



## Does the Commonwealth have constitutional power to take over the administration of public hospitals?

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### Executive summary

- The funding and administration of public hospitals is an enduring area of controversy in Australian politics.
- In recent years, the idea of a Commonwealth takeover of public hospitals has been floated at different times by both major political parties.
- Prior to the 2007 federal election, the Labor Party made the commitment that, should it be elected to government, it would seek a mandate from the public at the following election for the Commonwealth to ‘assume full funding responsibilities’ for public hospitals if the states and territories have not begun to engage in national health reform by mid 2009.
- However, more recently, the Federal Government appears to be backing away from a complete takeover of public hospitals. The Minister for Health and Ageing, Nicola Roxon, has stated that the Federal Government has always preferred the idea of working with the states rather than a complete takeover of public hospitals. She has also said that the Federal Government would examine the recommendations of the National Health and Hospitals Reform Commission at the end of June 2009 before deciding what action to take.
- This continues to raise the question of whether the Commonwealth would have constitutional power to take over and regulate the administration of public hospitals.
- This research paper finds that, despite the absence of an explicit public hospitals power in section 51 of the Constitution, several factors may enable the Commonwealth to do so; in particular, the continuing fiscal dominance of the Federal Government.

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## Introduction

This research paper addresses the question of whether the Commonwealth has the constitutional power to take over and regulate the administration of public hospitals (with or without the agreement of state governments).

There is a complex division of responsibility for health care services in Australia, with many types of providers and a range of funding and regulatory mechanisms. Generally speaking, in the area of public hospitals, although the states and Commonwealth are jointly responsible for funding public hospitals, the states are responsible for administering public hospitals.<sup>1</sup> This division of responsibilities has created the potential for federal-state tensions with cost shifting between the different levels of government and frequent claims of blame shifting and buck passing.<sup>2</sup>

As a consequence of federal-state tensions, as well as increasing pressure on hospitals from rising demand, an ageing population, the increasing cost of medical care and high profile cases of systemic failure (such as the Jayant Patel case in Queensland<sup>3</sup> and the Jana Horska case in Sydney<sup>4</sup>), public hospital reform has well and truly been on the political agenda. In this context, various political leaders and commentators have argued that the Commonwealth should take over public hospitals from the states. From the Commonwealth perspective, the former Health Minister, Tony Abbott, floated the idea of a Commonwealth takeover of public hospitals in 2004 before subsequently arguing that major reform was neither possible nor desirable.<sup>5</sup> Prior to the

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1. For a summary of the division of responsibilities in relation to health care services in Australia, see R de Boer, A Boxall, A Biggs, L Buckmaster, J Gardiner-Garden and R Jolly, *The interim report of the National Health and Hospitals Reform Commission—a summary and analysis*, Research paper, no. 24, 2008–09, Parliamentary Library, Canberra, 2009, viewed 20 May 2009, <http://www.aph.gov.au/library/pubs/rp/2008-09/09rp24.pdf>
  2. For an outline of cost and blame shifting and examples thereof, see R de Boer, A Boxall, A Biggs, L Buckmaster, J Gardiner-Garden and R Jolly, *The interim report of the National Health and Hospitals Reform Commission—a summary and analysis*. For further discussion of cost shifting in the health system, see also L Buckmaster and A Pratt, *Not on my account! Cost shifting in the Australian health system*, Research note, no. 6, 2005–06, Parliamentary Library, Canberra, 2005. For further discussion of blame shifting in health funding, see also Standing Committee on Health and Ageing, *The blame game: report on the inquiry into health funding*, Commonwealth of Australia, Parliament House, Canberra, November 2006.
  3. See, for example, J Chandler, ‘The scandal of “Dr Death”’, *The Age*, 28 May 2005, viewed 20 May 2009, <http://www.theage.com.au/news/General/The-scandal-of-Dr-Death/2005/05/27/1117129900672.html>
  4. See, for example, K Benson and A Smith, ‘Birth in toilet in hospital without care’, *Sydney morning herald*, 27 September 2007, viewed 20 May 2009, <http://www.smh.com.au/news/national/its-third-world-care/2007/09/26/1190486395840.html>.
  5. See, T Abbott (Minister for Health and Ageing), Speech given at CEDA Conference, Sydney, 25 February 2005, viewed 20 May 2009,

federal election in November 2007, the then Leader of the Opposition, Kevin Rudd, announced that he would seek to reform the public hospital system to the effect that:

... if by the middle of 2009 the State and Territory (sic) have not begun implementing a national reform plan, a Rudd Labor Government will seek a mandate from the Australian people at the following election for the Commonwealth to assume full funding responsibility for the nation's public hospitals ...<sup>6</sup>

The phrase 'assume full funding responsibility for the nation's public hospitals' suggests various scenarios in which the Commonwealth may seek to take over public hospitals, for example, by:

- simply providing all funding, without actual acquisition of property
- providing all funding and regulation, without any actual acquisition of property or
- a complete takeover, including acquisition of property.<sup>7</sup>

While it is noted that the Federal Government has more recently expressed its preference to work in co-operation with the states, rather than to take over public hospitals entirely, it has, arguably, left the door open for future consideration of a public hospital takeover.<sup>8</sup> Consequently, the

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<http://www.health.gov.au/internet/ministers/publishing.nsf/Content/health-mediarel-yr2005-ta-abbps250205a.htm?OpenDocument&yr=2005&mth=2>; Australian Broadcasting Commission, 'Rudd announces hospital takeover plan', *The 7.30 Report*, 23 August 2007, viewed 20 May 2009, <http://www.abc.net.au/7.30/content/2007/s2013516.htm>

6. Australian Labor Party, *New directions for Australian health – taking responsibility: Labor's plan for ending the blame game on health and hospital care*, August 2007, p. 7, viewed 10 January 2008, [http://www.alp.org.au/download/now/070823\\_dp\\_new\\_directions\\_for\\_australian\\_health.pdf](http://www.alp.org.au/download/now/070823_dp_new_directions_for_australian_health.pdf)
7. The National Health and Hospitals Reform Commission also suggested various options for the future regulation of primary health care services generally, despite the interim report not focusing on public hospitals per se: see, in particular, Option B in National Health and Hospitals Reform Commission, *A healthier future for all Australians – an interim report*, December 2008, pp. 291–294, viewed 17 February 2009, [http://www.nhhrc.org.au/internet/nhhrc/publishing.nsf/Content/BA7D3EF4EC7A1F2BCA25755B001817EC/\\$File/A%20brief%20overview%20of%20the%20Interim%20Report.pdf](http://www.nhhrc.org.au/internet/nhhrc/publishing.nsf/Content/BA7D3EF4EC7A1F2BCA25755B001817EC/$File/A%20brief%20overview%20of%20the%20Interim%20Report.pdf)

As to the role of the National Health and Hospitals Reform Commission, see National Health and Hospitals Reform Commission, *Terms of reference*, viewed 2 April 2009, <http://www.nhhrc.org.au/internet/nhhrc/publishing.nsf/Content/terms-of-reference>; C Bennett (Chair of the Commission), *National Health and Hospitals Reform Commission-developing a blueprint for a better health system*, Speech given to AMA National Conference, 31 May 2008, viewed 12 May 2009, <http://www.nhhrc.org.au/internet/nhhrc/publishing.nsf/Content/speech310508>

See also R de Boer, A Boxall, A Biggs, L Buckmaster, J Gardiner-Garden and R Jolly, *The interim report of the National Health and Hospitals Reform Commission—a summary and analysis*.

8. See, for example, M Metherell, 'Government cool on hospital takeover', *Sydney morning herald*, 25 May 2009, viewed 26 May 2009, <http://www.smh.com.au/national/government-cool-on-hospital->

question of whether the Commonwealth would have constitutional power to take over and regulate the administration of public hospitals remains one to be addressed.

In the absence of an explicit public hospitals power in the Constitution, an examination of several powers in the Constitution, as well as the High Court's tendency in more recent times to give a broad interpretation of the Constitution, suggests that there are various constitutional powers that may support the Commonwealth's takeover and regulation of public hospital administration in each scenario.<sup>9</sup>

## **Australia's federal system**

Federalism has been defined as:

... a system of governance which provides for action by a national or central government for certain common functions together with independent actions by sub-national units of government, with each level of government accountable to its own electorate.<sup>10</sup>

Essential features of a federal system are:

- a minimum of two levels of government—national and state (or provincial) governments
- independent action by each level of government and
- functions and powers assigned to each level of government.<sup>11</sup>

Australia's federal system reflects these essential features and consists of:

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[takeover-20090524-bjj5.html](#); M Grattan, 'Hospital takeover canned', *The Age*, 25 May 2009, viewed 26 May 2009, <http://www.theage.com.au/national/hospital-takeover-canned-20090524-bjik.html>

9. The issue of the High Court's constitutional interpretation is discussed on pp. 25–27 of the research paper.

10. J Pincus, 'Productive reform in a federal system', in Productivity Commission, *Productive reform in a federal system—roundtable* proceedings, 27–28 October 2005, Canberra, p. 26, viewed 12 May 2009, [http://www.pc.gov.au/\\_\\_data/assets/pdf\\_file/0019/9217/productivereform.pdf](http://www.pc.gov.au/__data/assets/pdf_file/0019/9217/productivereform.pdf)

See also Access Economics Pty Ltd, 'Appendix 2: the costs of federalism' in Business Council of Australia, *Reshaping Australia's federation: a new contract for federal-state relations*, October 2006, Chapter 1.2, viewed 17 December 2007,

<http://www.bca.com.au/Content.aspx?ContentID=100802>

11. See J Pincus, 'Productive reform in a federal system', pp. 25–26. See also Federal-State Relations Committee, *Australian federalism: the role of the states*, Report to the Parliament of Victoria, October 1998, viewed 17 December 2007,

<http://www.parliament.vic.gov.au/fsrc/report2/body/chapter1.htm#ch1sub2c>

- the Commonwealth
- state governments and territory governments (with state-like powers) and
- local government authorities.<sup>12</sup>

However, only the federal and state governments are mentioned in the Constitution.

## **Division of powers under the Constitution**

The Commonwealth's legislative powers are generally limited to matters contained in the text of the Constitution.<sup>13</sup> Notably, that there is no explicit power in the Constitution for the Commonwealth to make laws regarding public hospitals.

There are only a few matters for which the Commonwealth has exclusive legislative power. These are:

- determining rates of customs and excise duties
- national defence and
- legislation for the territories and Commonwealth public service.<sup>14</sup>

Most Commonwealth legislative powers are concurrent; that is, shared between the federal and state governments.<sup>15</sup> If a state law is inconsistent with a valid federal law, the federal law prevails to the extent of the inconsistency.<sup>16</sup>

The Constitution does not specify matters about which the states can make laws—the states' powers to make laws are residuary.<sup>17</sup>

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12. Access Economics Pty Ltd, 'Appendix 2: the costs of federalism'.

13. See, for example, *Australian Constitution* section 51. Note, however, that there are implied powers, such as the alleged implied nationhood power: see *Davis v Commonwealth* (1988) 166 CLR 79. See also *Victoria v Commonwealth* (1975) 134 CLR 388 at 397 per Mason J.

14. See *Australian Constitution* sections 52 and 90. See also Federal-State Relations Committee, *Australian federalism: the role of the states*, paragraph 1.30; J Pincus, 'Productive reform in a federal system', p. 29.

15. See *Australian Constitution* sections 107–108; Federal-State Relations Committee, *Australian federalism: the role of the states*, paragraph 1.32. See also Access Economics Pty Ltd, 'Appendix 2: the costs of federalism'; J Pincus, 'Productive reform in a federal system', p. 29.

16. *Australian Constitution* section 109.

17. See Access Economics Pty Ltd, 'Appendix 2: the costs of federalism'; J Pincus, 'Productive reform in a federal system', p. 29.

At this point, it is worth noting that the Constitution does allow the states to refer their powers to the Commonwealth.<sup>18</sup> However, this research paper is concerned with situations where the Commonwealth may take over the administration of public hospitals in the absence of such referral of power or agreement by the states.

## The Federal Government's plans to 'rescue' public hospitals

### Pre-election plans

The Australian Labor Party's (ALP's) pre-election plans regarding public hospitals, as mentioned above, are outlined in its pre-election policy statement *New Directions For Australian Health* and involve the following.<sup>19</sup>

**First**, a Rudd Labor Government will invest \$2 billion in a National Health and Hospitals Reform Plan to provide assistance for immediate reforms to reduce blame and cost shifting and improve health services for Australians.

...

- It will include additional funding to state and territory governments if they achieve agreed reform milestones—similar to the system of competition policy payments designed to reward those States that improve their performance. This will introduce a significant change and incentive to our health system—rewarding states and territories for reforms based on improved health outcomes not simply inputs.

...

**Second**, within the first one hundred days of its election, a Federal Labor Government, through COAG, will establish a National Health and Hospitals Reform Commission to develop a long-term health reform plan for the nation.

...

**Third**, if by the middle of 2009 the State and Territory (sic) have not begun implementing a national reform plan, a Rudd Labor Government will seek a mandate from the Australian people at the following election for the Commonwealth to assume full funding responsibility for the nation's public hospitals.<sup>20</sup>

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18. *Australian Constitution* section 51(xxxvii). An example of this is the area of corporations law.

19. Australian Labor Party, *New directions for Australian health – taking responsibility: Labor's plan for ending the blame game on health and hospital care*, pp. 6–7.

20. The reference to 'a mandate' by the Australian Labor Party is used in connection with 'conducting a national plebiscite or referendum on the question of any proposed Commonwealth takeover': see Australian Labor Party, *New directions for Australian health – taking responsibility: Labor's plan for ending the blame game on health and hospital care*, p. 27.

It is noted that the Labor Party did state, as part of its policy statement, ‘[u]nder Labor’s proposal, no public hospitals would be managed directly from Canberra.’<sup>21</sup>

## **Post-election plans**

As one of the first steps in implementing its pre-election promises, the Rudd Government established the National Health and Hospitals Reform Commission (the Commission) on 25 February 2008<sup>22</sup> with the aim to develop a national blueprint for health reform.<sup>23</sup> On 16 February 2009, the Commission released its interim report, which contained several policy proposals for health care services reform.<sup>24</sup>

In addition, the Council of Australian Governments (COAG) met several times during 2008 and focused on several issues, one of which was health.<sup>25</sup> At the COAG meeting on 29 November 2008, agreement was reached on several points relating to health, including:

- the Commonwealth would provide funding of \$64.4 billion dollars over five years for state health systems<sup>26</sup>
- health reform, including a new Intergovernmental Agreement (IGA),<sup>27</sup> accompanied by a rationalisation of the number of SPPs to states<sup>28</sup> and

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21. Australian Labor Party, *New directions for Australian health – taking responsibility: Labor’s plan for ending the blame game on health and hospital care*, p. 7.
  22. See Department of Health and Ageing, *National Health and Hospitals Reform Commission*, viewed 21 July 2008, <http://www.health.gov.au/internet/main/publishing.nsf/Content/nhrc-1>
  23. See C Bennett (Chair of the Commission), *National Health and Hospitals Reform Commission—developing a blueprint for a better health system*.
  24. National Health and Hospitals Reform Commission, *A healthier future for all Australians*, Media release, 16 February 2009. For a copy of the interim report, see National Health and Hospitals Reform Commission, *A healthier future for all Australians – an interim report*. For a summary and analysis of the Commission’s interim report, see R de Boer, A Boxall, A Biggs, L Buckmaster, J Gardiner-Garden and R Jolly, *The interim report of the National Health and Hospitals Reform Commission—a summary and analysis*.
  25. See Council of Australian Governments, ‘COAG meeting outcomes’, viewed 2 April 2009, [http://www.coag.gov.au/coag\\_meeting\\_outcomes/archive.cfm](http://www.coag.gov.au/coag_meeting_outcomes/archive.cfm)
  26. Council of Australian Governments, *Communique*, 29 November 2008, p. 4, viewed 2 April 2009, [http://www.coag.gov.au/coag\\_meeting\\_outcomes/2008-11-29/index.cfm](http://www.coag.gov.au/coag_meeting_outcomes/2008-11-29/index.cfm)
  27. As to the new IGA, see Council of Australian Governments, *Intergovernmental agreement on federal financial relations*, viewed 2 April 2009, [http://www.coag.gov.au/intergov\\_agreements/federal\\_financial\\_relations/docs/IGA\\_federal\\_financial\\_relations.pdf](http://www.coag.gov.au/intergov_agreements/federal_financial_relations/docs/IGA_federal_financial_relations.pdf)
  28. Council of Australian Governments, *Communique*, 29 November 2008, pp. 2–3.



- a new National Partnership Payment, funding specific projects and encouraging state governments to deliver on ‘nationally-significant reforms’.<sup>29</sup>

Following the Commission’s final report in mid 2009, COAG will consider additional health reform for the longer term.<sup>30</sup>

## **Mersey Hospital**

The Mersey Hospital in Devonport is a fairly recent example of the Federal Government assuming ownership of a public hospital, albeit with the Tasmanian Government’s co-operation.<sup>31</sup>

In August 2007, John Howard, then Prime Minister, spoke in terms of Commonwealth intervention by way of underwriting a community-based proposal to keep the Mersey Hospital running, after the Tasmanian Government decided to downgrade hospital services.<sup>32</sup>

Following the ALP’s election in November 2007, the new Federal Government took over the Mersey Hospital. However, it continued to be managed and operated by the Tasmanian Government as licensee, under an agreement signed by both governments on 27 August 2008 (the 2008 Agreement).<sup>33</sup>

Under the 2008 Agreement, which varied the agreement proposed by the Howard Government, the Federal Government agreed to pay up to \$180 million over three years to the Tasmanian Government to continue providing existing services, including:

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29. Council of Australian Governments, *Communique*, 29 November 2008, p. 3.

30. See Council of Australian Governments, *Communique*, 26 March 2008, viewed 26 September 2008, [http://www.coag.gov.au/coag\\_meeting\\_outcomes/2008-03-26/index.cfm#reform\\_agenda](http://www.coag.gov.au/coag_meeting_outcomes/2008-03-26/index.cfm#reform_agenda).

31. See Department of Health and Ageing, *Mersey Community Hospital*, viewed 26 September 2008, <http://www.health.gov.au/internet/main/publishing.nsf/Content/mersey-community-hospital>

32. See J Howard (Prime Minister), *Mersey Hospital Tasmania, a Commonwealth-funded and community controlled public hospital*, Media release, 1 August 2007, viewed 29 September 2008, [http://pandora.nla.gov.au/pan/10052/20070823-1732/www.pm.gov.au/media/Release/2007/Media\\_Release24472.html](http://pandora.nla.gov.au/pan/10052/20070823-1732/www.pm.gov.au/media/Release/2007/Media_Release24472.html). See also ABC Radio Hobart, *Mersey Hospital*, transcript of an interview with the Prime Minister, John Howard MP, 1 August 2007, viewed 29 September 2008, <http://pandora.nla.gov.au/pan/10052/20070823-1732/www.pm.gov.au/media/Interview/2007/Interview24474.html>

33. For details of the 2008 Heads of Agreement, see [http://www.health.gov.au/internet/main/publishing.nsf/Content/6DB8A2F87E5A4996CA25730F000F5D46/\\$File/MCH%20HOA%20-%20270808.pdf](http://www.health.gov.au/internet/main/publishing.nsf/Content/6DB8A2F87E5A4996CA25730F000F5D46/$File/MCH%20HOA%20-%20270808.pdf), viewed 26 September 2008.

... a High Dependency Unit, a 24-hour emergency service, medical and surgical services (both day surgery and in patient), low-risk obstetric services, low-risk inpatient paediatrics, and low complexity inpatient acute medical services.<sup>34</sup>

Commonwealth funding also provided for expanding services, including: ‘renal dialysis, more elective surgery, a regional rehabilitation unit for the North West, and transition care for older patients’.<sup>35</sup>

Regardless of original events under the Howard government, the Mersey Community Hospital, as it now operates, involves a situation where the Federal Government owns and funds the hospital with the Tasmanian Government having resumed managing and operating the hospital since 1 September 2008.<sup>36</sup>

## **Possible takeover scenarios**

As outlined above, there could be various possible scenarios in which the Federal Government would seek to regulate the administration of public hospitals.<sup>37</sup>

First, the Federal Government may simply provide all the funding for public hospitals, without any acquisition of property (Scenario 1). In this case, the states would continue to own and administer the public hospitals, with the Commonwealth allocating funds to the states with conditions on such matters as priorities and performance standards.<sup>38</sup>

Second, the Federal Government may provide all funding and administer public hospitals without any acquisition of property (Scenario 2). In this case, the states would still own the public hospitals but the Federal Government may employ the staff and oversee the administration of the public hospitals itself or, possibly, do this by setting up regional boards. This would have the effect of the state retaining ownership of such matters as public hospital property and equipment, and the Federal Government being a tenant providing health care services.

Third, the Federal Government may seek to completely take over public hospitals, including acquiring property (Scenario 3). In this case, the Federal Government would acquire hospital

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34. N Roxon MP (Minister for Health and Ageing), *Agreement for management of Mersey Community Hospital signed*, Media release, 28 August 2008.

35. N Roxon MP (Minister for Health and Ageing), *Agreement for management of Mersey Community Hospital signed*.

36. See N Roxon MP (Minister for Health and Ageing), *Agreement for management of Mersey Community Hospital signed*; 2008 Heads of Agreement.

37. For options re-Commonwealth involvement in health care generally, see National Health and Hospitals Reform Commission, *A healthier future for all Australians – an interim report*.

38. This is effectively the current situation, as discussed further in pp. 29–30 of this research paper.

property, employ staff, take over the day-to-day administration of the public hospitals, as well as becoming liable for all debts, contracts and other obligations associated with the running of public hospitals.

Regardless of the type of scenario, the ALP's policy position had been that:

- any plan by the Federal Government to regulate the administration of public hospitals would only be implemented as the last resort of an overall plan to reform health services and
- any such takeover would involve preserving local interests and needs in the provision of health services.<sup>39</sup>

Arguably, this policy position has been strengthened in light of the Health Minister's recent comments that the Federal Government would prefer to work co-operatively with the states.<sup>40</sup>

## **Possible powers**

Referendums aside,<sup>41</sup> each of the possible scenarios raises the question of would the Commonwealth have constitutional power to take over and regulate the administration of public hospitals to the extent necessary in each scenario?

As previously noted, there is no explicit power in the Constitution for the Commonwealth to make laws regarding public hospitals.

Other likely powers that will be explored in this research paper include:

- trade and commerce<sup>42</sup>
- corporations<sup>43</sup>

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39. See Australian Labor Party, *New directions for Australian health – taking responsibility: Labor's plan for ending the blame game on health and hospital care*, p. 7.

40. See, for example, M Metherell, "Government cool on hospital takeover", *Sydney morning herald*, 25 May 2009, viewed 26 May 2009, <http://www.smh.com.au/national/government-cool-on-hospital-takeover-20090524-bjj5.html>; M Grattan, 'Hospital takeover canned', *The Age*, 25 May 2009, viewed 26 May 2009, <http://www.theage.com.au/national/hospital-takeover-canned-20090524-bjik.html>

41. Historically, referendums have been largely unsuccessful: see S Bennett and S Brennan, *Constitutional referenda in Australia*, Research paper, no. 2, 1999–2000, Parliamentary Library, Canberra, 1999, p. 26. In total, of 44 referenda since Federation, eight were successful: see G Craven, 'Australia's Constitution: where less change is more (or less)', *AQ*, May-June 2007, p. 25.

42. *Australian Constitution* section 51(i).

43. *Australian Constitution* section 51(xx).

- external affairs<sup>44</sup>
- the provision of maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services (but not so as to authorise any form of civil conscription), benefits to students and family allowances<sup>45</sup>
- quarantine<sup>46</sup>
- powers associated with the acquisition of places by the Commonwealth for public purposes<sup>47</sup>
- appropriations<sup>48</sup> and
- financial assistance.<sup>49</sup>

## **Trade and commerce power**

According to section 51 of the Constitution, the Commonwealth may make laws regarding 'Trade and commerce with other countries, and among the States.'

The trade and commerce<sup>50</sup> power allows the Commonwealth to enact legislation regulating interstate and overseas trade.<sup>51</sup> However, it is important to note that this power is limited in that the Commonwealth must not discriminate or adversely affect intrastate trade,<sup>52</sup> nor give preference to one state over another state (or parts thereof).<sup>53</sup>

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44. *Australian Constitution* section 51(xxix).

45. *Australian Constitution* section 51(xxiiiA).

46. *Australian Constitution* section 51(ix).

47. *Australian Constitution* section 52.

48. *Australian Constitution* section 81.

49. *Australian Constitution* section 96.

50. As for the meaning of 'trade and commerce', see A Moeller and J McKay, 'Is there power in the Australian Constitution to make federal laws for water quality?', *Environmental and Planning Law Journal*, vol. 17, no. 4, p. 296.

51. See A Moeller and J McKay, 'Is there power in the Australian Constitution to make federal laws for water quality?', p. 296.

52. *Australian Constitution* section 92.

53. *Australian Constitution* section 99.

It has been argued that an example of how the trade and commerce power has been used in health was the application of both Commonwealth regulations and state legislation in the slaughter of stock for export.<sup>54</sup> In the *Noarlunga* case, Fullagar J stated:

It is true that the Commonwealth possesses no specific power with respect to slaughter-houses. But it is undeniable that the power with respect to trade and commerce with other countries includes a power to make provision for the condition and quality of meat or of any other commodity to be exported. Nor can the power, in my opinion, be held to stop there. By virtue of that power all matters which may affect beneficially or adversely the export trade of Australia in any commodity produced or manufactured in Australia must be the legitimate concern of the Commonwealth ... How far back the Commonwealth may constitutionally go is a question which need not now be considered, and which must in any case depend on the particular circumstances attending the production or manufacture of particular commodities. But I would think it safe to say that the power of the Commonwealth extended to the supervision and control of all acts or processes which can be identified as being done or carried out for export.<sup>55</sup>

However, it may be difficult to argue that the provision of public health services at a hospital, with no intention to charge a fee for service, would constitute interstate (or overseas) trade and commerce, thereby attracting this power. Obviously, in some cases, there may be an interstate element to an arrangement—for instance the provision of in vitro fertilisation services or other specialist medical services—which could constitute a form of trade or commerce.

## **Corporations power**

According to section 51 of the Constitution, the Commonwealth may make laws relating to ‘Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth.’

A relatively recent and seminal High Court case involving the corporations power was the *WorkChoices* case, in which the High Court determined that the Commonwealth has power to regulate the industrial rights and obligations of constitutional companies.<sup>56</sup> In the *WorkChoices* case, the majority of the High Court approved of Gaudron J’s statement in *Re Pacific Coal Pty. Ltd.; Ex parte Construction, Forestry, Mining and Energy Union*, in which her Honour stated:

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 described

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54. See *O’Sullivan v Noarlunga Meat Ltd* [1954] HCA 29 at [5] per McTiernan J; [21] per Fullagar J (the *Noarlunga* case).

55. *O’Sullivan v Noarlunga Meat Ltd* [1954] HCA 29 at [21] per Fullagar J.

56. *New South Wales v Commonwealth; Western Australia v Commonwealth* [2006] HCA 52. For discussion as to the implications of the High Court’s decision in the *WorkChoices* case, see J Burnett, *The WorkChoices case*, AGS, September 2007, p. 9; P Kildea and K Gelber, ‘High Court Review 2006: Australian federal implications of the *WorkChoices* decision’, *Australian Journal of Political Science*, vol. 42, no. 4, December, p. 649 at 654.

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 or is capable of affecting its activities, functions, relationships or business.<sup>57</sup>

The effect of the majority decision on hospitals was discussed by Kirby J, albeit in dissent, who stated:

The States, correctly in my view, pointed to the potential of the Commonwealth's argument, if upheld, radically to reduce the application of State laws in many fields that, for more than a century, have been the subject of the States' principal governmental activities. Such fields include education ... Likewise, in healthcare, where hospitals (public and private), clinics, hospices, pathology providers and medical practices are, or may readily become, incorporated.<sup>58</sup>

Gaudron J's comments indicate that a public hospital would have to be a foreign, trading or financial corporation for the corporations power to apply. It is noted that some public hospitals are, in fact, incorporated bodies.<sup>59</sup> Examples are:

- South Coast District Hospital, Victor Harbour (South Australia)<sup>60</sup>
- Inglewood and Districts Health Service (Victoria)<sup>61</sup>
- Bass Coast Regional Health (Victoria)<sup>62</sup> and

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57. *New South Wales v Commonwealth; Western Australia v Commonwealth* [2006] HCA 52 at [178]; *Re Pacific Coal Pty. Ltd.; Ex parte Construction, Forestry, Mining and Energy Union* [2000] HCA 34 at [83]. See also *Re Dingjan: Ex parte Wagner* [1995] HCA 16 at [30]–[31] per Gaudron J; [2], [7] per McHugh J.

58. *New South Wales v Commonwealth; Western Australia v Commonwealth* [2006] HCA 52 at [539].

59. The precise numbers of such bodies throughout Australia is difficult to ascertain and outside the scope of this research paper. Where an incorporated body is a company, it would have to be registered as a company with ASIC and come under the Commonwealth's jurisdiction. However, where an incorporated body is an incorporated association, State legislation on incorporated associations and, in some cases—Commonwealth legislation, would apply to that body. For further information about the differences between companies and incorporated associations, see ASIC, *Registering not-for-profit or charitable organisations*, viewed 12 May 2009, <http://www.asic.gov.au/asic/asic.nsf/byheadline/Registering+not-for-profit+or+charitable+organisations?openDocument>

60. South Coast District Hospital, *About South Coast District Hospital*, viewed 20 January 2009, <http://encounterhealth.sa.gov.au/article/articleview/70/1/13/>

61. Inglewood and Districts Health Service, *History*, viewed 20 January 2009, <http://www.idhs.vic.gov.au/aboutus/history/index.aspx>

62. Bass Coast Regional Health, *Bass Coast Regional Health: Corporate Plan 2008/2009*, p. 2, viewed 12 May 2009, <http://www.gha.net.au/bcrh/viewresources.asp?itype=120>

- Kyneton District Health Service (Victoria).<sup>63</sup>

However, the question of what type of body constitutes a constitutional corporation was not conclusively determined by the High Court in the *WorkChoices* case.<sup>64</sup> This is an important question as it affects the ambit of the corporations power. The test that the courts have used in distinguishing between a trading or financial corporation has been to determine a corporation's character by reference to its activities.<sup>65</sup> In other words, a trading corporation engages in trading activities and a financial corporation engages in financial activities.<sup>66</sup>

However, it is not always clear to what extent a corporation must engage in a particular type of activity in order for the corporation's character to be ascertained.<sup>67</sup> For the purposes of this research paper, it is assumed that public hospitals would not generally be involved in financial activities and, as the paper is only concerned with public hospitals in Australia, it is not concerned with whether public hospitals are foreign corporations. Consequently, this research paper will focus on whether public hospitals could be regarded as trading corporations, thereby falling within the scope of the corporations power.

In *Adamson's* case, Mason J stated:

Not every corporation which is engaged in trading activity is a trading corporation. The trading activity of a corporation may be so slight and so incidental to some other principal activity, viz. religion or education in the case of a church or school, that it could not be described as a trading corporation. Whether the trading activities of a particular corporation are sufficient to warrant its being characterized as a trading corporation is very much a question of fact and degree.<sup>68</sup>

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63. Kyneton District Health Service, *About the hospital*, viewed 20 January 2009, [http://www.kynetonhealth.org.au/default.asp?cid=2464&t=About\\_Us&rid=2464](http://www.kynetonhealth.org.au/default.asp?cid=2464&t=About_Us&rid=2464)

64. See N Gouliaditis, *The meaning of 'trading or financial corporations': future directions*, AGS, September 2007, p. 1.

65. N Gouliaditis, *The meaning of 'trading or financial corporations': future directions*, p. 2. Distinguishing between a trading and financial corporation can sometimes be a difficult task: see N Gouliaditis, *The meaning of 'trading or financial corporations': future directions*, p. 2; G Williams, 'Dilemma of too much choice', *Weekend Australian*, 28 April 2007, p. 21.

66. N Gouliaditis, *The meaning of 'trading or financial corporations': future directions*, p. 2 (for example— buying and selling goods and services; and lending or borrowing money).

67. See *R v Federal Court of Australia; Ex parte WA National Football League* [1979] HCA 6 at [30]–[33] per Mason J (*Adamson's* case).

68. *R v Federal Court of Australia; Ex parte WA National Football League* [1979] HCA 6 at [33] per Mason J (approved by Jacobs J but was not a majority opinion).

Arguably, the exact same words could be applied to hospitals and health, in place of ‘religion or education’.<sup>69</sup>

According to Mason J, also in *Adamson’s* case:

"Trading corporation" is not and never has been a term of art or one having a special legal meaning. Nor, as the Chief Justice pointed out, was there a generally accepted definition of the expression in the nineteenth century. Essentially it is a description or label given to a corporation when its trading activities form a sufficiently significant proportion of its overall activities as to merit its description as a trading corporation.<sup>70</sup>

Murphy J also stated:

A trading corporation may also be a sporting, religious, or governmental body. As long as the trading is not insubstantial, the fact that trading is incidental to other activities does not prevent it being a trading corporation.<sup>71</sup>

There is also Federal Court authority (albeit somewhat dated) that public hospitals can in fact be trading corporations.<sup>72</sup> In *E v Australian Red Cross Society*, Wilcox J stated:

It seems to me that the critical question is the nature of The Prince Alfred Hospital's activities at the relevant time. Accepting that its predominant activity was the provision of medical and surgical care to patients, they were not objectives antithetical to the notion of trade. Many trading corporations supply services rather than goods. Many privately owned hospitals provide medical and surgical care for reward with the purpose of thereby trading profitably. There was nothing in the intrinsic nature of The Prince Alfred Hospital's activities to disqualify it as a trading corporation.<sup>73</sup>

At this point, it is important to note that his Honour thought: ‘It does not matter that the corporation was incorporated by statute and publicly-owned.’<sup>74</sup>

For those public hospitals that are incorporated and could be considered to be trading corporations, the corporations power would assist the Federal Government to take over those hospitals.<sup>75</sup> Else, the corporations power would be unlikely to assist.<sup>76</sup>

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69. See, for example, Wilcox J’s comments in *E v Australian Red Cross Society* (1991) FCA 20, as discussed in notes 73 and 74 below.

70. *R v Federal Court of Australia; Ex parte WA National Football League* [1979] HCA 6 at [31] per Mason J (approved by Jacobs J but was not a majority opinion).

71. *R v Federal Court of Australia; Ex parte WA National Football League* [1979] HCA 6 at [10] per Murphy J.

72. *E v Australian Red Cross Society* (1991) FCA 20 at [126] per Wilcox J.

73. *E v Australian Red Cross Society* (1991) FCA 20 at [131].

74. *E v Australian Red Cross Society* (1991) FCA 20 at [127].



Until the particular question of whether public hospitals could be regarded as trading corporations is definitively addressed by the High Court, the possibility of the corporations power being a source of Commonwealth power to take over and regulate the administration of public hospitals remains speculative at best.

## **External affairs power**

Section 51(xxix) of the Constitution provides that the Commonwealth may make laws relating to external affairs.

Members of the High Court have held that the scope of this power extends to:<sup>77</sup>

- matters or things geographically situated outside Australia<sup>78</sup>
- Australia's relationships with other countries and international organisations<sup>79</sup>
- in some cases, matters of international concern<sup>80</sup> and
- implementing treaty obligations.<sup>81</sup>

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75. See J McMillan, *Commonwealth constitutional power over health*, Consumers' Health Forum of Australia, 1993, p. 7.

76. See G Williams, 'Dilemma of too much choice', p. 6.

77. See N Wood, *The external affairs power: XYZ v Commonwealth*, paper given at the Constitutional Law Forum, AGS, 27 September 2007.

78. N Wood, *The external affairs power: XYZ v Commonwealth*, p. 2; *New South Wales v Commonwealth* [1975] HCA 58. The geographic externality principle was endorsed in *Polyukhovich v Commonwealth* [1991] HCA 32; *XYZ v Commonwealth* [2006] HCA 25.

79. *R v Sharkey* [1949] HCA 46 per Latham CJ (importance of maintaining positive relations with other countries regarded as important in managing the external affairs of the Commonwealth); *Koowarta v Bjelke-Peterson* [1982] HCA 27 per Brennan J (external affairs power extends to laws regarding relations to international persons such as the United Nations); *Commonwealth v Tasmania* [1983] HCA 21 at [41] per Murphy J (external affairs power extends to relations with transnational corporations, international trade unions and other groups who can affect the Commonwealth).

80. See *R v Burgess: ex parte Henry* [1936] HCA 52 per Latham CJ; *Koowarta v Bjelke-Peterson* [1982] HCA 27 at [35] per Stephen J (an issue which is of international concern affects the Commonwealth's relations with other countries and, consequently, that issue is itself part of the Commonwealth's external affairs); *Polyukhovich v Commonwealth* [1991] HCA 32 at [29]–[30] per Brennan J and [19]–[20] per Toohey J. However, some members of the High Court have expressed concern regarding the difficulties in applying the 'international concern' doctrine: see, for example, *XYZ v Commonwealth* [2006] HCA 25 at [18] per Gleeson CJ. See also S Murray, 'Back to ABC after XYZ: should we be concerned about "international concern"', *Federal Law Review*, vol. 35, 2007, p. 317 at 318; N Wood, *The external affairs power: XYZ v Commonwealth*, p. 5.

It is important to note that although section 61 of the Constitution empowers the Executive to ratify international treaties and that, once a treaty has been ratified, Australia is bound at international law to observe the terms of a treaty, the treaty does not become directly enforceable in Australian domestic law unless and until legislative action is taken to implement it. In addition, when using the external affairs power, the Commonwealth would not be able to legislate to simply give effect to the Federal Government's own policies—the legislation implementing the treaty must be reasonably and appropriately adapted to the purpose of the instrument.<sup>82</sup>

The external affairs power does have other limits, including:

- entry into a treaty must be done on a bona fide basis and
- there are limits on the extent to which this power can be used to undermine express or implied constitutional prohibitions on the Commonwealth's legislative power.<sup>83</sup>

The precise scope of the external affairs power remains uncertain, but it would be unlikely that this power, in itself, would support the Commonwealth taking over the administration of public hospitals in Australia. However, used in conjunction with other powers under section 51 of the Constitution, the external affairs power may support aspects of such a takeover in relation to implementing treaty obligations and legislating on matters affecting Australia's relations with other countries and international organisations.<sup>84</sup>

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81. *Commonwealth v Tasmania* [1983] HCA 21 at [26] per Mason J (the law must conform to and implement the treaty—whether the Commonwealth may legislate to implement a treaty depends on the nature of the treaty concerned, whether the treaty's provisions are declaratory of international law, impose obligations or provide benefits), [38] per Murphy J (due to globalisation, an internal affair may also be part of the Commonwealth's external affairs), [40] per Murphy J (power extends but is not restricted to implementing treaties—available even without a treaty), [27] per Brennan J (if the Commonwealth accepts an obligation under an international Convention, the external affairs power allows the Commonwealth to make laws necessary to implement that obligation), [21] per Deane J (the law implementing a treaty must be reasonably proportionate to the treaty's purpose and the means of achieving that purpose). See also *R v Burgess: ex parte Henry* [1936] HCA 52 at [7] per Latham CJ.

82. *Victoria v Commonwealth (Industrial Relations Act Case)* [1996] HCA 96 at [34]. See also G Witynski, *Federalism after the Work Choices case*, paper presented at the Constitutional Law Forum, AGS, 27 September 2007, p. 5.

83. See A Twomey, *Federal Parliament's changing role in treaty making and external affairs*, Research paper, no. 15, 1999–2000, Department of the Parliamentary Library, Canberra, 2000, p. 34–35.

84. See J McMillan, *Commonwealth constitutional power over health*, p. 7. Examples of international agreements, to which Australia is a party and which *may* be relevant to taking over and regulating public hospitals, are as follows.

- The *International Covenant on Economic, Social, and Cultural Rights* (ratified by Australia on 10 March 1976): see United Nations Office of the High Commissioner for Human Rights,

## Provision of allowances and benefits

Section 51(xxiiiA) of the Constitution provides that the Commonwealth can pass laws for the peace, order and good government of the Commonwealth with respect to:

The provision of maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services (but not so as to authorize any form of civil conscription), benefits to students and family allowances.

This power was one of the few successful amendments to the Constitution since Federation. As previously noted, it was made in 1946 during the term of the Chifley Labor Government and specifically refers to medical services.<sup>85</sup>

In *British Medical Association v Commonwealth*,<sup>86</sup> Chief Justice Latham observed:

The power is not a power to make laws with respect to, e.g. pharmaceutical benefits and medical services. It is a power to make laws with respect to the provision of such benefits and services. A power to make laws with respect to medical services might well be held to be a power which would authorize a law providing for the complete control of medical services rendered by any person to any other person and so would enable the legislature to control the practice of the medical profession completely or to such less extent as Parliament might think proper.

...

If, as I think should be held, it is the case that the constitutional provision contained in par. (xxiiiA.) relates only to the provision of certain benefits by the Commonwealth, it follows that under this legislative power the Commonwealth Parliament could not prevent the provision of such benefits by any other agency, and therefore, for example, could not prevent the States, through their hospitals or otherwise, supplying benefits either identical with or different from

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'International Covenant on Economic, Social, and Cultural Rights', viewed 29 September 2008, [http://www.unhcr.ch/html/menu3/b/a\\_ceschr.htm](http://www.unhcr.ch/html/menu3/b/a_ceschr.htm); United Nations Economic and Social Council, *The right to the highest attainable standard of health – general comments*, Committee on Economic, Social and Cultural Rights, General comment no. 14/2000, 11 August 2000

- *The International Health Regulations 2005*: World Health Organization, *International Health Regulations*, viewed 8 May 2009, [http://whqlibdoc.who.int/publications/2008/9789241580410\\_eng.pdf](http://whqlibdoc.who.int/publications/2008/9789241580410_eng.pdf)
- *The Convention on the Rights of the Child*: United Nations Office of the High Commissioner for Human Rights, *Convention on the Rights of the Child*, viewed 8 May 2009, <http://www.unhcr.ch/html/menu3/b/k2crc.htm>

85. It has been argued that the meaning of 'medical services' is ambiguous but may include services for healing by drugs, surgery and manipulation: see J McMillan, *Commonwealth constitutional power over health*, p. 34.

86. *British Medical Association v Commonwealth* [1949] HCA 44.

those which were included within the Commonwealth scheme, as long as the Federal and State statutes, each positively providing for such benefits, were not inconsistent with each other.<sup>87</sup>

Importantly, it is further stated:

... the Act does not in any way assume Commonwealth control of State institutions such as hospitals &c. It only offers to them an opportunity of coming into the Commonwealth scheme if they think fit.<sup>88</sup>

It is important to note that Latham CJ's statements were made in 1949 and the High Court's position on constitutional interpretation, favouring expansion of federal power, has evolved since that time.<sup>89</sup>

It has been argued that, in relation to medical services:

The Commonwealth is not obliged to provide the services itself. It can (as it mostly has done) make payments directly or indirectly to medical practitioners, pharmacists and nursing homes that provide the services under a Commonwealth-sponsored program, like Medicare. Regulatory control can then be imposed upon those bodies as a condition of receiving a Commonwealth payment ...<sup>90</sup>

This power is limited in that civil conscription in relation to the provision of medical services is prohibited.<sup>91</sup> It has been argued that civil conscription generally involves compulsion on a medical practitioner in relation to the provision of medical services.<sup>92</sup>

While there continues to be no High Court authority specifically addressing the question of whether this power would support the Federal Government taking over the administration of public hospitals, section 51(xxiiiA) of the Constitution remains a potentially important source of Commonwealth constitutional power in relation to this issue as public hospitals, which, arguably, may be established by the Commonwealth under the auspice of the reference to medical

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87. *British Medical Association v Commonwealth* [1949] HCA 44 at [60] per Latham CJ.

88. *British Medical Association v Commonwealth* [1949] HCA 44 at [61] per Latham CJ.

89. See, for example, *New South Wales v Commonwealth*; *Western Australia v Commonwealth* [2006] HCA 52. See generally L Zines, *The High Court and the Constitution*, Fifth Edition, 2008.

90. J McMillan, 'The constitutional power of the Commonwealth in public health', in Australian Institute of Health Law and Ethics, *Public health law in Australia - new perspectives*, Canberra, 1998, p.110.

91. See J McMillan, *Commonwealth constitutional power over health*, p. 42.

92. For further High Court discussion on what constitutes 'civil conscription', see *Wong v Commonwealth*; *Selim v Lele, Tan and Rivett constituting the Professional Services Review Committee No. 309* [2009] HCA 3 at [60]–[61] per French CJ and Gummow J, [106]–[110] per Kirby J, [198]–[201] and [226] per Hayne, Crennan and Keiffel JJ; *British Medical Association v Commonwealth* [1949] HCA 44 at [70]–[81] per Latham CJ; *General Practitioners Society v Commonwealth* [1980] HCA 30 at [10], [17] per Gibbs J.

services.<sup>93</sup> This power would be particularly relevant to Scenarios 2 and 3, in that it would enable the Federal Government to regulate public hospital services by setting up and administering its own public hospital scheme, which the state-run public hospitals may join if they so choose.

## **Quarantine power**

Section 51(ix) of the Constitution provides that the Commonwealth can pass laws for the peace, order and good government of the Commonwealth with respect to quarantine.

The quarantine power has primarily been relied upon in the area of public health.<sup>94</sup> Public health ranges from the regulation of disease prevention to the regulation of tobacco and alcohol.<sup>95</sup>

The scope of this power remains uncertain.<sup>96</sup> However, the legislative definition of quarantine includes:

- (i) the examination, exclusion, detention, observation, segregation, isolation, protection, treatment and regulation of vessels, installations, human beings, animals, plants or other goods or things; or
  - (ii) the seizure and destruction of animals, plants, or other goods or things; or
  - (iii) the destruction of premises comprising buildings or other structures when treatment of these premises is not practicable; and
- (b) having as their object the prevention or control of the introduction, establishment or spread of diseases or pests that will or could cause significant damage to human beings, animals, plants, other aspects of the environment or economic activities.<sup>97</sup>

While it is conceivable that the quarantine power may support particular aspects of the Commonwealth taking over the administration of public hospitals, such as infection control and therapeutic medicines in Scenario 3, it would be necessary to also rely on other heads of power.<sup>98</sup>

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93. See J McMillan, *Commonwealth constitutional power over health*, pp. 7, 32, 34.

94. See J McMillan, 'The constitutional power of the Commonwealth in public health', p. 108; C Reynolds, 'Quarantine in times of emergency: the scope of s 51(ix) of the Constitution', *Journal of Law and Medicine*, vol. 12, 2004, p. 166.

95. For a discussion of what is public health law generally, see J McMillan, 'The constitutional power of the Commonwealth in public health', pp. 122–128; C Reynolds, 'Public health law in the new century', *Journal of Law and Medicine*, vol. 10, 2003, pp. 436–438.

96. See J McMillan, 'The constitutional power of the Commonwealth in public health', p. 108. The Commonwealth's quarantine power has most recently been exercised following WHO's swine flu pandemic alert on 24 April 2009.

97. *Quarantine Act 1908 (Cth)* subsection 4(1).

## **Related provisions under section 51**

There are several other provisions in section 51 of the Constitution, which may be relevant to the exercise of some of those powers discussed above.

### **Incidental power**

Section 51(xxxix) of the Constitution provides that the Commonwealth may make laws that are incidental to executing any of the powers vested in the Commonwealth.

The incidental power effectively assists in the practical implementation of each constitutional power vested in the Commonwealth under section 51.

### **Power to acquire property**

Section 51 of the Constitution provides that the Commonwealth make laws with respect to: ‘the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws’.

It is important to note that this power to acquire property is restricted to those purposes in respect of which the Commonwealth has constitutional power to make laws. In addition, the Commonwealth must compensate people, whose property has been acquired by the Commonwealth, on just terms.<sup>99</sup>

‘Acquisition of property’ in section 51(xxxi) of the Constitution has been expansively construed by the High Court.<sup>100</sup>

Using its constitutional powers, the Commonwealth Parliament has enacted legislation governing the acquisition of land and interests in land by the Commonwealth—the *Lands Acquisition Act 1989*. There are provisions in this Act that set out procedures relating to the acquisition of land by agreement and by compulsory acquisition.

Assuming that the Commonwealth does have power to make laws in respect of public hospital services—where the Federal Government acquires a public hospital, including such items as

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98. See J McMillan, *Commonwealth constitutional power over health*, p. 6.

99. The most recent case dealing with section 51(xxxi) and the concept of ‘just terms’ compensation is *Wurridjal v Commonwealth* [2009] HCA 2. For academic discussion of this provision, see S Brown, ‘Acquisition’ and statutory rights, paper presented at the Constitutional Law Forum 2007, AGS, 27 September 2007, p. 1.

100. *Telstra Corporation Ltd v Commonwealth* [2008] HCA 7. See also the High Court’s examination of the meaning of ‘acquisition of property’ and ‘just terms compensation’ in *Wurridjal v Commonwealth* [2009] HCA 2— (‘acquisition of property’) [87]–[93] per French CJ and [356]–[365] per Crennan J; (‘just terms’) [307]–[308] per Kirby J and [461]–[463] per Kiefel J.

properties; chattels; interests in contracts; and debts related to that public hospital, the effect of section 51(xxxi) is that the Federal Government would have to compensate the state governments on just terms for those acquisitions.<sup>101</sup> However, the problem of how to value such property is raised, particularly given the large number of public hospitals involved. It is expected that acquisition of all public hospitals would be financially unattractive for the Commonwealth and that the pursuit of co-operation with the states would be far more appealing.

## **Commonwealth's power to legislate in relation to places acquired for public purposes**

On the one hand, it is arguable that section 52(i) of the Constitution may assist the Commonwealth to take over public hospitals as places acquired by the Commonwealth for public purposes.<sup>102</sup>

It has been stated by some judges of the High Court that 'places acquired by the Commonwealth' refers to places over which the Commonwealth has some kind of proprietary right through acquisition,<sup>103</sup> as opposed to territories surrendered or otherwise acquired under sections 111 and 122 of the Constitution respectively.<sup>104</sup>

Notably, the term 'public purposes' has been regarded as encompassing a general and broad scope, not necessarily confined to those purposes for which the Commonwealth has power to make laws.<sup>105</sup>

Section 52(i), though uncertain, has been said to apply to laws that restrict and control the use to which such places are put.<sup>106</sup>

However, on the other hand, it is important to note that section 52(i) of the Constitution simply gives the Commonwealth power to make laws in relation to places already acquired by the Commonwealth for public purposes. Therefore, this provision assumes that the Commonwealth

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101. See G Witynski, *Federalism after the Work Choices case*, p. 9. This would be particularly relevant in Scenario 3.

102. Under section 52(i) of the Constitution, the Commonwealth has exclusive powers to legislate for peace, order and good government in relation to all places acquired by the Commonwealth for public purposes. See also *Commonwealth Places (Application of Laws) Act 1970 (Cth)*.

103. For example, a primary piece of legislation enabling the Commonwealth to acquire land is the *Lands Acquisition Act 1989 (Cth)*.

104. See, for example, *Worthing v Rowell and Muston Pty Ltd* [1970] HCA 19 at [23] per Windeyer J.

105. See, for example, *Worthing v Rowell and Muston Pty Ltd* [1970] HCA 19 at [24] and [26] per Windeyer J.

106. See *Attorney-General (NSW) v Stocks & Holdings (Constructors) Pty Ltd* [1970] HCA 58 at [2] per Windeyer J. This includes regulating the conduct of people at such places: see, for example, *R v Phillips* [1970] HCA 50 at [9] per Menzies J.

has already acquired such places under other provisions in the Constitution that confer acquisitions power onto the Commonwealth, such as section 51(xxxi), which itself relies on the application of other powers conferred under section 51.

While section 52 has been referred to in this research paper for the sake of completeness, it is noted that the law relating to the scope of this section remains somewhat dated and relatively unexplored. It is uncertain whether this power would be of use to a Federal Government interested in taking over public hospitals.

## **Expansion of federal constitutional powers**

### **Role of the High Court in constitutional interpretation**

During the first 20 years after Federation, the High Court interpreted the Constitution in such a way as to limit Commonwealth power and protect the role of the states through the doctrines of intergovernmental immunities and reserved powers respectively.<sup>107</sup> It is argued that after the first 20 years following Federation, decisions of the High Court have largely favoured the Commonwealth, contributing to the significant expansion of the Commonwealth's jurisdiction.<sup>108</sup>

The Engineers case<sup>109</sup> has been widely regarded as pivotal in reflecting a change in the way the High Court interprets the Constitution. In that case, the majority of the High Court rejected both the reserved powers and intergovernmental immunities doctrine and held that it would not

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107. See Federal-State Relations Committee, *Australian federalism: the role of the states*, paragraph 2.4; P Kildea and K Gelber, 'High Court Review 2006: Australian federal implications of the WorkChoices decision', p. 652. The doctrine of intergovernmental immunity means that no one level of government can be bound by the laws of another level of government and the doctrine of reserved powers means that anything not expressly mentioned as a Commonwealth power in the Constitution is reserved to the states: see Federal-State Relations Committee, *Australian federalism: the role of the states*; A Lynch, *Perspectives on federalism*, 11 September 2007, viewed on 15 January 2008, <http://www.deir.qld.gov.au/pdf/ir/conference/perspectives-federalism-lynch.pdf>

108. It is important to note that, in addition to the High Court's approach to constitutional interpretation, other factors were also involved in expanding the Commonwealth's legislative power in that period of time, for example, the expansion of international law and effects of taxation arrangements. For further discussion about the High Court's approach to constitutional interpretation, see P Kildea and K Gelber, 'High Court Review 2006: Australian federal implications of the WorkChoices decision', p. 651; G Winterton, 'The High Court and federalism: a centenary evaluation', in P Cane (ed), *Centenary essays for the High Court of Australia*, LexisNexis Butterworths, 2004, p. 201. For examples of cases, see: *Amalgamated Society of Engineers v Adelaide Steamship Co.Ltd.* [1920] HCA 54 (the Engineers case); *South Australia v Commonwealth* [1942] HCA 14 (the First Uniform Tax case); *Koowarta v Bjelke-Petersen* [1982] HCA 27; *Commonwealth v Tasmania* [1983] HCA 21 (the Tasmanian Dam case); *New South Wales v Commonwealth*; *Western Australia v Commonwealth* [2006] HCA 52.

109. *Amalgamated Society of Engineers v Adelaide Steamship Co. Ltd* [1920] HCA 54.



narrowly interpret grants of Commonwealth power in order to protect the states.<sup>110</sup> Instead, the High Court stated that it would interpret the Constitution by focusing on the ordinary meaning of the words.<sup>111</sup> According to Higgins J:

The fundamental rule of interpretation, to which all others are subordinate, is that a statute is to be expounded according to the intent of the Parliament that made it; and that intention has to be found by an examination of the language used in the statute as a whole. The question is, what does the language mean; and 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 ...<sup>112</sup>

Since the *Engineers* case, the High Court's decisions have generally continued to be influenced by the Court's decision in that case, with the end result favouring the expansion of federal constitutional powers.<sup>113</sup>

The *WorkChoices* decision is a more recent example of the High Court's willingness for broad interpretation of the Constitution and expansion of the Commonwealth's legislative powers. In this case, the majority stated:

The general principles to be applied in determining whether a law is within respect to a head of legislative power are well settled. It is necessary, always, to construe the constitutional text and to do that "with all the generality which the words used admit". The character of the law must then be determined by reference to the rights, powers, liabilities, duties and privileges which it creates. The practical as well as the legal operation of the law must be examined ...<sup>114</sup>

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110. See A Lynch, *Perspectives on federalism*, p. 2; G Witynski, *Federalism after the Work Choices case*, p. 3. See also Federal-State Relations Committee, *Australian federalism: the role of the states*, paragraph 2.6.

111. *Amalgamated Society of Engineers v Adelaide Steamship Co. Ltd* [1920] HCA 54 per Knox CJ, Isaacs, Rich and Starke JJ. See also P Kildea and K Gelber, 'High Court Review 2006: Australian federal implications of the WorkChoices decision', p. 652; A Lynch, *Perspectives on federalism*, at p. 2.

112. *Amalgamated Society of Engineers v Adelaide Steamship Co. Ltd* [1920] HCA 54.

113. See, for example, *South Australia v Commonwealth* [1942] HCA 14 (the First Uniform Tax case); *Commonwealth v Tasmania* [1983] HCA 21 (the Tasmanian Dam case). However, see also *Melbourne Corporation v Commonwealth* [1947] HCA 26 (the High Court recognised that the federal structure of the Constitution may have implications for interpreting Commonwealth power when Commonwealth law:

- discriminates against or between States, and
- threatens a State's existence as an independent entity).

114. *South Wales v Commonwealth; Western Australia v Commonwealth* [2006] HCA 52 at [142].

## **Fiscal powers**

### **Appropriations power**

Section 81 of the Constitution provides:

All revenues or moneys raised or received by the Executive government of the Commonwealth shall form one Consolidated Revenue Fund, to be appropriated for the purposes of the Commonwealth in the manner and subject to the charges and liabilities imposed by this Constitution.

This power is significant because it seems that there are few limitations on what is considered as being for Commonwealth purposes, potentially expanding the Commonwealth's power to spend as it chooses.<sup>115</sup>

According to Gleeson CJ in *Combet v Commonwealth*:

Section 81 of the Constitution provides for the Consolidated Revenue Fund "to be appropriated for the purposes of the Commonwealth". It is for the Parliament, in making appropriations, to determine what purposes are purposes of the Commonwealth. It is also for the Parliament to determine the degree of specificity with which such purposes are expressed.<sup>116</sup>

This power would be a powerful tool for the Commonwealth; for example, in acquiring public hospitals, particularly as there is High Court authority that ordinarily the validity of an appropriation act may not be successfully challenged.<sup>117</sup> However, this power to spend money may be subject to the limitation imposed by the power to compulsorily acquire property under section 51(xxxi) of the Constitution, as discussed above.

### **Financial assistance power**

Section 96

Section 96 of the Constitution provides:

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115. See, for example, *Attorney-General (Vic) (at the Relation of Dale) v Commonwealth* [1945] HCA 30 per Latham CJ. See also J McMillan, 'The constitutional power of the Commonwealth in public health', p. 116; J McMillan, *Commonwealth constitutional power over health*, p. 12. It is important to note that section 81 does not permit the enactment of laws to regulate the bodies that spend the money.

116. *Combet v Commonwealth* [2005] HCA 61 at [5].

117. See *Davis v Commonwealth* [1988] HCA 63 at [20] per Mason CJ, Deane and Gaudron JJ. See also *Attorney-General (Vic) (at the Relation of Dale) v Commonwealth* [1945] HCA 30 per Latham CJ; *Victoria v Commonwealth* [1975] HCA 52 at [7] per McTiernan J, [16]–[17] per Mason J.

During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit.

This is arguably the most powerful tool allowing the Commonwealth to regulate, albeit indirectly, many areas, including those areas in which it does not otherwise have powers. Section 96 would be extremely relevant in relation to Scenario 1, where the Federal Government grants financial grants to the states in relation to public hospitals, setting conditions on how such financial grants must be used.<sup>118</sup>

To date, there have been two types of financial grants made to states:

- general revenue (untied) grants—a lump sum payment to a state to be used as the state chooses and
- specific purpose or tied grants—the state may only use these grants in accordance with terms or conditions that the Federal Government imposes.<sup>119</sup>

#### Vertical fiscal imbalance

Financial power has been increasingly consolidated in the hands of the Commonwealth. This has given rise to ‘vertical fiscal imbalance’.<sup>120</sup> Vertical fiscal imbalance is the difference between the revenue raising capacity and spending responsibilities of the Federal Government compared with the revenue raising capacity and spending responsibilities of the states.<sup>121</sup> In Australia, the Federal Government collects approximately 80 per cent of tax revenue and is responsible for approximately 54 per cent of ‘own-purpose expenditure’.<sup>122</sup> In contrast, states collect approximately 16 per cent of tax revenue but are responsible for approximately 40 per cent of own-purpose expenditure.<sup>123</sup>

The consolidation of financial power in the hands of the Commonwealth, together with section 96 of the Constitution, has allowed the Commonwealth to become involved in areas traditionally the preserve of the states.

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118. See ‘Specific purpose payments’ below.

119. J McMillan, *Commonwealth constitutional power over health*, p. 14.

120. See S Bennett and R Webb, *Specific purpose payments and the Australian federal system*, Research paper, no. 17, 2007–08, Parliamentary Library, Canberra, 2008, p. 10.

121. S Bennett and R Webb, *Specific purpose payments and the Australian federal system*, p. 10. See also Access Economics Pty Ltd, Appendix 2: the costs of federalism’, p. 16.

122. Own-purpose expenditure means revenue minus transfers to states and local governments: S Bennett and R Webb, *Specific purpose payments and the Australian federal system*, p. 10.

123. S Bennett and R Webb, *Specific purpose payments and the Australian federal system*, p. 11.

## Specific purpose payments

### The system to date

Specific purpose payments (SPPs) have often been conditional in nature and paid either to states, through states or directly to local governments.<sup>124</sup>

Most SPPs have been paid to states and supplement state funding. Public hospitals are one area in which such payments have been made.<sup>125</sup>

Conditions attached to SPPs have included:

- general policy conditions that may be attached to the grant of money (e.g. that the states provide free public hospital access for Medicare patients in return for funding under the Health Care Agreements)
- expenditure conditions (e.g. SPPs for schools to be spent on teacher salaries and curriculum development)
- input control requirements, in the forms of ‘maintenance of effort’ and ‘matching funding’ arrangements, where the states are required to maintain funding levels and/or match Commonwealth funding in a program area
- performance and financial information reporting by the states and
- due recognition conditions, whereby the states are required to acknowledge publicly the Commonwealth’s funding.<sup>126</sup>

The High Court has interpreted the text of section 96 broadly. Consequently, the Federal Government may impose any condition of its choice on a payment.<sup>127</sup>

It is argued that SPPs have effectively expanded the scope of the Commonwealth’s constitutional power in that SPPs have enabled the Federal Government to become and remain involved in

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124. See S Bennett and R Webb, *Specific purpose payments and the Australian federal system*, pp. 1, 3, 4. SPPs are sometimes called ‘tied grants’: S Bennett and R Webb, *Specific purpose payments and the Australian federal system*, p. 4. See also V Koutsogeorgopoulou, *Fiscal relations across levels of government in Australia*, OECD Economics Department Working Papers, no. 541, 23 January 2007, p. 13.

125. S Bennett and R Webb, *Specific purpose payments and the Australian federal system*, p. 3.

126. S Bennett and R Webb, *Specific purpose payments and the Australian federal system*, p. 4. See also V Koutsogeorgopoulou, *Fiscal relations across levels of government in Australia*, p. 15.

127. See *Victoria v Commonwealth* [1926] HCA 48; *Victoria v Commonwealth (Second Uniform Tax Case)* [1957] HCA 54 at [21] per Dixon CJ. See also J McMillan, *Commonwealth constitutional power over health*, p. 14.

areas traditionally regarded as belonging to the states.<sup>128</sup> An example of how an SPP may be used by the Commonwealth under the system to date would be a condition that the payment be used to build a public hospital at a certain place.<sup>129</sup>

## Reforms to SPPs

Consistent with the Rudd Government's commitment to achieving national health care reform in partnership with state and territory governments,<sup>130</sup> COAG agreed to the following general reforms of the SPPs system at its meetings during 2008:<sup>131</sup>

- there would be a rationalisation of SPPs<sup>132</sup>—in other words, the then current number of 92 payments would be amalgamated into approximately five or six new national agreements delivering services, including health services<sup>133</sup> and
- the new agreements would be ongoing with regular reviews focusing on outcomes and outputs, as well as providing incentives for reform.<sup>134</sup>

The new form of national agreements, in relation to health, could mean greater financial control by the Federal Government over the states' administration of public hospitals.

## Concluding comments

Despite the absence of an explicit public hospitals power in the Constitution, it is arguable that the following, to varying degrees and in different combinations, may enable the Commonwealth to take over and regulate the administration of public hospitals:

- a combination of powers under section 51 (Scenarios 2 and/or 3)

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128. S Bennett and R Webb, *Specific purpose payments and the Australian federal system*, pp. 5, 7. See also R Garnaut, 'Discussant', Productivity Commission, *Productive reform in a federal system —roundtable* proceedings, 27–28 October 2005, Canberra, p. 93, viewed 12 May 2009, [http://www.pc.gov.au/\\_\\_data/assets/pdf\\_file/0019/9217/productivereform.pdf](http://www.pc.gov.au/__data/assets/pdf_file/0019/9217/productivereform.pdf)

129. J McMillan, *Commonwealth constitutional power over health*, p. 15.

130. The Prime Minister of Australia, *Health*, viewed 29 September 2008, <http://www.pm.gov.au/topics/health.cfm#hospitals>

131. See Council of Australian Governments, 'COAG meeting outcomes'.

132. See, for example, Council of Australian Governments, *Communique*, 29 November 2008, pp. 2–3.

133. See Council of Australian Governments, *Communique*, 29 November 2008, pp. 2–3. See also W Swan (Treasurer), *Modern federalism and our national future*, Address to the 2008 Economic and Social Outlook Conference, 27 March 2008, p. 3.

134. See Council of Australian Governments, *Communique*, 29 November 2008, pp. 2–3; W Swan (Treasurer), *Modern federalism and our national future*, pp. 3–4.

- perhaps, the Federal Government making laws for public hospitals as places acquired for public purposes under sections 51(xxxi) and 52 (Scenario 3)
- the appropriations power in section 81 (Scenarios 1–3)
- the long-term trend of the High Court to interpret the Constitution broadly and being open to expanding Commonwealth power and
- the continuing fiscal dominance of the Federal Government (Scenario 1).

However, it appears that, after considering the various options above, the most immediate and effective (albeit indirect) means of regulating public hospitals would be an approach to which the Rudd Government appears to remain committed—Scenario 1—to rely on the Commonwealth’s financial power under section 96 of the Constitution and the new national agreements with the states.

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