International Journal of Political Science & Diplomacy
Research Article Open Access

Higher Education Accreditation in Australia: A Political and Constitutional Dimension

Bradley Young
Rabdan Academy Campus , Abu Dhabi Almushrif, Dhafeer St, United Arab Emirates

Abstract

The international trend of programme accreditation in higher education has expanded significantly over the past decade and Australia has not been immune to its influences and effects. This is most visibly evident with legislative efforts that align with increased government involvement and control of the higher education landscape *Tertiary Education Quality and Standards Agency Act 2011* (Cth) (*TEQSA*). While awash with criticisms that TESQA has brought only increased managerialism, a bloated bureaucracy, plus an excessive burden of questionable evidence masquerading as a particular and narrow philosophical view of "quality" benchmarks could be viewed as promoting an atmosphere of distrust within the sector. Indeed, further criticisms cite that this legislation is having the opposite effect to that for which it was intended by reducing curriculum to "the lowest common denominator", stifling innovation, creativity, and responsiveness to change and challenges. This paper explores the legislative underpinnings of the TEQSA Act, the degree to which its continued existence can be constitutionally challenged and how this might be decided by the High Court today.

Publication History:
Received: April 08, 2015
Accepted: June 14, 2015
Published: June 16, 2015

Keywords:

Education Policy and Law, Australian Constitution, Quality Standards and Accreditation

"The question is not how are we going to comply? But should we comply." [1]
Professor David Dixon, Dean of Law at UNSW

Introduction

The international trend of programme accreditation in higher education has expanded significantly over the past decade and Australia has not been immune to its influences and effects. This is most visibly evident with legislative efforts that align with increased government involvement and control of the higher education landscape. The most recent of these being the Commonwealth Government's response to the 2008 Review of Higher Education conducted by Professor Denise Bradley[2] which recommended a range of significant reforms spanning the financial to the structural that was to foreshadow the introduction of the *Tertiary Education Quality and Standards Agency Act 2011* (Cth) (*TEQSA Act*)[3]. The report called for changes such as: the introduction of benchmarks against other OECD countries; accreditation criteria; increased Commonwealth control and responsibility for funding; along with the establishment of an independent national tertiary education regulatory body[4]. The Deputy Prime Minister and Minister for Education at the time, Julia Gillard, in a speech delivered at the Universities Australia Conference in 2009 outlined the intention to: increase bachelor degree holders in the 25-34 year old age bracket to 40% by 2025; more domestic places; the removal of enrolment caps; and the establishment of a national regulatory body for the purpose of providing national consistency[5].

While awash with criticisms that this Act has brought only increased managerialism , a bloated bureaucracy, plus an excessive burden of questionable evidence masquerading as a particular and narrow philosophical view of "quality" benchmarks[8] could be viewed as promoting an atmosphere of distrust[9]. Indeed, further criticisms cite that this legislation is having the opposite effect to that for which it was intended by reducing curriculum to "the lowest common denominator"[10], stifling innovation, creativity, and responsiveness to change and challenges. Nevertheless, the definition of quality in higher education is another debate and not the focus of this paper, which explores the legislative underpinnings of the *TEQSA Act*, the degree to which its continued existence can be constitutionally challenged and how this mightbe decided by the High Court today.

TEQSA Act

TEQSA is an independent national body responsible for the regulation and oversight of higher education in Australia and is part of the Commonwealth's strategy to improve Australia's performance as knowledge based economy so as to be more globally competitive[11]. Thus this national scheme has largely displaced the previous State based scheme and provided for a national regulatory body responsible for the oversight of the higher education sector[12]. All this demonstrated a clear progression in thinking over a sustained period that culminated with the establishment of TEQSA. It is important to note that one of the purposes of the national scheme was to conjoin regulatory frameworks[13]; hence taking away much of the regulatory activities undertaken at the State level[14]. Furthermore, it will be the Commonwealth Minister for Tertiary Education in consultation with the Minister for Research who will decide who the TEQSA Commissioner will be as well as the members of the Higher Education Standards Panel[15]. Professor Craven identified four conclusions as to the extent of the Commonwealth's control of higher education: direct constitutional power; indirectly through conditional funding; lack of cohesive constitutional power necessary for comprehensive regulation; and the ongoing need for cooperation with States[16]. While Craven in 2006 alluded to the future establishment of a TEQSA type body he disregarded its eventuality, as he believed that there was not a sufficiently broad head of power to support it [17]. At the time, *New South Wales v Commonwealth (WorkChoices Case)*[18] was pending and he acknowledged that its outcome could provide the Commonwealth with such a tool to control teaching and research [19].

Key Aspects of the Act

The *TEQSA Act* relies upon the Corporation's head of power s 51(xx)

***Corresponding Author:** Dr. Bradley Young, Rabdan Academy Campus , Abu Dhabi Almushrif, Dhafeer St, United Arab Emirates; E-mail: brad_young@icloud.com

Citation: Young B (2015) Higher Education Accreditation in Australia: A Political and Constitutional Dimension. Int J Polit Sci Diplom 1: 105. doi: http://dx.doi.org/10.15344/ijpsd/2014/105

Copyright: © 2015 Young. This is an open-access article distributed under the terms of the Creative Commons Attribution License, which permits unrestricted use, distribution, and reproduction in any medium, provided the original author and source are credited.

of The Constitution but the Corporation's head of power is unlike the Trade and Commerce head of power in that it can control intrastate activities. Moreover, the constitutional basis for the TEQSA Act is expressed in Division 4 – Constitutional Matters; confirming this Act relies on:

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

It must be noted that the Federal Government's power over Australia's Territories has been well established and is expressed in s 122 (the Territories Power)[21]. Therefore the Commonwealth can make laws for the Territories that would normally be under the purview of a State Legislature.This means that the *TEQSA Act* has full effect and indeed the Commonwealth enjoys complete control over the whole of the higher education landscape in an Australian Territory.

The *TEQSA Act* states that it excludes State and Territory higher education laws that purport to regulate the provision of higher education[22] (s 109 the Australian Constitution) but does not strike down the part of the legislation that establishes the higher education provider [23]. The State Governments of Victoria and Western Australia expressed concerns citing a range of issues including doubts and uncertainty as to the constitutional basis for the Commonwealth to "cover the field" of education and training with its corporations power when education was constitutionally a State responsibility [24]. The constitution does not expressly identify education explicitly in its lists of subjects about which the Commonwealth Parliament can make laws in sections 51 and 52. However, section 96 of the Constitution that is concerned with the payment of grants to the State and their accompanying conditions was, up until the *TEQSA Act*, the principal mechanism for Commonwealth intervention into the field of education i.e. "the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit." This state of affairs over the years has been the avenue to exert significant "control over universities in this way even though it has not specific power in relation to education." [26]Incidental power to give effect to a head of power was seen in *O'Sullivan v Noarlunga* [27] with the need to ensure the safety of export meat where the only way to achieve this objective was to regulate production (in the slaughterhouse) i.e. go back to the level of production to regulate trade. An example of incidental power regarding universities is evident in higher education awards.

The*TEQSA Act* describes a higher education award [28] that is offered/conferred on completion of an Australian or overseas course of study provided wholly or mainly from Australian premises related to the award [29]. Moreover, to dispense these regulated higher education awards the higher education providers must meet certain criteria that are defined in the *TEQSA Act* as:

3. a constitutional corporation that offers or confers a regulated higher education award; or
4. a corporation that:

   a) offers or confers a regulated higher education award; and

   b) is established by or under a law of the Commonwealth or a Territory; or

   c) a person who offers or confers a regulated higher education award for the completion of a course of study provided wholly or partly in a Territory [30].

In addition, the *TEQSA Act* under s 4 requires higher education providers not only to be registered with TEQSA but to also have their courses of study accredited by TEQSA. Australia's 37 publically funded universities are self-accrediting and, as such,they are able to accredit the awards it gives.At present, the right of Australian universities to self-accredit has been preserved with the qualification that TEQSA can still impose restrictions or remove a provider's authority to self-accredit [31]. Before placing any such imposition, however, TEQSA is required to provide its rationale to the Minister for each relevant State and Territory and provide opportunity to make representations.

Additionally, in order to encourage compliance the TEQSA Act has made it a criminal offence to:

1) fail to register with TEQSA[33];

2) offer a regulated higher education award without being registered [34];

3) offer an award without a course of study [35];

4) misrepresentation [36]; and

5) breach of a condition of registration/accreditation [37].

Heads of Power and Higher Education

At present, decision-making, regulation, and governance for higher education institutions is a shared responsibility between the Commonwealth, States, Territories, and each institution. Historically, universities generally have enjoyed a high level of autonomy within the boundaries set by their establishing legislation[38]. Williams cited Craven, who stated that, "universities were not intended by the framers of the Australian Constitution to be a subject of Commonwealth legislative power, and were assumed instead to fall within the scope of State power [39]." He further outlines sections of the Constitution that have permitted the Federal government to regulate universities citing s 51(xxiiiA), s 51(xx), and to some degree the nationhood power s 51(vi), external affairs power s 51(xxix), and taxation power s 51(ii).

The Commonwealth became the principal funding body for higher education in 1974 being enshrined in legislation with the *Higher Education Support Act 2003* (Cth) that also stipulated under s 13(1) that in order to receive the funding higher education was required to satisfy quality and accountability requirements. The Commonwealth's ability to grant money conditionally, through either the States under s 96 of the Constitution or any of its other mechanisms, as was demonstrated in *Victoria v Commonwealth (Second Uniform Tax Case*)[41], has been well established [42]. This situation has provided the Commonwealth with a significant degree of direct fiscal influence over higher education.

Furthermore, Craven lists a range of intentions that he considered the Commonwealth had with regard to controlling higher education that included: accreditation and institutional establishment; governance; teaching and syllabus arrangements "quality"; research profile and direction; property assets; commercial operations; reporting and accountability inter alia [43]. Importantly, Williams states that, "These moves raise questions about the Commonwealth's capacity to legislate generally with respect to higher education [44]."

As the *TEQSA Act* draws its authority from 51(xx) it cannot apply to a university unless the university qualifies as a constitutional corporation. Therefore, according to Williams, "if a higher education provider within a State is not a constitutional corporation, the regulatory regime in that State will continue to apply as it will not be displaced by the TEQSA Act [45]." Moreover, a threshold test would apply if the university can be characterised as a constitutional corporation, and as all universities are constituted as a corporation by State legislation this test is satisfied. Most universities are corporations and all universities constituted by State legislation fall under the definition of a corporation [46]. For example, in the case of the University of Southern Queensland (USQ) this is evident in s 4 of the enabling act[47] with the wording "The University is a body corporate; has a seal; and may sue and be sued in its corporate name." This is similar to other university acts in other States. Therefore, all universities that are a result of their State legislation are corporations; however, it also lies within a State Parliament's power "to reconstitute a university other than as a corporation [48]." Firstly, there is no question that USQ was formed within the limits of the Commonwealth of Australia as it was formed by an act of the Queensland Parliament. The result,however, of a reconstitution would be that the university could be created as something that is not characterised as a trading corporation and therefore would not fall under the requirements of the *TEQSA Act*. Williams notes that this strategy has been done in other fields following the *WorkChoicesCase* and cites the Queensland Parliament example of the *Local Government and Industrial Relations Act 2008* (Qld) that, with the exception of the Brisbane City Council, removed from Queensland local governments their corporate status, thus having the net effect of removing them from being encompassed by the corporations power through Federal industrial law. The Commonwealth cannot legislate to reconstitute universities as corporationsbecause the power over constitutional corporations extends only to those that have already been "formed"[51] as per *New South Wales v Commonwealth* (*Incorporation Case*) [52]. This case considered the corporations power under s 51(xx) of the Constitution and whether under the Corporations Act of 1989 the Commonwealth had the power to regulate the formation of companies. However, a question that has not yet involved the high court is one regarding the scope of a corporation's power as expressed in s 51(xx) of the Constitution; and that is whether or not the Commonwealth is capable of providing the breadth and inclusiveness to provide a head of power so as to enable Acts such as the TEQSA Act to operate to their full effect.

Narrow to Broad

The "reserved powers" doctrine that was historically abolished in 1920 [53]had previously limited Commonwealth power that interfered with the 'reserved' powers (not in the list of enumerated powers) as these were considered the purview of the States [54]. The current view, however, is that the Commonwealth heads of power are to be interpreted on their own without concern for the effect on the States.Section 51 of the 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.

This section identifies three types of constitutional corporations: foreign, trading or financial. The high court previously interpreted the corporation's power s 51(xx) very narrowly in *HuddartParker v Commonwealth (Huddart Parker) [55]. Huddart Parker*, while an older case, is important for its insight into what the writers of the Constitution intended and the dissenting reasons in the obiter dicta of Isaacs J that relate directly to the construction and effect of s 51(xx). Isaacs J identified two relevant limitations on the power conferred by s 51(xx). First, only some kinds of corporations fell within the power; secondly, the corporations that "come within the legislative reach of the Commonwealth must be corporations already existing."

It was in *Strickland v Rocla Concrete Pipes Ltd (Concrete Pipescase)* [57] that rejected the narrow interpretation of the Commonwealth's corporations power in Huddart Parker. The types of activities that the Commonwealth can regulate has been left unresolved in the *Concrete Pipescase*[58] that considered the corporations power under s 51(xx) and whether it was a valid exercise of power to use the Trade Practices Act. This case, decided some 60 years later overruled *Huddart Parker*, thus establishing that the Commonwealth can clearly regulate the trading activities of trading corporations;nevertheless, it remained unclear as to whether additional activities (non-trading in nature) can be regulated also. Having been identified as a trading corporation, the question then arises as to the extent of powers that the Commonwealth has: Are these powers to be considered in a very broad or a narrow sense? Are they limited to only those activities of the corporation that can be defined as "trading activities"? In the Commonwealth v Tasmania (Tasmanian Dam case) the Chief Justice's remarks indicate a narrow interpretation, thus limiting the Commonwealth's power to make laws with respect to trading activities [60].

Subsequent cases did not resolve the matter until the *WorkChoicescase* [61]. This case considered whether the amendments [62]to the *Workplace Relations Act* of 1996 considering s 51(xx) and the issue of WorkChoices could be made by the Commonwealth. It was decided by the High Court with a 5-2 majority that the Commonwealth did indeed have the authority under s 51(xx) to reshape regulation of industrial relations. Williams cites *Re Dingjan; Ex parte Wagner* [63] and *Re Pacific Coal Pty Ltd; Ex parte Construction, Forestry, Mining and Energy Union* [64] whereby the majority endorsed Guadron J's reasoning as follows [65]:

"laws regulating 'the activities, functions, relationships and the business' of a constitutional corporation, and laws creating "rights, and privileges belonging to such a corporation, [imposing] obligations on it and, in respect to those matters, [regulating] the conduct of those through whom it acts" including its employees, and regulating "those whose conduct is or is capable of affecting its activities, functions, relationships or business" would, on this test, be properly characterised as laws with respect to constitutional corporations [66]."

Aroney described the *WorkChoicescase* decision as a paradox, being able to read the case as entirely predictable or alternatively, as a revolutionary decision that has "ended our conventional understanding of the extent of the Commonwealth's power over industrial relations and corporations, with far-reaching implications for the balance of power between the Commonwealth and the States [67]."

The *WorkChoicescase* represents a decision on the Commonwealth's regulatory power under the corporationspower s 51(xx) as extremely broad. The broad view [68] is a real encompassing relationship with corporations and s 51(xx). It is not viewed as a purposive power, therefore, provided there is a substantial link between the law and a constitutional corporation, it will be annexed thenby s 51(xx) [69].

The *WorkChoicescase* also brings with it a strong rejection of importing concerns over "federal balance" [70] into s 51(xx)[71]. This broad view applies to activities, rights, privilege, and obligations of constitutional corporations, along with their relationship with employees and others it acts through, including regulation of those whose actions affect constitutional corporations. In summary, it provides the Commonwealth with the ability to regulate everything a constitutional corporation does. As such, it provides a clear basis on which the *TEQSA Act* can operate to regulate universities or higher education providers that have been defined or are characterised as constitutional corporations. Furthermore, as indicated by Williams, this power through the *TEQSA Act* would encompass relationships between the University, employees, students, the provision of courses, the awarding of qualifications and any matter capable of being passed under that power [72].

Purpose Test and Substantial Activities Test

Fencott v Muller (O'ConnorsWinebar case)[73] focused on determining whether a corporation's purpose could fall under the definition of a trading corporation. This case considered the purpose of an entity in deciding whether it is a trading corporation and therefore encompassed by the corporations head of power s 51(xx) [74]. This approach still is useful particularly in the early stages following incorporation to identify "intent" or "purpose" [75]. *R v Trade Practices Tribunal; Ex parte St George County Council (St. George County Council)*[76] also focused on identifying whether or not a corporation falls within s 51(xx) by reference to its purpose/charter rather than its activities. If we are to examine the purpose of USQ or any other Australian University (as favoured in the Tasmanian Dam Case) to determine whether or not it would be classified as a trading corporation then we see in the Act that s 5 (h) is the only function that explicitly mentions commercial activity [78]. For the purposes test an examination of the establishing legislation [79] and the strategic plan [80] would identify the University's predominant activity. This being education, Australian Universities could in a theoretical High Court reformulation find itself excluded from the definition of either a trading or a financial corporation. While there is rich diversity in Australian Universities it is worth considering however whether indeed there would be such explicit differences in stated goals.

The authority for the determination as to whether or not a corporation is a "trading" corporation is *R v Federal Court of Australia*; *ex parte WA National Football League* (*Adamson's case*) [81]. It is through reference to a corporation's activities that characterises a corporation as a "trading" corporation. In this particular case because the football league engaged in a significant level of trading activity it was considered a constitutional corporation (trading). However, this case did not resolve the level nor define any percentage or measurement for a threshold assessment to be made as to what classifies as a significant level of trading activity.

The *Tasmanian Dam case* [82] demonstrates that the High Court considers corporation entities (created through legislation rather than the relevant corporations law) as no barrier to being classified a constitutional corporation. Mason J notes Barwick CJ's dissenting judgement in St. George County Council that "the connexion of the corporation with the government of a State will not take it outside s. 51(xx) [83]."

Characterisation as a "trading" rather than "foreign" or "financial" constitutional corporation can be explored in more detail when examining the proportion, scale, percentage to be characterised as "substantial" activities [84]." Established authorities of the *Tasmanian Dam case* [85] *and E v Australian Red Cross Society & Others (Red Cross Society Case)* [86] draw out the proposition that provided trading activities formed a substantial part of an entity's activities it could properly be described as trading. An institution's own documentation (annual reports, budgets, etc.) can demonstrate these activities effectively (eg. USQ's annual report[87] , strategic plan[88] , legislation [89]).

Furthermore, the *Adamson's case* [90] determined that the activities test covers any business activity with the purpose of earning revenue: "When its trading activities for a sufficiently significant proportion of its overall activities as to merit its description as a trading corporation [91]" When examining the tests used in the Adamson case, of "substantial" and "a sufficiently significant proportion of its overall activities" we find for example that although only 4.4% of the revenue arose from trading activities, this small percentage amounted to $2 million,which was considered a sufficiently significant proportion of the income[92]." In *Burrows v Shire of Esperance* [93] 8.8% trading activity was found to be sufficient to qualify the local council as a trading corporation. As can be seen percentage appears of little importance when it constitutes a large sum of money.There is no explicit benchmark as to what exactly constitutes a significant sum of money at this point sothere is little indication of whether $1 million or $500,000 is substantial and what, if any, is the relationship between percentage of revenue and gross amounts. An interesting situation could be produced by an organisation if it relinquished its corporate form and reconstituted itself as a trust or unincorporated association. For example, charities in England separate trading activities into a controlled organisation; however, this increases operational costs creating a compliance requirement (tax, fringe benefits, donation deductibility, etc.) that is not practical for many [94].

In support, the *State Superannuation Board (Vic) v Trade Practices Commission (State Superannuation case)* [95] confirms the activities test in Adamson's case by a narrow majority as a means for defining a financial corporation. The decision in the Superannuation case considered whether or not the State Superannuation Board was a financial corporation and therefore, subject to the *Trade Practices Act 1974* (Cth) [97] while rejecting the idea of the predominant purpose in favour of the activities test. However, Williams notes that the "substantial activities" test is "notoriously difficult to apply as it depends on an intuitive judgement" as to not only what constitutes as substantial but what types of activities qualify; including the fact that this test needs to be applied on an ongoing basis so as to monitor whether there is a change in status/classification [98].

Lower Courts

The High Court has not considered whether or not a universityis a constitutional corporation. There are a number of cases that have been decided in lower courts that have found to hold non-profit organisations as corporations[99] applying Adamson's case, Tasmanian Dams case [100], and State Superannuation case [101]. These cases include:

1) Red Cross Society case (1991)[102]
2) Kirinari Residential Services case (1996)[103]
3) Syd-West Personnel case (1998)[104]
4) Aboriginal Rights League case (1999)[105]
5) Quickendencase (2001)[106]
6) Orion Pet Products case (2002)[107]
7) Educangcase (2006)[108]

In addition, there are a number of court cases that have found not for profit (NFP) organisations to be "constitutional corporations" for the purposes of various acts such as the *Workplace Relations Act* [109]. Some of these organisations have included the: Australian Red Cross Society, because they derived substantial income from the sale of goods [110] and in the same case the Royal Prince Alfred Hospital, despite receiving a high proportion of government funding and being established by legislation, still charged fees and earned money from commercial activities. Nevertheless, a local government failed the substantial activities test in the Australian Workers' Union of Employees, *Queensland v Etheridge Shire Council case* [112] while in *Burrows v Shire of Esperance* [113] was found to be a trading corporation. This variability within the local government classification demonstrates that within a particular class it is possible to have some members classified differently from others of the same class. Conceivably,this could be applied to universities also based on the variability and degree of activities judged to be trading in nature.

Quickenden v O'Connor (Quickenden)[114] is the leading Federal Court case that relates directly to universities in which it upheld that the University of Western Australia, as established via its enabling legislation [115], was a trading corporation (and also described as a financial corporation in the constitutional sense) [116]. In this case 18% ($54.7 million dollars) of the total operating budget was determined to qualify as "substantial" and a "significant proportion" of trading activity. Carr J noted that a "purely financial examination would be consistent with authorities such as *Adamson's case* and *Red Cross Society case* [118]." Moreover, in *Quickenden* it was decided that fees related to overseas students, accommodation, parking, along with the sale of land and property classified as trading activities, while revenue under the Higher Education Contribution Scheme caused some differences of opinion between the Justices, ultimately deciding not to decide this point [120]. As this case is a decade old and decided by a lower court Williams states that this cannot be considered a conclusive authority with regard to whether or not particular activities define a university as a trading corporation. He further believes that for the time being there is no reason the lower courts would not follow *Quickenden* in characterising a university as a trading corporation. However, should this issue come before the High Court following the *WorkChoicescase* it might "reformulate the substantial activities test, or create an exception for bodies such as charities, educational institutions, and local government bodies [121]."

High Court – Future Cases

In the*WorkChoicescase* the High Court was not asked to define a trading corporation or the constitutional expression "trading or financial corporations formed within the limits of the Commonwealth [122]." The High Court in the *WorkChoicescase* stated that it was not concerned with the issue of what is a trading or a financial corporation, as it had not been raised; Callinan JJ emphasised the importance of answering this question and indicated that it will occupy the courts in the future [123].

"There is no occasion now to consider, what kinds of corporation fall within the constitutional expression 'trading or financial corporations formed within the limits of the Commonwealth'. Any debate about those questions must await a case in which they properly arise [124]."

Both Kirby J and Callinan JJ were of the opinion that the majority decision in WorkChoices case" was inconsistent with the federal character of the Constitution." In particular Kirby J expressed concern that under such interpretation, "the Commonwealth could take over many traditional State fields such as education (universities, colleges and private schools), healthcare (corporatised hospitals, clinics and medical practices), as well as privatised and outsourced governmental activities formerly conducted by departments and statutory authorities [125]." The majority in the *WorkChoicescase* drew attention to UK authorities which was the base model for Australia describing a distinguishing intention in the legislation between commercial undertakings and charitable associations and that the framers of the constitution, by using the word trading, intended to distinguish companies formed for commercial gain versus the purposes of promoting art, science, religion, or charity [126]. Williams identifies, amongst the obiter dicta of the High Court Justices in the *WorkChoicescase*, willingness both explicitly and implied to explore further the definition and identification test for determining a trading corporation [127]. He also identifies a number of possible scenarios (see below) should the High Court consider the question of whether a university is a trading corporation and noted that membership of the High Court has changed since the *WorkChoicescase* was decided [128]:

1. Apply the substantial activities test and the same reasoning as was used in Quickenden to hold that the university is a trading corporation;
2. Apply the substantial activities test more rigorously to find that a higher proportion of activities must be trading activities in order for the university to be a trading corporation;
3. Narrow what is understood as a trading activity in a way that excludes many university activities, such that universities are no longer likely to be classified as a trading corporation;
4. Build on the exception to the substantial activities test recognised in O'Connors Winebar case to hold that certain types of corporations are to be assessed according to the purposes for which they were formed, such that a university created by State legislation for educational purposes may not be a trading corporation;
5. Recognise an exception to the substantial activities test that excludes bodies formed for 'religious, scholastic, charitable, scientific and literary purposes'; or
6. Overrule the substantial activities test in favour of a 'dominant purposes' or other test.

Also noting change, Appleby believes that the jurisprudential pattern of the High Court is trending to increase the power of the Commonwealth well beyond what was intended by the framers of the constitution and that this raises the question of relevance and functionality of the States [129]. Williams concedes that while all possibilities are open to the High Court some are less likely than others for reason of long standing authority or impracticality with the current regulatory environment [130]. He favours a redefinition of the substantial activities test by a more rigorous, narrowing of scope through the creation of an exception [exemption] test. The outcome he indicates is uncertain and it could be that all, none, or some of Australia's universities would be classed as a trading corporation [131]. It is difficult to tell whether all universities from the Federal Court's decision in *Quickenden*[132] would be classified as trading corporations or whether even the same university could possibly change its status over time. Therefore, it is not inconceivable that an institution could challenge the applicability of the legislation [133].

In *Pape v Commissioner of Taxation* [134] it was decided that s 81 of the Constitution was itself not a source of power. If the Commonwealth is unable to regulate a university it may also lack the power to fund it [135]. As stated by Appleby, s 81 of the Constitution is not a "power" at all, instead it usually works in concert with a further source of power and on its own is just a parliamentary fiscal tool [136]. The "leverage approach" question pertains to whether the Commonwealth can use the trade and commerce authority to affect the purpose of achieving an unrelated goal of some kind.

"However, it remains uncertain as to whether this will enable the Commonwealth to achieve all of its regulatory and funding aims for the sector. Until one or more future High Court decisions clarifies this, it remains the case that the only certain path to a comprehensive regulatory scheme lies in Federal-State cooperation [137]."

In conclusion, a most recent case *Williams v Commonwealth of Australia* [138] casts some anticipated doubts over whether the High Court would "adopt a sufficiently broad interpretation of trading and/or financial corporations" that would include universities [139]. Should this eventuate it would be undermining the constitutional foundation of TEQSA.

"Divisions and limitations upon governmental powers have been deliberately chosen in the Commonwealth of Australia because of the common experience of humanity that the concentration of governmental (and other) power is often inimical to the attainment of human freedom and happiness [140]"

Kirby J

References

1. Anne Susskind, 'Law Schools Groan Under Burden Of Government Compliance' (2012) 50(9) Law Society Journal 14, 16.
2. Denise Bradley et al, 'Review of Australian Higher Education' (Commonwealth of Australia, 2008).
3. Tertiary Education Quality and Standards Agency Act 2011 (Cth); Tertiary Education Quality and Standards Agency (Consequential Amendments and Transitional Provisions) Act 2011 (Cth).
4. Denise Bradley et al, above n 2, xi.
5. George Williams and Sangeetha Pillai, 'Commonwealth Power Over Higher Education' (2011) 30(2) University of Queensland Law Journal 284, 291.
6. John Ross and Andrew Trounson, 'Go8 fear red tape overkill POLL WILL NOT CHANGE TEQSA STANCE', The Australian (Canberra), 7 August 2013, 2; John Ross, 'Review Attacks Regulator', The Australian (Canberra), 6 August 2013, 6.
7. Philippa Martyr, 'Review Essay: Failing By Degrees' (2012) 28(3) Policy Magazine<http://www.cis.org.au/publications/policy-magazine/issue/311-policy-spring-2012>; Nicholas Graves, Adrian Barnett and Phillip Clarke, Reform Australian Universities By Cutting Their Bureaucracies (18 March 2013) The Conversation <http://theconversation.com/reform-australian-universities-by-cutting-their-bureaucracies-12781>; Julie Hare, 'Unis hit by reform red tape: Hilmer', The Australian (Canberra), 26 July 2012, 5.
8. Joseph Gora, 'Watch Out! Here Comes the TEQSA Juggernaut' (2010) 52(2) Australian Universities' Review 76, 77.
9. Bernard Lane, 'Quality regulator `at the extreme end'', The Australian (Canberra), 19 June 2013, 33.
10. Donald Meyers, Australian Universities: A Portrait of Decline (AUPOD, 2012) 170.
11. George Williams and Sangeetha Pillai, above n 5, 289.
12. Ibid.
13. Joo-Gim Heaney, Peter Ryan and Márta Konczosné Szombathelyi, 'A Comparison of Higher Education in Hungary and Australia' (Paper presented at the Academy of World Business Marketing and Management Development (AWBMAMD) Conference, Budapest, 16 July 2012).
14. George Williams and Sangeetha Pillai, above n 291.
15. Ibid 291.
16. Greg Craven, 'Commonwealth Power Over Higher Education: Implications and Realities' (2006) 1(1) Public Policy 1, 1.
17. George Williams and Sangeetha Pillai, above n 5, 290.
18. New South Wales v Commonwealth (2006) 229 CLR 1.
19. Craven, above n 16, 7.
20. Tertiary Education Quality and Standards Agency Act 2011 (Cth) s 8.
21. R v Bernasconi (1915) 19 CLR 62; Buchanan v The Commonwealth (1913) 16 CLR 31; Waters v The Commonwealth (1951) 82 CLR 18; Mitchell v Barker (1918) 24 CLR 365.
22. Tertiary Education Quality and Standards Agency Act 2011 (Cth) s 9(1).
23. Ibid s 9(2)(a).
24. George Williams and Sangeetha Pillai, above n 5, 294, 295.
25. Australian Constitution s 96.
26. Ibid Overview, 6, 7.
27. R v Australian Industrial Court: ex parte C L M Holdings (1977) 136 CLR 23; O'Sullivan v Noarlunga Meat Ltd (1954) 92 CLR 565.
28. Tertiary Education Quality and Standards Agency Act 2011 (Cth) s 5.
29. Ibid s 6.
30. Ibid s 5.
31. Ibid s 45.
32. Ibid s 33.
33. Ibid s 105.
34. Ibid s 106.
35. Ibid s 107.
36. Ibid s 108-112.
37. Ibid s 113-114.
38. George Williams and Sangeetha Pillai, above n 5, 288.
39. Ibid, 289.
40. Higher Education Support Act 2003 (Cth) s 13(1).
41. Victoria v Commonwealth (1957) 99 CLR 575, 609.
42. George Williams and Sangeetha Pillai, above n 5, 289.
43. Craven, above n 2, 3.
44. George Williams and Sangeetha Pillai, above n 292.
45. Ibid 296.
46. University of Western Australia v Gray (2009) 179 FCR 346, 365.
47. University of Southern Queensland Act 1998 (Qld) s 4(2)(a).
48. George Williams and Sangeetha Pillai, above n 5, 297.
49. University of Southern Queensland Act 1998 (Qld).
50. George Williams and Sangeetha Pillai, above n 297.
51. Australian Constitution s 51(xx).
52. JD Heydon, 'One small point about originalism' (2009) 28(1) University of Queensland Law Journal 7, 8; New South Wales v Commonwealth (1990) 169 CLR 482.
53. Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (1920) 28 CLR 129.
54. Huddart, Parker & Co Pty Ltd v Moorehead (1909) 8 CLR 330.
55. Ibid.
56. Ibid, 393; New South Wales v Commonwealth (2006) 229 CLR 1, 83.
57. Strickland v Rocla Concrete Pipes (1971) 124 CLR 468.
58. Ibid.
59. Commonwealth v Tasmania (1983) 158 CLR 1, 183.
60. Ibid 96.
61. New South Wales v Commonwealth (2006) 229 CLR 1.
62. Workplace Relations Amendment (WorkChoices) Act 2005 (Cth).
63. Re Dingjan; ex parte Wagner (1995) 183 CLR 323.
64. Ex parte Construction, Forestry, Mining and Energy Union (2000) 203 CLR 346.
65. George Williams and Sangeetha Pillai, above n 5, 296.
66. New South Wales v Commonwealth (2006) 229 CLR 1, 181.

67. Nicholas Aroney, 'Constitutional Choices in the WorkChoices Case , or What Exactly Is Wrong with the Reserved Powers Doctrine?' (2008) 32(1) Melbourne University Law Review 1.
68. Re Dingjan; ex parte Wagner (1995) 183 CLR 323.
69. Australian Constitution s 51(xx).
70. Melbourne Corporation Case (1947) 74 CLR 31; Victoria v Commonwealth (1996) 187 CLR 416.
71. New South Wales v Commonwealth (2006) 229 CLR 1, 196.
72. George Williams and Sangeetha Pillai, above n 5, 296.
73. Fencott v Muller (1983) 152 CLR 570, 20.
74. Ibid.
75. Jennifer Clarke et al, HANKS: Australian Constitutional Law: Materials and Commentary (LexisNexis Butterworths, 9th ed, 2013) 292; Fencott v Muller (1983) 152 CLR 570.
76. R v Trade Practices Tribunal; Ex parte St George County Council (1974) 130 CLR 533.
77. Commonwealth v Tasmania (1983) 158 CLR 1.
78. University of Southern Queensland Act 1998 (Qld) s 5(h).
79. Ibid.
80. University of Southern Queensland, 'USQ Strategic Plan 2013-2015' (University of Southern Queensland, 2012).
81. R v Federal Court of Australia; Ex parte WA National Football League (Adamson's Case) (1979) 143 CLR 190.
82. Commonwealth v Tasmania (1983) 158 CLR 1, 30..
83. Ibid 104.
84. Christopher Tran, 'Trading or Financial Corporations' under Section 51(xx) of the Constitution: A Multifactorial Approach' (2011) 37(3) Monash University Law Review 12.
85. Commonwealth v Tasmania (1983) 158 CLR 1.
86. E v Australian Red Cross Society (1991) FCA 20.
87. University of Southern Queensland, 'Annual Report' (University of Southern Queensland, 2012).
88. University of Southern Queensland, above n 80.
89. University of Southern Queensland Act 1998 (Qld).
90. R v Federal Court of Australia; Ex parte WA National Football League (Adamson's Case) (1979) 143 CLR 190.
91. Ibid 54.
92. The Queen v Trade Practices Tribunal; Ex parte St George County Council (1974) 130 CLR 533, 542.
93. Burrows v Shire of Esperance (1998) 86 IR 75.
94. M McGregor-Lowndes and S Bitomsky, 'Do Nonprofit Organisations "Trade" Under The New WorkChoices Legislation?' (2007) 59(1) Keeping Good Companies 39.
95. State Superannuation Board v Trade Practices Commission (1982) 150 CLR 282.
96. Ibid.
97. Actors and Announcers Equity Association of Australia v Fontana Films (1982) 150 CLR 169.
98. George Williams and Sangeetha Pillai, above n 5, 298.
99. E v Australian Red Cross Society (1991) FCA 2; Orion Pet Products Pty Ltd v RSPCA (Vic) Inc (2002) 120 FCR 19; Educang Ltd v Queensland Industrial Relations Commission (2006) 154 IR 43; Kirinari Residential Services (Vic) & (NSW) Inc (1996) 40 AILR 3-42; Belcher v Aboriginal Rights League Inc (1999) 45 AILR 4-045.
100. Commonwealth v Tasmania (1983) 158 CLR 1.
101. George Williams and Sangeetha Pillai, above n 5, 298.
102. E v Australian Red Cross Society (1991) FCA 20.
103. Kirinari Residential Services (Vic) & (NSW) Inc (1996) 40 AILR 3-420.
104. Fowler v Syd-West Personnel (1998) 44 AILR 3-836.
105. Belcher v Aboriginal Rights League Inc (1999) 45 AILR 4-045.
106. Quickenden v O'Connor (2001) 109 FCR 243.
107. Orion Pet Products Pty Ltd v RSPCA (Vic) Inc (2002) 120 FCR 191.
108. Educang Ltd v Queensland Industrial Relations Commission (2006) 154 IR 436.
109. Workplace Relations Amendment (WorkChoices) Act 2005 (Cth).
110. E v Australian Red Cross Society (1991) FCA 20, 126.
111. The Queen v Federal Court of Australia; Ex parte Western Australian National Football League (Inc) (1979) 143 CLR 190.
112. Australian Workers' Union of Employees, Queensland v Etheridge Shire Council (2008) 250 ALR 485.
113. Burrows v Shire of Esperance (1998) 86 IR 75.
114. Quickenden v O'Connor (2001) 109 FCR 243.
115. University of Western Australia Act 1911(WA) s 6.
116. Quickenden v O'Connor (2001) 109 FCR 243, 25.
117. George Williams and Sangeetha Pillai, above n 5, 299.
118. Ibid 299.
119. Ibid 299.
120. Ibid s 299.
121. Ibid, 300.
122. Ibid 300.
123. Leslie Zines, The High Court and the Constitution (The Federation Press, 5th ed, 2008) 116.
124. New South Wales v Commonwealth (2006) 229 CLR 1, 58.
125. Leslie Zines, above n 125.
126. George Williams and Sangeetha Pillai, above n 5, 300.
127. Ibid 301.
128. Ibid 301.
129. Gabrielle Appleby, 'Proportionality and Federalism: Can Australia Learn From the Europeean Community, the US and Canada?' (2007) 26(1) University of Tasmania Law Review 1.
130. George Williams and Sangeetha Pillai, above n 301.
131. Ibid 301.
132. Quickenden v O'Connor (2001) 109 FCR 243.
133. Bernard Lane, 'TEQSA statute vulnerable to High Court challenge', The Australian (Canberra), 13 April 2011, 23.
134. Pape v Commissioner of Taxation (2009) 238 CLR 1.
135. George Williams and Sangeetha Pillai, above n 5, 303; Gabrielle Appleby and Stephen McDonald, 'Looking at the Executive Power through the High Court's New Spectacles' (2013) 35 Sydney Law Review 253, 267.
136. Gabrielle Appleby, 'There Must Be Limits: The Commonwealth Spending Power' (2009) 37 Federal Law Review 93, 112.
137. George Williams and Sangeetha Pillai, above n 303.
138. Williams v The Commonwealth of Australia & Ors [2012] HCA 23.
139. Chris Penman, 'University Governance and Regulations Forum' (The University of Melbourne, 2012).
140. New South Wales v Commonwealth (2006) 229 CLR 1, 228.