of this underclass.

Arguably, the major problem areas in Australian education, in order of severity and immediacy, are early childhood education, training, and basic research (further details of each are below). The first two are subject to shared federal/state responsibility – or rather, the shared evacuation of responsibility. The last is a solely federal matter.

Federal/state relationships in education

The federal/state relationship is not stable. There has been no permanent compact in any sector of education. For long periods in the different sectors of education there has been no negotiated demarcation on funding levels and policy roles; in fact such arrangements - for example Whitlam's settlement of higher education in 1973 and 1974, the Karmel (1973) decisions on schools funding and successor agreements, the federal/state compact on TAFE funding in the 1990s - are more the exception than the norm (for more discussion of the history see Marginson, 1997). The division of responsibility is subject to disputes and open to symbolic politicking on both sides of the federal/state and coalition/Labor divides. It is often remarked that 'the public' must be weary of the blame game in education but it continues nonetheless.

The federal/state fault line in education has been an important source of political tensions and issues. At times it has been the springboard for major policy initiatives of lasting value: the modernisation of university funding and planning in the 1950s and 1960s, the schools funding settlements in the 1960s and 1970s, and the coordination of tertiary education under Whitlam and Fraser, all resulted from the federal filling of lacunae left by inadequacies in state support. At such times federal/state tensions have been minimised. By the same token, positive federal/state coordination has become over-dependent on episodic federal fiscal expansion, conditioned by federal fiscal imbalance, rather than mature federal policies grounded in negotiated inter-governmental agreements. Given that fiscal policy is always politicised at the best of times, this dependence of federal/state accord on federal fiscal initiative has become a primary cause of instability and policy caprice. Further, since the early 1990s major federal financial initiatives have been off the agenda. This has made it very difficult to address the larger areas of unmet need such as early childhood and training.

While there might seem obvious reasons for better coordination and possibly national systems in some structural areas of schooling that are largely state-determined such as teacher registration, term dates, senior secondary curricula and examinations, standards for school testing, university entrance arrangements, foreign student recruitment into schools, in practice it has been very hard to move towards common approaches. There is no real momentum in favour of 'standard gauge' policy. TAFE is an even more striking example, as there the lack of standardisation inhibits not only mobility between states, but also mobility between vocational education and training (VET) and higher education institutions between and within states and territories.

In the particular sectors of education:

- **Pre-schools and childcare:** This sector has fallen into the cracks between childcare and schooling, between costly private provision and non-universal public provision, and between state and federal government. The states have had the legal responsibility but not the fiscal capacity. The federal government has had the fiscal capacity but has not been willing to take the policy responsibility. Given the crucial role of early learning in personal intellectual, cultural and social formation this lacuna is the most important issue in education policy. There is concern on both sides of politics but it requires concerted investment on a large scale. The ALP proposes a \$450 million plan to provide each four year old with 15 hours of learning per week for 40 weeks of the year (Rudd 2007). This remains well short of full coverage.
- **Primary and secondary schooling:** There is no agreed demarcation of function in relation to funding of schools, which as noted has been driven by electoral politics at both state and federal levels, in relation to both public and private schooling and especially the latter. The federal government has played the key role in the material development of private schooling, which now educates just over 30 per cent of all school students, up from the historical low point 20 per cent in the late 1970s. The federal government provides more than half the dollars received by private schools from all sources. About 65 per cent of all federal money for schools goes to private schools, including the Catholic systems in each state and territory, up from 58 per cent when the Howard government took office in 1996 (AEU 2007). Private schools receive some funding from the states as well as the federal government. The federal government provides only about 10 per cent of the total funds received by public schools, which continue to be administered and largely funded in state and territory systems. Given the federal government's greater fiscal power, the split of primary funding responsibilities between federally funded private schools and state funded public schools has pre-structured parental choice so as to destabilise the public systems over time. There is a framework for policy collaboration in schooling policy through MCEETYA (2007), but the coverage of issues is incomplete and the machinery lacks clout. MCEETYA has not engaged in binding agreements. It falls short of the gravitas of inter-

governmental financial negotiations of the Council of Australian Governments (COAG). Recent MCEETYA discussion has focused on the broad areas of curriculum provision though well short of common curricula, and the rhythms and protocols for standardised testing. The ALP (Rudd 2007) proposes programs for literacy and numeracy in schools, a boost for maths and science teaching, and a 'national curriculum board to develop a uniform national curriculum for the core subjects of English, history, maths and science'.

- **Training:** The Whitlam and Fraser governments established shared federal/state funding in TAFE. Federal intervention was used for upgrading and modernisation. In the late 1980s and early 1990s a national approach to industry standards was established and implemented industry by industry. Policy adopted the conception of a national training market with limited regulation of those private providers receiving public subsidies. Since then the federal government share of funding has declined and regulation across the training market has been increasingly re-devolved to the states. In the late 1990s the intergovernmental arrangements that supported the Australian National Training Authority (ANTA) and funding for TAFE broke down. There has been little effort to re-establish federal/state coordination in VET and TAFE has become the most severely under-funded education sector apart from early childhood education. The ALP (Rudd 2007) proposes to strengthen the pre-tertiary training strand within schooling by providing training centres at about \$200 million per year, subject to agreement with the states on cost sharing.
- **Higher education:** Higher education is discussed in more detail below. In outline, the federal government's leading role in finance and policy was accepted by the states between the early 1960s and early 1970s, first in the universities and later in advanced education and the teachers' colleges where the federal government took full public responsibility in 1974; albeit with some continuing potential for occasional federal/state disputes in particular areas of policy such as university governance. There is federal/state cooperation in relation to protocols for new institutions, accreditation of non public universities, and the national regime of quality assurance led by the Australian Universities Quality Agency (AUQA 2007). There is however tension in higher education over the federal government's current demand that the states hand over financial accountability functions and probably other powers, with the threat that the corporations power will be invoked if they resist (for more discussion see below). International education, which has grown to a \$10 billion export industry, and provides 25 per cent of students and 15 per cent of income in higher education, is framed by federal regulation in immigration and education. It is led by federal policy making and marketing activities through Australian Education International (AEI 2007) in DEST, though the states have responsibilities in the administration of the ESOS Act which governs provider institutions. Public research policy and funding are de facto national functions though from time to time the states provide funding for specific research activities, especially Queensland and to a lesser extent Victoria. The neglect of

basic research in recent years is an inadvertent casualty of the shift from public source to private source funding in universities since the late 1980s, which has reduced the capacity of institutions to leverage income for teaching places as infrastructure for basic research provision.

Table 1. Summary of federal/state relations in education in Australia

	history	legal position after HCA Work Relations 2006	system organisation	funding sources	principal policy issues
Public early learning	ignored and neglected	stay with states?	states	states (poor!) minor private	under funding, provision, quality
Private early learning	recent growth	federal	independent	private & state, federal childcare	quality & regulation
Public schools	federal policy climax in 70s	stay with states?	states	largely state minor fed +priv	funding, quality in poor districts
Private schools	federally-driven since 60s	might be divided	Independent & state based	federal & private minor state	regulation
TAFE	federal policy climax in 70s	federal	states	primarily state; private, federal	under funding & quality
Private training	regulated market in 90s	federal	independent	private, federal & state subsidies	regulation incl. global quality
Universities	federally-driven since 50s	federal	federal with caveats	federal, private minor state	research funding global quality
Private higher education	federally-driven in 2000s	federal	independent	federal, private minor state	regulation incl. global quality

Note: states includes territories. HCA = High Court of Australia.
Source of the schematic judgements in this table: author

Table 1 summarises the legal, funding and policy distinctions between the states and federal governments by sector. The paper now moves to more detailed discussion of higher education, the corporations power and the potential for a federal takeover of the remaining state functions in the higher education sector.

The universities and the corporations power

In 2005 the federal government provided 41.3 per cent of total income of higher education institutions, the states and local government provided just 3.6 per cent, and students provided 39.1 per cent through various avenues (DEST 2007). Prior to the High Court case on the Work Relations Amendment (Work Choices) Act 2005, the federal government exercised a significant but not full power in higher education. Under section 51 (xxiii.a) of the constitution it is empowered to create benefits to students. This has been the major support for the Higher Education Funding Act. Under section 81 the federal government has the power to appropriate money 'for the purposes of the Commonwealth' and this has been interpreted to mean any purpose

the government sees fit, to specify conditions and to enter into agreements and contracts to secure its objectives. This together with the funding authority confer a potent but not comprehensive power to influence higher education. The extent to which this federal influence could be translated into legislation, as distinct from administrative actions, has been less certain. The government has been unable to mount the legislative framework for a comprehensive administrative regime. Craven remarked prior to the Work Relations decision that:

To a limited extent, the Commonwealth may also use its incidental power to give such schemes a legislative form, although the exercise of Commonwealth legislative power in this way is both complex and limited, and the whole question of the capacity of the Commonwealth to legislate in pursuance of appropriations and financial agreements is far from resolved (Craven 2006, p. 7).]

Federal programs in higher education have been provided in large part by means of administrative fiat and contractual agreement rather than direct parliamentary act and scrutiny, and as such have been somewhat lacking in democratic accountability.

In contrast, and despite the minor character of their funding and policy functions, the states still exercise the general legislative supervision of higher education that they have exercised since prior to federation in 1901. They control the university Acts and also act as bail out government when individual institutions are in difficulties. They also continue to accredit non self-accrediting and new higher education institutions (including the emerging private institutions now entering the sector with federal support via FEE-HELP). In other words, prior to Work Relations 2006 the federal government's authority, via its funding programs and the conditions attached to them, has been more narrowly based than the broad legislative authority of the states. Nevertheless, federal authority has been exercised with greater intensity, with close scrutiny and micro-management of many aspects of university operations, via standardised data requirements, the regulations governing HECS-based places, the performance regime in research funding, and competitive bidding for innovations grants. There is no question that the federal government is the leading policy maker. Yet the states are still the legislative port of call for many changes in the sector especially at the level of individual institutions.

There is potential for the states to refer powers to the federal parliament under section 51 (xxxvii) of the constitution; but it should be noted that most constitutional authorities argue that the state can withdraw such an authority at a future date.

In recent years the federal government has sought to establish a broad-based authority over universities on the grounds that they are 'trading corporations' and therefore subject to federal power under section 51 (xx) of the constitution. That the universities and most training institutions are involved in trading activities is beyond doubt. Education generates \$10 billion in export income a year: Australia is the fifth largest education exporter in the world, and education is the third or fourth biggest export sector (ABS 2007; Marginson 2007). The scale of the industry within individual

universities is massive. For example at the University Melbourne in 2006, 26 per cent of all students were international students paying full cost tuition fees, and these revenues in total comprised 16 per cent of income (University of Melbourne 2007).

Prior to the Work Relations decision, while it was clear that universities were involved in trading activities, there were doubts about whether this created a power over the generality of their activities beyond financial transactions, including the bulk of governance, teaching and research. It appears that this matter has now been settled. The Work Relations decision generally upheld the federal government's position in relation to the corporations power (Roth and Griffith 2006). The Court did not define a 'trading corporation', but previous judgements suggest that it would need to have 'substantial trading activities' that form 'a sufficiently significant proportion of its overall activities'. 'Significant' and 'substantial' have not been defined more closely. The test of 'substantial' is in relation to each individual corporation, not a whole industry (Williams 2007). Given the role of fee-based enterprise in education it includes all universities, probably includes most other higher education and vocational training and institutions, and is likely to include independent private schools charging high tuition. It may also include other private schools and could even include public schools that raise significant revenues through sale of services.

Once an organisation or institution is accepted as a corporation, the implications of the decision are considerable. In the Work Relations case decision the majority adopted a broad construction of the corporations power, holding that as long as a law is addressed to foreign, trading or financial corporations, the government can regulate any aspect of what that corporation does, whether specifically associated with trade or not. The Court specifically rejected distinctions such as that between the internal and external relationships of a corporation which might be grounds for qualifying the extent of application of the power. Particular attention was paid to the minority judgement of Gaudron J in *Re Pacific Coal Pty Ltd; Ex parte Construction, Forestry, Mining and Energy Union* (2000) where she stated that section 51 (xxx) extended to

The regulation of the activities, functions, relationships and the business of a corporation described in that sub-section, 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 capable of affecting its activities, functions, relationships or business (cited by Roth and Griffith 2006, from HCA 52 2006, para. 178).

The majority in the Work Relations Case concluded that 'This understanding of the power should be adopted' (HCA 52 2006, para 178). So long as a law is addressed to a constitutional corporation the federal government can regulate any aspect of what it does, including any relationship it may have with a third party or employees. As if to emphasise that its decision opened the way to an evacuation of state powers almost without limit, the Court stated that while the constitution is predicated on the existence

of the States, with legislative, executive and judicial functions, this in itself 'does not identify the content of any of those functions' (HCA 52 2006, para 194).

The decision ushers in an era of expanded federal potential in the universities and all other educational institutions that can be construed as 'corporations'. Craven's broad summation is that it 'changes federalism and constitutionalism in this country from being determined by the constitution to really the political will of the Commonwealth' (ABC 2006a). That remains to be seen but he was probably on stronger ground where he stated that it will 'pretty well allow the Commonwealth to take over the regulation of the universities' (ABC 2006b). It is likely that using the corporations power the federal government is now able to establish a comprehensive legal and administrative regime in higher education for the first time. A transition from state to federal acts would be complex, involving questions about state property, sunk public investments and compensation. For example section 51 (xxxi) requires that the federal government pay just compensation for acquired state property, which might include university property. Nevertheless, this development is very significant.

The new potential for federal legislation and administration does not mean in itself that the federal government will necessarily intervene further or more closely in the universities, let alone, say, compromise free academic inquiry. That is a matter of policy. The point is that the federal government now has a much wider policy choice. To assess the political meaning of this, we need to take into account the pattern of recent federal involvement in the sector, including the close governance of student places; the allocation of funds via competitive bidding; and the performance management mechanisms for classifying, measuring, shaping and prioritising research. This suggests that the federal government is likely to step up the intensity of its micro-management of the sector as the corporations power allows it to do and that it may further compromise creative independence, especially in research. On the other hand, in the new legal and policy context a countervailing political pressure may emerge that favours university autonomy, academic freedom and creative inquiry. In some unitary university systems the values of university autonomy and academic freedom are codified within legislation (for example New Zealand) or have a strong role within the political culture (example the Netherlands and the Nordic nations). The question of unitary versus federal does not in itself determine whether a government pursues an authoritarian policy. However, a government that has an authoritarian bent finds itself less constrained in a unitary policy framework. In that sense the past disjunctures of federalism in higher education may have provided universities with some protection, though the federal government still exercised a potent influence.

There may be one remaining legal limit to the power of the federal government in relation to higher education. That is the to the capacity of the government to regulate corporations in the process of coming into being, for example applications for entry into the higher education sector. Section 51 (xx) allows the Commonwealth to make laws 'with respect to... Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth'. Past High Court judgements suggest that this implies that the corporation concerned is already in existence. This is a key

issue as the federal government has indicated that the capacity to regulate the boundaries of and entry into the higher education market is one of its primary reasons for seeking full authority over the sector (Bishop 2007). It may be that even if the corporations power provides a comprehensive framework for federal regulation, the specific matter of accreditation of new (though not existing) institutions is an exception and it would be necessary for the states to refer their powers to the federal government if it was to control market entry as well as exit.

Another interesting question arises in relation to Internet-based universities operating from outside Australia, which would appear to lie outside the scope of the corporations power as not 'formed within the limits of the Commonwealth', though online activities in education are in any case almost impossible to regulate in practice.

The federal government has now moved to explore the potential of the corporations power to clarify and strengthen its role in higher education. The May 2007 budget papers included a statement that 'the Australian government will ask the states and territories to refer regulatory powers over their financial management of universities which will avoid duplication and reduce red tape', so that 'there will be only one layer of financial accountability and associated reporting requirements imposed on universities' (Bishop 2007). There was no suggestion there of a referral of powers in other areas, for example in relation to the existing university acts, but in a statement to *The Age* reported on 10 May Minister Julie Bishop indicated that the request for referral would include not only financial powers but the state power in 'establishing new universities', the one area where the federal power appears to be still constrained. If the federal government was able to secure a referral in that area it would then be able to move to complete legislative supervision of higher education, subject only to the potential for the states to recall their referral in the matter of the power to form new corporations in the sector.

The Age also reported that the Minister stated that the federal government 'could use its constitutional powers to intervene if the states refused to surrender their powers' (Topsfield 2007, p. 1). The states have yet to respond in detail, but Bishop's threat confirms that Australia has entered a new era in federal/state relations in education.

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