

THE UNIVERSITY OF
NEW SOUTH WALES



FACULTY OF LAW

GEORGE WILLIAMS

ANTHONY MASON PROFESSOR
SCIENTIA PROFESSOR
AUSTRALIAN RESEARCH
COUNCIL LAUREATE FELLOW
FOUNDATION DIRECTOR,
GILBERT + TOBIN CENTRE OF
PUBLIC LAW

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Committee Secretary
Senate Education, Employment and Workplace Relations Committees
Parliament House
Canberra ACT 2600
Australia

Dear Secretary

Inquiry into the Tertiary Education Quality and Standards Agency Bill(s) 2011

This submission deals with the capacity of the Federal Parliament to enact the Tertiary Education Quality and Standards Agency Bill 2011 so that it provides for a scheme of regulation that applies to Australia's university sector. Put simply, I have doubts about whether as a matter of constitutional law it can achieve that goal.

My conclusions are that:

1. the Bill would be a valid enactment under the Commonwealth's corporations power in section 51(xx) of the Constitution;
2. some or all of Australian universities may not be trading corporations under that power (or, even if they are, they may be taken outside the scope of that power by States reconstituting them other than as corporations); and
3. there are reasons to believe that the Bill, if enacted, will not be capable of applying to some or many of Australia's universities.

The Bill

The Bill states:

8 Constitutional basis

This Act relies on:

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

There is no doubt that Federal Parliament has the power under section 122 of the Constitution to regulate universities and other higher education providers based in the territories.

On the other hand, it is not clear that the Commonwealth's corporations power in section 51(xx) of the Constitution is capable of providing a basis for the regulation of universities outside of the territories.

Scope of section 51(xx)

Section 51(xx) of the Australian Constitution states:

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: –.

(xx.) Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth:

In the *New South Wales v Commonwealth (Work Choices Case)* (2006) 229 CLR 1, the High Court upheld the Federal Parliament's use of section 51(xx) to reshape the regulation of industrial relations brought about by the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth).

The *Work Choices Case* at 114-115 spells out the great width of the Federal Parliament's corporations power. The power at least extends to:

- the regulation of the activities, functions, relationships of a constitutional corporation;
- the business of a constitutional corporation;
- the creation of rights and privileges belonging to a constitutional corporation;
- the imposition of obligations on a constitutional corporation and, in respect of those matters, the regulation of the conduct of those through whom it acts, its employees and shareholders; and
- the regulation of those whose conduct is or is capable of affecting the activities, functions, relationships or business of a constitutional corporation.

This provides an ample basis upon which to regulate universities that are a constitutional corporations (that is, a 'foreign', 'trading' or 'financial' corporation). There is no reason to think that the power would do other than extend to the full extent of the relationship between universities that are constitutional corporations and their employees and students, including as to matters such as the provision of courses and the awarding of qualifications.

The Tertiary Education Quality and Standards Agency Bill 2011, in so far as it relies under section 8 upon the corporations power, is capable of being passed under that power. However, the Bill could not actually apply to a university unless that university is a constitutional corporation.

‘Trading Corporations’ under section 51(xx)

If a university created by State legislation is a constitutional corporation, it will be because it is a trading corporation rather than a financial or foreign corporation.

To be a trading corporation, a university must first be a corporation. This is a question of whether the university is constituted as a corporation by the State legislation creating the body. As far as I am aware, all universities created by State legislation are corporations, and so fulfil this requirement.

However, it lies within the power of a State Parliament to reconstitute a university other than as a corporation. If this was done, the university would not be a trading corporation and so would not fall under the regime created by the Tertiary Education Quality and Standards Agency Bill 2011.

It should be noted that States have taken this path in other fields. The Queensland Parliament enacted the *Local Government and Industrial Relations Act 2008* (Qld) so as to remove the corporate status of Queensland local governance bodies (with the exception of the Brisbane City Council) in order to remove them from the scope of federal industrial law enacted under the corporations power.

A university that remains as a corporation under State legislation may be classified as a trading corporation so long as it has sufficient trading activities. The effect of the High Court’s decisions in *R v Federal Court of Australia; ex parte WA National Football League (Adamson’s Case)* (1979) 143 CLR 190 and *State Superannuation Board of Victoria v Trade Practices Commission* (1982) 150 CLR 282 is that the test for determining whether a corporation is a trading corporation is whether the trading activities of that corporation form a substantial proportion of its total activities.

The High Court has not yet determined whether a university is a trading corporation under this test.

At the lower court level, the Full Court of the Federal Court in *Quickenden v O’Connor* (2001) 109 FCR 243 held that the University of Western Australia was a trading corporation. The annual revenues generated by the University’s trading activities were \$54.7 million, or 18% of the University’s total operating revenues, and it was found that this was sufficient to indicate that it had substantial trading activities.

In the absence of further guidance from the High Court, the *Quickenden* decision represents a reasonable application of relevant test. Indeed, the conclusion in *Quickenden* would today likely be strengthened by the growth of commercial activities in the higher education sector in areas such as overseas student fees.

The decade-old Federal Court decision in *Quickenden* as to the University of Western Australia is not, however, conclusive as to whether universities in general are trading corporations. It may be that some bodies like the University of Western Australia are trading corporations, while others are not. The answer in each case will depend upon the extent of the trading activities of the particular university. It also possible that a university will be a trading corporation at one point in time, but not at another as its level of trading fluctuates.

The recent Federal Court decision in *Australian Workers' Union of Employees, Queensland v Etheridge Shire Council* (2008) 250 ALR 485 demonstrates these possibilities. It held that a particular local government body was not a trading corporation. On the other hand, it would appear likely that other, larger local government bodies with more significant trading activities would be classified as such a corporation. The case demonstrates in the analogous local government sector that whether any particular body is a trading corporation, and can thus encompassed by federal legislation relating to such bodies, must only be determined on a case-by-case basis.

Of even more significance is the fact that the High Court has yet to determine the status of universities. It may well apply its own test to give a different answer to that in *Quickenden*, or it may recast its test or create an exception for universities.

Indeed, the High Court may exclude bodies such as charities, educational institutions and local government authorities entirely from the scope of section 51(xx).

In the *Work Choices Case*, the High Court was required only to deal with the scope of the corporations power, and not the definition of what is a trading corporation. Accordingly, no opportunity arose for the High Court to reconsider 'what kinds of corporation fall within the constitutional expression "trading or financial corporations formed within the limits of the Commonwealth"' (at 75). However, the majority judges suggested a willingness to do this, noting at that 'any debate about these questions must await a case in which they properly arise'.

While stressing that the issue of what constituted 'trading or financial corporations' did not arise in the case, Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ stated at 86 that it was:

interesting to observe that [in *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330] Isaacs J regarded ... 'those domestic corporations, for instance, which are constituted for municipal, mining, manufacturing, religious, scholastic, charitable, scientific, and literary purposes, and possibly others more nearly approximating a character of trading' as falling outside the class of trading or financial corporations.

The majority in the *Work Choices Case* at 92 also drew attention to nineteenth century developments in corporations law, such as the enactment of the *Companies Act 1862* (UK), which they said was 'taken as the model for equivalent legislation' in several Australian colonies. They noted that this legislation 'sought to distinguish between 'commercial undertakings' and 'what we may call literary or charitable associations'.

In dissent, Callinan J at 373 stated that a:

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

In a recent article, Gouliaditis ('The Meaning of 'Trading and Financial Corporations': Future Directions' (2008) 19 *Public Law Review* 110 at 122) suggests that the majority may have been attempting to draw attention to the idea that:

the framers of the *Constitution*, in using the words 'trading corporation', would have been influenced by the concepts and classifications introduced by the 1862 UK Act,

especially the distinction it seems to draw between companies formed for the acquisition of gain and companies formed for the purposes of promoting art, science, religion or charity.

This view reflects comments made during the hearing of the *Work Choices Case*. In particular, Hayne J suggested that the question of whether there had been an ‘evolution of application of the term [trading and financial corporations]’ needed to be confronted directly, and that the pertinent question was ‘not what activities are or are not trading, but whether trading or financial corporations are defined by their activities *or are to be identified otherwise*’ (*New South Wales v Commonwealth* [2006] HCA Trans 233 (10 May 2006) emphasis added).

The High Court has in clear terms suggested a willingness to revisit its definition of a trading corporation. It is quite possible that, in doing so, it will apply or further develop its test in a way that excludes some or all of Australia’s universities from the scope of being a trading corporation. If this occurs, the regime sought to be enacted by the Tertiary Education Quality and Standards Agency Bill 2011 will not be capable of applying to those bodies.

Yours sincerely

Professor George Williams