

# Commonwealth Control of Universities

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In 2005, the Commonwealth government exercises very extensive control over Australia's universities. Late in 2004, the Australian Vice-Chancellors' Committee (AVCC, 2004:13-14) counted a dozen new bureaucratic requirements in the Nelson higher education reform package that was due to come into effect the following January — in a sector that already regarded 'red tape' as a major problem. Since the AVCC did their tally, two new restrictive policies, a ban on compulsory charges for non-academic services and instructions on the content of universities workplace agreements, have been announced. Though this control derives from the Commonwealth's financial leverage, it has expanded even as the Commonwealth's relative contribution to university income shrinks to its lowest level since the early 1960s, at around 40 per cent (time series statistics for the Dawkins and beyond era are available on the AVCC website: <http://www.avcc.edu.au/content.asp?page=/publications/stats/fexp.htm>; for 1960s data see Karmel (1999:4). The later calculations exclude HECS, which was 16 per cent of university revenue in 2003). In two recent Department of Education, Science and Training (DEST, 2004 and 2005a) discussion papers, *Rationalising Responsibility for Higher Education* and *Building Better Foundations for Higher Education in Australia*, the Commonwealth is suggesting that its legal — as opposed to financial — power over universities be increased.

This move is significant not just in itself, but as part of a pattern of policies proposed by the Howard Government designed to diminish the states' policymaking capacity. These include creating a national industrial relations system, uniform defamation law, pressure to remove state taxes, and the direct involvement of the Commonwealth in technical colleges. Each issue has its own idiosyncrasies, and the arguments for and against must reflect these. But underlying them all is a tension between the claimed advantages of centralism, often described as the improved outcomes from national consistency, versus the advantages of federalism in quarantining bad policy, allowing policy experiments, ensuring proximity between governors and the governed, and protecting liberties by diversifying power. This article explores the relative weight of these arguments for universities.

## The Commonwealth and the Constitution

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

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legislate for higher education. All universities, public and private, in the Australian States and Territories, with the exception of The Australian National University (ANU), derive their power to award degrees from state or territory legislation. The public universities have detailed 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 or territory governments on their activities, and be audited by state Auditor-Generals. 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 (Section 51(xxiiiA) added at a referendum in 1946). 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.

#### *How the Commonwealth exercises power over universities*

Specific constitutional mention is not 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 19<sup>th</sup> century (Section 96).

For many years universities were funded via these conditional grants to the states. In the early 1990s the Commonwealth bypassed the states and began financing higher education institutions 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 (Section 81, see discussion in Booker, Glass and Watt, 1998:116-119).

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. Though many academics at research universities believe that their research benefits their teaching, there is no evidence that on average students learn more, or are more satisfied with teaching, at research universities (on the tensions

between research and teaching see Norton, 2002:50-54 and 144; and for some American research see Pascarella and Terenzini, 2005, especially Chapter 3). The knowledge gained through research has to be weighed against competition for time between research and teaching duties. 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 full range of subjects covered by university researchers and funded by the Commonwealth through the Australian Research Council. 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’. Justice Brennan gave as examples ‘initiatives in science, literature and the arts’ (Booker, Glass and Watt, 1998:128). These are imaginative readings of the Constitution, but to date Commonwealth research 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 tuition fees to Commonwealth-supported students. This ban was partially lifted by the Nelson reforms, but the low maximum student contribution amount means that universities still cannot raise enough money to cover costs for Commonwealth-supported students. By limiting universities’ sources of finance it is difficult for universities to say ‘no’ to any other Commonwealth requirement, no matter how burdensome or unreasonable. The workplace relations requirements announced by the Commonwealth in April 2005 are an example of how the Commonwealth operates. In exchange for an increment of up to 7.5 per cent on the money paid under the Commonwealth Grant Scheme (for teaching coursework students), universities must modify their workplace relations policies to comply with Commonwealth requirements. Though the increment would amount to a small percentage of total university income, universities are so financially constrained by other Commonwealth policies that most will see no alternative but to comply.

### *Limits on power*

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 a High Court challenge, if one were made. It has serious doubts about alternative Constitutional regulatory foundations, such as the corporations power.<sup>1</sup> More immediately, the Constitution creates obstacles to

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<sup>1</sup> Legally, universities are corporations. 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

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.

A key aspect of policy that is not always accessible to money as a policy lever is the accreditation and management of universities that do not seek Commonwealth funding. This has been left to the states. As is clear from the *Building University Diversity* discussion paper (DEST, 2005b), the Commonwealth Minister for Education Science and Training, Dr Nelson, would like the rules on what constitutes a university relaxed to allow more 'universities' to enter the market. However, as the Commonwealth no longer gives the states any money for higher education the Minister lacks his usual tool of policy change. The Commonwealth is also concerned by the immunity self-financing private higher education institutions have from Commonwealth regulation (DEST, 2004:13). Currently, less than one-third of the more than 100 private higher education providers have involved themselves with FEE-HELP, the new income-contingent loans scheme for full-fee students, and thus exposed themselves to Commonwealth regulation.

Canberra's power may also be contained by the growing financial independence of public universities. The most important trend in Australian higher education over the last fifteen 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, and significantly explain why the Commonwealth's share of university revenues is in decline. It is unlikely that the Commonwealth has the same power over full-fee students as it has 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. The Commonwealth's 'voluntary student unionism' (VSU) legislation purports to prevent universities, on threat of losing some of their Commonwealth grant money, from charging any person a compulsory fee for non-academic amenities and services. Universities may be able to challenge this legislation in the High Court insofar as it applies to fee-paying students or TAFE students funded by the states.

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 not get their money. No state government wants to be responsible for their universities losing money; through

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concern — see discussion of the corporations power in Booker, Glass and Watt, (1998:75-89). The Commonwealth's legal advice concurs (DEST, 2005:8).

2004 and 2005 they changed university statutes in line with Commonwealth guidelines so that those universities qualified for small increases in 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 forty-four 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 (Aitken and Orr, 2002:155-156). A cheaper alternative, also allowed for under the Constitution, is for the states to refer their own power over universities to the Commonwealth — Section 51(xxxvii). This is the idea that Dr Nelson is now investigating through his two discussion papers.

Such a referral would not in itself eliminate the complexity, transaction costs and inconsistency complained of in the Commonwealth's discussion papers, and which are the public rationales 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 (Section 109 of the Constitution), 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. 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. The then 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?'. Unless Dr Nelson can get all the state

governments to agree to the same referral of powers some inconsistency will still exist.

We should not forget that the Commonwealth already achieves some of its otherwise unconstitutional goals by alternative means. In the second discussion paper (DEST, 2005a:1), the Minister noted that he would explore ways of working 'strategically with the States and Territories' to achieve his goals. In fact, there is a history of such working together. 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, which carries out quality audits of universities each five years. It is a reminder that while the federal system constrains the Commonwealth, it does not prevent national policymaking where there is sufficient consensus. More coercively, as noted, in 2004 and 2005 the states changed their university statutes, in areas to do with governance, so that their universities would be eligible for additional Commonwealth funding.

### **Policy Consistency**

The two discussion papers are strongly in favour of 'consistency'. *Rationalising Responsibility* (DEST, 2004:15) 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'. *Rationalising Responsibility* (p. 11) notes critically that, at least before recent legislative changes, there was 'little national consistency' in how university governing bodies were organised. *Building Better Foundations* (DEST, 2005:7-8) says that differences in financial management legislation mean that 'universities across Australia do not operate on a level playing field' in expanding and diversifying their revenue sources. To achieve consistency, the Commonwealth's suggestions include testing its existing Constitutional power to legislate for trading or financial corporations or seeking a limited referral of powers from the states.

#### *Inherent benefits of consistency*

In some areas of higher education policy, there does seem to be a case for consistency to reduce confusion, risk and information costs. For example, without controls on credential titles it is difficult for potential students to evaluate and compare the various courses on offer. How do Diplomas, Bachelor degrees, and Graduate Certificates differ from each other? Without a common definition for credentials, potential students face a complex and time-consuming process ascertaining what, and at what level, they will be taught in each course. If they get it wrong, they incur both direct and opportunity costs. It is also much easier for employers if they have a reasonable idea of what level of qualification job applicants possess. So there is an economic efficiency argument for consistency

in credentials. This could still be the case even if the credential definitions are not optimal — the losses from less certainty could outweigh the gains from varying credential definitions.

The desirability of these common standards persuaded the states to cooperate amongst themselves through MCEETYA. Standard definitions for credentials are set out in the Australian Qualifications Framework. However, this left considerable variance in what it took to enter the higher education industry, especially as a university. In 2000, MCEETYA went further and devised national protocols to establish standard procedures for accreditation or higher education providers and use of the title ‘university’ (the protocols can be found at: [http://www.dest.gov.au/highered/mceetya\\_cop.htm](http://www.dest.gov.au/highered/mceetya_cop.htm); Dr Nelson has issued a discussion paper on them: DEST, 2005b).

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. The ‘range of fields’ requirement rules out highly specialised institutions. It is unlikely that any new private universities will be established in Australia while these rules exist. In effect, the protocols are a major barrier to entry in the higher education industry.

National consistency going beyond the core areas required by economic efficiency has disadvantages 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 signs that it fills a niche left vacant by publicly subsidised universities. (For a description of these for-profit universities, see Kirp, 2003, especially Chapter 13.) The protocols probably 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 (Morris, 2005). This is not likely to mean a ‘race to the bottom’. Each state retains a strong incentive to protect the actual and perceived quality of degrees awarded within their borders, because otherwise their universities risk losing market share. But operating under the current system of national cooperation, rather than centralised consistency, leaves scope for policy experiments in different standards. The idea of policy experiments will be considered in more detail below.

*No need for consistency*

In other areas of higher education policy, the need for consistency is much less obvious. When *Rationalising Responsibility* (DEST, 2004:11) 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'. This is quite a different proposition to saying that there is any intrinsic reason why governance needs to be nationally consistent. Given the differing missions and circumstances of universities, considerable variety in governance arrangements may well be appropriate, and not a cause for reform. Similarly, different rules on commercial activities may reflect different circumstances or preferences. As the various problems of university commercial arms suggest, there may be a case for restricting universities' activities in these areas. (For examples of troubled commercial ventures, see Jopson and Burke, 2005.) This is not to advocate such restrictions, but merely to point out that 'inconsistent' rules may reflect prudent decisions by state governments to protect the finances or reputations of universities they have established, rather than representing a problem that needs to be fixed. The discussion papers do not explore these possibilities. In any case, it does not follow from the Commonwealth's analysis of the problems that consistency itself is the solution. The difficulty is purportedly bad policy, not inconsistent policy. Legislation could be identical nationwide but still hopelessly flawed.

Where there is no intrinsic need for policy consistency, the argument is really a claim that the Commonwealth is a consistently better policymaker than the states, and better outcomes could be achieved if it had sole control. Unfortunately, the Commonwealth's record as a higher education policymaker gives us no confidence that this is the case. 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 per cent 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 (Section 137-10, *Higher Education Support Act 2003*). 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 debt reduction, the Commonwealth offers a 10 per cent bonus on sums paid in addition to repayments collected through the taxation system. 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, benefiting from the 10 per cent 'early' repayment bonus of \$909.10 (Section 151-5, *Higher Education Support Act 2003*). 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 is hard to think of any defensible rationale for reversing this, and subsidising postgraduates instead.

Or consider 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 (undated) 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.

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 ...' (Vanstone, 1996:10). 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 per cent, 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 per cent in low-subsidy law to around seven per cent in high-subsidy dentistry and medicine. There is no obvious reason why law faculties should earn an additional 20 per cent while medical or dentistry faculties should earn only seven per cent 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. It makes the Commonwealth claim that some universities 'lack ... the skills necessary to oversee major commercial undertakings' look hypocritical.

It does not seem likely that the Commonwealth has the staff within DEST to bring about rapid improvements in its policymaking capacities. Of the five most senior bureaucrats in the higher education section of the Department in late May 2005, three were classified as 'acting' rather than permanent appointments and another had only taken over his position in April 2005 (DEST, 2005c). At minimum, this signals a lack of continuity; at worst, a lack of expertise.

## **Quarantining Policy Problems**

These Commonwealth policy failings — and especially the crucial issue of university financing — highlight the dangers of a highly centralised system. In the United States, where tuition subsidies and controls on tuition fees (at public institutions) remain a matter for the states, universities have experienced far less serious problems than in Australia. In the 1990s, the student/staff ratio in the United States went down, while it increased considerably in Australia as universities were forced to cut costs (Productivity Commission, 2002:22). Academic salaries are considerably higher in the United States and in other countries than in Australia (Horsley, Martin and Woodburne, 2005:Chapter 5), making it difficult for Australian universities to compete in the international market (and in the local market against the professions). With a highly decentralised system in the US, relatively large movements of students between states, and a large private higher education sector, states are reluctant to let their institutions slip too far behind. To the extent that this does occur, the problem is quarantined in that state (or states). In centralised Australia, poor policy turns into a nationwide problem.

This danger is most acute in areas where consistency brings no inherent advantages.

In its discussion of governance problems, *Rationalising Responsibility* tactfully does not name NSW, which has experienced more governance instability than other states — with Vice-Chancellors and Chancellors being forced out of office over the last few years. What if all Australia had consistently followed NSW practice? Everyone else would have worse off than if they had enacted ‘inconsistent’ good legislation. An advantage of a federal, potentially inconsistent, system is that not every jurisdiction needs to be dysfunctional at the same time. Federalism manages policy risk more effectively than centralism.

## **Policy Experimentation and Learning**

The Commonwealth itself has clearly learned things from the states’ policy experience. It can treat state policies as experiments. In governance, NSW is a model not to follow. On the other hand, the Commonwealth acknowledges a positive effect of state-based policy experience when it says that its governance policy builds on Victoria’s (DEST, 2003:13-14). 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 ANU, after Victoria had already reformed its universities.

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 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 (see the *Australian National University Act 1991*, Section 10). 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.

State policy experiments continue to inform national debates. There have been two state VSU experiments prior to the recent Commonwealth legislation. Western Australia and Victoria, both in 1994, pursued two quite different VSU strategies. In Western Australia, like in the proposed Commonwealth model in 2005, the separate amenities fee was prohibited (*Voluntary Membership of Student Guilds and Associations Act 1994*). In Victoria, the *Tertiary Education (Amendment) Act 1994* permits the amenities fee, but restricts expenditure from its revenue to services or activities of direct benefit to students at the institution. The latter model enabled universities to continue providing a wide range of student services, and is regarded by universities as by far the more successful of the two systems. The main advocates of VSU, however, preferred the Western Australian model because it reduced compulsory student charges and limited student political activity. Each side is drawing conclusions from what happened in practice in the states (see for example the debate on the VSU bill in the House of Representatives, 12 May 2005).

### **Feedback and Responsiveness**

A further difficulty with centralising higher education policy is the likely reduced attention given to each institution. 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 its media monitoring service. Its statistics are often months and sometimes years out-of-date. 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. A report (Ewan, 2005) on consultations with Vice-Chancellors on the referral of power proposal highlighted this issue, commenting that ‘frequently Vice-Chancellors stated that it was difficult to help DEST understand the peculiarities of specific local circumstances’.

Even when the Commonwealth Minister makes a decision, it can be hard to get it on 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 per cent of respondents who thought education was an issue governments should be doing more about, only 15 per cent nominated universities as the most important (Newspoll, 2004). With such low political priority, universities will struggle to find a place on federal parliamentary schedule that is considerably busier than those seen 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.

### **Threats to Academic Freedom**

Despite their legal and financial vulnerabilities, universities have preserved much of their academic freedom. Within their financial constraints, they decide 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. The Department’s incentive structures orient it 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 enrol 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.

In the original *Higher Education Support Bill 2003* (Section 19-35), the Commonwealth tried to insist that selection of subsidised students be based on ‘merit’, with exceptions for educationally disadvantaged applicants. 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, because of its role in reproducing social inequality (children from advantaged families and private schools do well in Year 12). For example, Simon Marginson (1993:243) argues for weakening the 'selection function'. 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.

The final *Higher Education Support Act 2003* (Section 36-15) gave the Minister power to de-fund what he called 'cappuccino courses' (there are parallel provisions to avoid loans going to these courses in Section 104-10). Degrees in the paranormal, surfboard riding, golf course management and aromatherapy were offered as examples of courses that ought not to be funded. A funding organisation is entitled to make decisions about its funding priorities. But where this is combined with a prohibition on offering full fee-paying only courses to Australian undergraduate students there is the potential for the Minister to effectively close down courses he or she does not like. Under the federal system, there remains the possibility that state governments would fund courses the Commonwealth refused to support, or establish institutions to do so that were outside the Commonwealth's control. The South Australian government's decision to spend \$20 million on the Carnegie Mellon University campus in Adelaide is an example of how state governments can use their existing powers (Kelton, 2005).

Dr Nelson has also created controversy by rejecting research grants recommended to him by the Australian Research Council. 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. University of Wollongong academic Gregory Melleuish has, for example, 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.

## Conclusion

The Commonwealth's case for centralising power over universities in Canberra is weak. The Prime Minister, John Howard (2005:2), maintains that with his government's centralising push 'the goal is to free the individual, not to trample the states'. But centralisation creates greater risks that individual and organisational freedom will be further curtailed, without the checks and balances provided by a federal system. His own government's higher education record is a case study in the dangers of centralised power, with no guarantee that future governments would not try to extend their powers even further.

This is not to say that the states have everything right in their policies for universities. The Commonwealth is not just making things up when it points to problems in state policy. But the test of a system is not whether it gets everything right all the time, but whether it has the capacity to change as circumstances require. We need systems with feedback altering 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.

In an attempt to avoid the many small mistakes made by universities and their respective state governments, transferring power over universities from the states to the Commonwealth 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. With greater responsibility, 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.

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