



Australian Government

Department of Education, Science and Training

Building Better Foundations For Higher Education In Australia:

A discussion about re-aligning Commonwealth-State responsibilities

FOREWORD

The Australian Government has pursued ongoing reform to the higher education sector starting with the *Our Universities: Backing Australia's Future* package in 2003. The package spearheaded major changes to the sector to realise the Australian Government's vision for an education system based on the four principles of sustainability, diversity, quality and equity.

Backing Australia's Future was underpinned by significant additional investment – over the next ten years the Australian Government will provide some \$11 billion in new support for the sector.

However as I said when announcing *Backing Australia's Future*, money is only half the problem. Increased funding without changes to administration, regulation and perverse incentives for institutional and individual behaviour will only compound the challenges facing the sector.

Australia needs a vigorous, diverse and flexible higher education sector if it is to successfully lead in a competitive global environment and make the most of opportunities at home.

We need a nationally consistent, well defined 'brand' to support our engagement with the international marketplace for higher education. We also need a sector with a wide diversity of institutions with the flexibility to pursue their own distinct missions and develop innovative responses to opportunities which arise.

Shortcomings in key fundamentals are impeding the realisation of these objectives of global competitiveness, diversity and flexibility. State and Territory governments have actively collaborated with the Australian Government to address deficiencies in some areas, but we need to go further.

The discussion paper points to three areas in particular in which current arrangements impede efficiency and innovation. These are the implementation of the National Protocols on Higher Education Approval Processes, universities' powers to engage in commercial activities and the operation of governing bodies. These are all matters which are regulated by State and Territory governments.

Variations between jurisdictions have the potential to seriously undermine Australia's long term international reputation for quality and consistency and to frustrate universities' efforts to diversify their revenue sources.

At least one State government has indicated its interest in moving its universities' legislative regime to the Federal level. While I am happy to consider any proposals of this nature, I am particularly interested in exploring ways in which the Australian Government can work strategically with the States and Territories to promote greater national consistency and a more level playing field for universities.

The Australian Government will not, and should not, coerce governments in this regard. Certainly if there is to be any change, it will ultimately be the product of consultation between the Australian Government, States and Territories, universities and the broader community.

It is important that we have a public conversation about these issues to ensure the long term welfare of Australia's universities and of Australia as a nation.



The Hon Dr Brendan Nelson MP
Minister for Education, Science and Training

EXECUTIVE SUMMARY

The Australian Government has significant financial and policy responsibility for higher education, while State and Territory governments retain major legislative responsibilities. Recent debate has suggested that there may be a need to re-think this arrangement to promote national consistency and transparency in key areas and ensure the capacity of Australia's universities to compete in both domestic and international markets.

A discussion paper, *Rationalising Responsibility for Higher Education in Australia*, released in December 2004, provided some scope within which such a debate can be progressed. This new discussion paper explores the issues raised in the previous paper in more detail, taking into account the findings of reports expressly commissioned by the Australian Government. It suggests that, on the evidence currently available, there may be benefits in the Australian Government having a greater role in three key regulatory functions which are currently the responsibility of State and Territory governments.

Firstly, legislative differences mean that universities cannot always operate on a level playing field in seeking to expand and diversify their revenue sources through commercial activities. The Australian Government could play a strategic role in encouraging and achieving more consistency across jurisdictions and institutions in areas such as land use, power to invest and to operate outside jurisdiction of establishment.

Secondly, governance and management in public universities have not always been responsive to changes in the operating environment over the last decade, for example, diversification of revenue sources and growth in commercial activity. All the State and Territory governments support implementation of the National Governance Protocols introduced by the Australian Government. This represents a major step in the evolution of governance. However, there is considerable scope for further improvement to enable universities to respond effectively to increasingly complex domestic and international conditions.

Thirdly, there is an emerging consensus on the need for greater national consistency in recognition of universities and accreditation of courses and providers. It has been suggested that variations in the implementation of the National Protocols on Higher Education Approval Processes between the States and Territories are costly for providers seeking to operate in more than one State and Territory and confusing for consumers. They may negatively affect Australia's reputation for quality and consistency.

This paper seeks stakeholders' views on these issues from two perspectives: the extent to which stakeholders perceive that problems in these three areas need to be addressed and the mechanisms available to address them. These mechanisms include referral of powers from State and Territory governments to the Australian Government, enactment of uniform legislation across jurisdictions, selective testing of the Commonwealth's constitutional corporations power and the establishment of universities as trusts. These are discussed in more detail in the paper.

CONSULTATION PROCESS

State and Territory governments and sector stakeholders are invited to consider the discussion and proposed consultation questions, and formulate their views on the basis of their own particular circumstances. The release of this paper will be followed by consultation with key stakeholders.

Submissions on the issues raised in this paper are welcome and should be sent by 20 May 2005 to backingaustraliasfuture@dest.gov.au (subject line marked "Rationalising responsibility") or to

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INTRODUCTION

This discussion paper has been prepared to inform the debate on the division of responsibility for higher education in Australia between State and Territory governments and the Australian Government. It follows release in December 2004 of the issues paper *Rationalising Responsibility for Higher Education in Australia*, which described the evolving nature of Federal and State involvement in higher education and the current division of responsibilities between the Australian Government and the State and Territory governments. The issues paper identified significant variation between the States and Territories in terms of the legal, regulatory and accountability requirements on universities within their jurisdictions and noted a lack of consistency in application of some nationally agreed requirements. It was argued that this may constrain the capacity of Australia's higher education sector to meet the requirements of a competitive global environment.

The issues paper canvassed the potential benefits of greater involvement by the Australian Government in the higher education sector, including improved international competitiveness and improved operations of higher education providers through re-design of their governance and management framework.

The paper also identified risks which would need to be managed in the event of a transfer of responsibility. For example, the sustainability of universities would need to be safe-guarded in the event of a withdrawal of State and Territory government financial and in-kind support. The important economic and social role played by universities in regional economies would need to be taken into account, and the status and viability of dual sector institutions considered. The paper also indicated that there might be implications for Commonwealth grants to States and Territories if the Australian Government assumed additional functions in respect of higher education such as provision of Ombudsman services.

This discussion paper has benefited from expert input from two commissioned papers. The two papers are attached for the information of readers. The Phillips KPA paper analyses the current division of responsibilities between the Commonwealth and the States, considers a number of alternative models and proposes a number of options. Professor Christine Ewan canvassed the initial views of Vice-Chancellors on the transfer of responsibility for universities from State and Territory governments to the Australian Government, from the perspective of individual universities and their particular circumstances.

This discussion paper also refers to research projects commissioned by the Department of Education, Science and Training (DEST) in other contexts and to evidence provided to the Commonwealth in the course of implementation of the *Our Universities: Backing Australia's Future* package of reforms. Overall, the process of developing this paper revealed both the complexity of the issues and often a lack of detailed information by jurisdictions to underpin consideration of them.

SHOULD RESPONSIBILITIES BE RE-ALIGNED?

Responsibility for higher education encompasses a range of legislative functions currently performed by Commonwealth and State/Territory governments. In this section each of these functions is discussed in terms of the current locus of responsibility and whether some re-alignment might be valuable.

Ownership of existing public universities

'Ownership' can be either legislative or proprietary. The first term refers to ownership of the legislative regime which underpins the operation of the university and the second term to ownership of the property and assets of the university, which the university may have acquired through government provision (of land grants), government capital funding, use/gift of Crown land, bequest or commercial purchase.

Legislative regime

Thirty-six universities and higher education institutions in Australia are established by State or Territory legislation and publicly funded by the Australian Government. The ownership of the legislative regime establishing these institutions lies with the respective State or Territory government. Three other institutions also have access to all the types of Australian Government funding available for higher education institutions – the Australian National University and Australian Maritime College, both established under Commonwealth legislation, and the Australian Catholic University (ACU), a public company limited by guarantee of the Catholic Church. The ACU has been given statutory recognition as a university by the *Australian Catholic University Act 1990* in New South Wales.

Ownership of property and assets

The 39 institutions above have total assets of around \$30 billion, including land and buildings reported to be valued at around \$16 billion (as at the end of 2003). Other physical assets such as property, plant and equipment were around \$4 billion and library assets were valued at \$2 billion. Many universities control large amounts of Crown land (land granted by government and generally closely regulated), which may 'anchor' a university to a State, ensuring it continues to operate in that State.

With the exception of the Territories, the Commonwealth would likely need a referral of power from the States if it were to effectively 'own' the establishment legislation of universities. Acquisition of the property of an existing university would require payment of 'just terms' compensation under s.51(xxxi) of the Constitution.

Phillips KPA notes that "it could be argued in principle that it is a flawed arrangement for the Commonwealth Government to be the largest single source of funding to institutions that are, in effect, State statutory corporations" (2005, p.13). Indeed, at least one State government has expressed interest in a transfer of legislative authority. However, the Phillips KPA report does not see Commonwealth ownership (in the legislative sense) as necessarily desirable. It recognises that State and Territory governments have a legitimate interest in the institutions within their jurisdictions because they provide financial and in-kind assistance to them and because the institutions impact directly on regional and State economies and intersect with schools and vocational education and training systems. It also considers it beneficial to avoid a situation where a single sphere of government has full legal and funding responsibility.

Phillips KPA suggests that the Commonwealth not be “distracted by the issue of direct ‘ownership’ but rather, taking the ‘public’ universities as established entities, should concentrate on promoting better governance, regulatory and policy outcomes through cooperative legislation.” (2005, p.21)

Ewan reported that most Vice-Chancellors considered the present situation not logical and a more logical arrangement inherently attractive. They sought more information on the nature of any proposed legislation, but generally saw no imperative for change to the status quo and were concerned about potential risks. They considered their relationship with their respective State or Territory government important and were concerned about its possible loss in the event of a transfer of legislative responsibility to the Commonwealth. In addition, they expressed concern about the absence of a moderating influence on the power of a single Minister.

An alternative to Commonwealth or State/Territory legislative ‘ownership’ may be to set up universities under general Trust law (including charitable trusts). This is discussed in more detail in the sections which follow.

KEY CONSULTATION QUESTION

- Is ‘ownership’ (legislative and/or physical assets) of the public universities an issue that needs to be considered for re-alignment? If so, what might be an appropriate mechanism to achieve re-alignment?

Regulation of public universities' commercial activities

Since 1991 there has been significant diversification in the sources of revenue available to public universities, in particular rapid growth in commercial activity. This includes sale of education and consultancy services, management of intellectual property and commercialisation of research. An issues paper prepared for the 2002 *Crossroads* review of higher education noted that consultancy services and commercialisation of research contribute on average about 5 per cent of a university's revenue annually. Australia's public universities now operate more than 300 commercial entities (Nelson 2002, p.3).

Establishment Acts regulate the capacity of public institutions to engage in commercial activities, in terms of their powers in areas such as: establishment of companies, investment, borrowing, acquisition, use and disposal of land and capacity to conduct commercial activities outside their jurisdiction of establishment. General financial management legislation applicable to the jurisdiction within which they operate may also place constraints on their powers. This can limit inter-jurisdictional collaboration between otherwise willing university partners. Differences in financial management legislation on matters such as borrowings, investments, fiduciary requirements and interest charges mean that universities across Australia do not operate on a level playing field in seeking to expand and diversify their revenue sources.

In 2001 DEST commissioned a research project by Phillips Fox Lawyers to examine aspects of the regulatory environment applying to universities. The findings of the report in four key areas are summarised at Attachment A. The report highlighted significant differences between universities in their capacity to operate in a commercial environment.

The *Crossroads* paper, prepared in 2002, noted that State and Territory governments had recently been reviewing their policies on commercial activities in universities, and where necessary, amending legislation to reflect the contemporary operational environment. However significant differences remain between jurisdictions, including universities' accountability for commercial activities. Not all universities can respond to, and capitalise on, commercial opportunities with equal ease and in timelines appropriate to the commercial world. During consultations undertaken as part of the *Crossroads* review, the Business Council of Australia identified difficulties for business in timely decisions and approvals when entering into joint activities with universities across jurisdictions (Nelson 2002, p.7).

The extent to which universities should be 'liberated' from government control in the area of commercial activities is a contentious issue. In 2004, a joint Australian Vice-Chancellors' Committee/Business Council of Australia (AVCC/BCA) report into the commercialisation of university research noted that some universities may face constraints on commercial activity from clauses in their establishment legislation. It gave as an example the situation at Royal Melbourne Institute of Technology (RMIT), where, under the terms of the establishment Act, articles of incorporation for any spin-off company must be approved by the University Council. The University is also required to notify the State Education Minister of the company formation and the reasons for it. The report comments that:

Such clauses in the foundation Act of a university may deter investors from entering into commercialisation activities with the university due to both the time delays involved and the potential

loss of commercial confidentiality. Legislative action may be necessary to address the problems currently facing some universities in this area.

(AVCC/BCA 2004, p.26)

The AVCC/BCA considers that University Councils have an important role to play in overseeing commercialisation activities within the universities, and suggests that Councils:

*...should provide general oversight of the overall strategic direction, as opposed to the day to day operations of commercialisation entities and should establish overall parameters for their operations.
(ibid)*

The report also suggests that the requirements of Commonwealth, State and Territory Auditors General may also act to constrain commercialisation opportunities for universities. It comments that, if an Auditor General believes that universities should not be engaged in commercial activities (which the report notes has been suggested is the case in Victoria), the Auditor General will submit negative reports to Parliament on universities' risk profiles and exert pressure on Government to "introduce inappropriate and cumbersome administrative arrangements for approval of commercialisation activities" (ibid). Potential investors may also be deterred because of the loss of confidentiality that this will bring about.

It can, however, be argued that a significant degree of involvement by University Councils and government in the commercialisation activities of universities is legitimate, given that a substantial portion of their assets have been acquired through taxpayer funds.

Phillips KPA believes there is a strong case to give all public universities "equal and unquestionable powers and freedoms to operate commercially and in locations outside of their State or Territory of establishment." (2005, p.19). It also supports greater consistency in universities' powers in relation to land. It suggests a general approach whereby the Commonwealth, State and Territory governments agree on a common set of criteria for 'public' universities, with these criteria then enacted into national legislation. It suggests that this approach be used to achieve national consistency in the commercial powers of public universities.

To achieve greater consistency, there are a number of options.

- The Commonwealth could seek referral of powers in particular areas or initiate the enactment of uniform legislative provisions relating to commercial activities across jurisdictions. The Commonwealth could offer incentives to entry through provision of differential funding to providers. However, these approaches could involve lengthy delays.
- Alternatively, the Commonwealth could test its constitutional power over trading and financial corporations. While the extent to which this power could be used to regulate the conduct of a trading and financial corporation's activities has not been fully tested, it is likely to support regulation of some activities in public higher education institutions. However it is legally less certain that the corporations power would support the Commonwealth in altering the fundamental structure or charter of an institution. The implication is that the Commonwealth could potentially legislate uniform provisions in respect of some aspects of the powers of institutions to engage in commercial activities, although it could not alter the objects of a university set out in its

establishment legislation. However, even if consistency was achieved in establishment Acts, variations in financial management and other general purpose legislation would remain. This is discussed further in the section on general purpose legislation.

- The trust model for the operation of universities would require the deed of trust to clearly set out the commercial powers that universities would have. This in itself would have no impact on achieving national consistency unless there was agreement on common clauses.

KEY CONSULTATION QUESTIONS

- Is there a need for greater national consistency between jurisdictions and individual institutions in respect of powers to operate in a commercial environment?
- Do individual institutions operate on an uneven playing field in their efforts to diversify their revenue sources in this manner?
- How could a more even playing field be best achieved?

Regulation of governance arrangements in public institutions

The establishment Acts of public institutions typically provide for a governing body such as a Council, Senate or Board to have overall control and management of the institution. It is generally agreed that effective corporate governance is critical to the long-term sustainability of our higher education sector. Given its role as a major source of revenue to Australia's public universities, the Commonwealth has a particular interest in ensuring the protection of its investment.

However, governance and management arrangements have not always been responsive to changes in the universities' operating environment over the last decade, which include the diversification of revenue sources, rapid growth in commercial activity, expansion of consultancy services and commercialisation of research.

To expedite reform, the Australian Government has tied funding increases under the Commonwealth Grant Scheme to adherence to a set of National Governance Protocols. The Protocols set out specific requirements in areas such as: size and composition of the governing body; procedures for nomination of prospective members; codification and publication of the provider's internal grievance procedures; inclusion in establishment legislation of the duties of members and sanctions for breach of duties (for public institutions); and the way in which the governing body oversees controlled entities. All State and Territory governments have now agreed to make the necessary legislative changes to allow universities within their jurisdictions to comply with the Protocols. Implementation of the Protocols will improve accountability and transparency in universities, while enhancing institutional autonomy.

Ewan reports that, while acknowledging the scope for further improvement, most Vice-Chancellors are satisfied with the way in which their governing bodies are appointed and function under the Protocols. There was a concern that, whichever jurisdiction applies, appointments to governing bodies should advise the institution in the achievement of its mission, and not represent political interests.

Recent high profile cases involving failures of governance and management and large operating deficits have underlined the need for continuing reform. Although implementation of the Protocols will undoubtedly improve governance arrangements, there is considerable scope for further improvement in a number of areas. For example, the Protocols specify that the size of the governing body should not exceed 22. It has been argued that a smaller governing body would allow for more streamlined operations, while others suggest that it might be appropriate for the size of the governing body to reflect more closely the size of the institution itself.

The ideal composition of a governing body is also an issue worth exploring. The *Crossroads* paper on governance noted that a key issue is whether governing body members act as trustees or delegates – the difference being in general terms that trustees are regarded as obliged to always act in the overall interests of the university, whereas delegates may regard themselves as primarily representatives of the groups who have elected them (Nelson 2002, p.21). A recurring theme in submissions to the *Crossroads* review was the inability of some governing body members to act as a trustee rather than a delegate. The paper noted that issues of conflict of interest are particularly important given the growth in university commercial activities. This suggests that further development of a trustee model of governance may be worth consideration. Stakeholder views in a trustee model could be solicited through regular open sessions and forums rather than having representatives on the Council itself.

A further issue is whether current university legislation and governance arrangements provide the governing body with the capacity to deal effectively with allegations such as academic fraud, plagiarism, soft marking; financial and reputational risks; and provide leadership, stewardship and control.

Options through which the Commonwealth could pursue this change include referral of powers from State and Territory governments or cooperative legislation, where Commonwealth and States agree on model provisions. Each jurisdiction would enact laws in the same terms, giving effect to agreed national arrangements. It should be noted that other cooperative schemes have involved delays in implementation and difficulty in maintaining uniformity. A further option is for the Commonwealth to test its constitutional corporations power, which may support regulation of a range of activities in public universities. The trust model for universities may offer particular benefits in terms of promoting effective governance and management.

KEY CONSULTATION QUESTIONS

- Would a trustee model assist university governing bodies to operate effectively?
- How can we continue to improve the governance of public universities?
- Which governance model will provide the most appropriate framework?
- Is there a benefit in developing models of best practice to further improve governance in universities?

Reporting requirements

The Commonwealth *Higher Education Support Act 2003* (HESA), administered by DEST, regulates provision of Commonwealth funding for student places, student loans and fees, performance funds and other purposes. This function is supported by the Commonwealth's constitutional powers in respect of appropriations and benefits to students.

Duplication

The issues paper released in December 2004 suggested that one benefit of legislative transfer might be a reduction in duplication of accountability and reporting between the Commonwealth and the States and Territories. A number of submissions to the 2002 *Crossroads* review raised concerns about duplication or inconsistency between Commonwealth and State and Territory governments. For example, Curtin University (submission i145) noted differences between Commonwealth and State government definitions in the areas of affirmative action, equal opportunity and equity groups; and the University of Western Sydney (UWS) (submission 263) noted that some duplication of legislation in education for overseas students, commercial entities and privacy can create confusion with regard to compliance. The Central Queensland University (submission 280) cited conflicting financial and audit and planning reporting requirements.

There have been a number of instances where the State Auditors-General have interpreted the accounting standards and Commonwealth financial reporting requirements differently, resulting in universities in some States having their financial statements qualified while no audit qualifications were issued to universities in other jurisdictions. Two examples of such anomalies have been the treatment of advance payments made by the Commonwealth, and that of the unfunded superannuation liability and corresponding amounts receivable from the Commonwealth/State Governments.

Other submissions to *Crossroads* were concerned about the general level of reporting requirements, with some giving details of the number of Acts with which they were obliged to comply - for example Queensland University of Technology (38 Commonwealth, 50 State Acts) and the University of Western Australia (111 in total). A number proposed a rationalisation of or greater national consistency in regulation (eg. UWS, University of Newcastle Academic Senate, Curtin University).

Level of Commonwealth reporting and accountability

The Commonwealth provides universities with an average 57 per cent (including HECS and loans) of their revenue. In 2003, this proportion varied significantly between universities, ranging from 29 per cent to 74 per cent of total revenue. In 2005, the total taxpayer funding to universities from the Australian Government's Education, Science and Training Portfolio is estimated to be around \$7.5 billion.

Of the undergraduate students in 2004, 550,579 (97 per cent) were in Commonwealth supported places. Of these, 413,085 students chose to defer their HECS repayments. A total of 5,176 students also received Commonwealth Learning Scholarships in 2004.

This significant level of taxpayer investment in universities and the large number of students in receipt of Commonwealth support (through loans and scholarships) necessitate a robust accountability and reporting regime. The Australian Government's data and information collection is thus driven by its accountability responsibilities for implementing and managing Government policies and programmes. In addition the Government seeks, through its accountability regime, to protect the interests of students in the new environment of partial deregulation and greater diversity which has developed since 2003.

Professor Ewan found that Vice-Chancellors were not concerned about the duplication between Commonwealth and State/Territory requirements. They did emphasise however the need for reduced Commonwealth reporting. The Commonwealth has taken steps to ensure that reporting requirements on universities are kept to a minimum and it will continue to do so where possible. In 2002-2003 DEST and the AVCC reviewed reporting and as a result many requirements were dropped: descriptions of Strategic Planning; Quality Assurance and Improvement Plans; some elements in the Student Collection; and expense by function and segment information in Financial Reports. Others were reduced in scope: Capital Asset Management Plans; Equity Reports; and Indigenous Education Reports.

In addition, the Commonwealth's accountability mechanism, the Institution Assessment Framework (IAF), derives most of its information from routine collections or publicly available information. While it requires universities to provide some additional data, universities derive the benefit of having the Department's analysis presented in time series and with comparisons to like institutions and the sector as a whole. Many universities have indicated that the assessments are very useful for their own performance measurement and planning.

A number of data sets collected by DEST are also used by the Australian Vice-Chancellors' Committee, State and Territory governments and universities.

Level of State and Territory reporting and accountability

Public universities which are statutory bodies established under State and Territory legislation are subject to similar regulatory and accountability requirements as other statutory bodies in the State or Territory. They are generally required to provide their Minister for Education with an annual report containing audited financial statements, performance information and information on specified financial and/or business dealings. The reporting framework may also require matters such as occupational health and safety, Freedom of Information requests, referrals to the Ombudsman and other aspects of university operations to be included in the report. Other State authorities such as the Auditor-General and Ombudsman may impose their own reporting requirements.

The Ewan report noted that some Vice Chancellors from New South Wales and some from dual sector institutions have experienced problems with State reporting and accountability frameworks.

Regulation of general purpose legislation

Higher education providers are also subject to Commonwealth, State and Territory general purpose legislation in areas such as financial management and audit (in respect of public universities), consumer protection (Ombudsman), industrial relations, occupational health and safety (OH & S) and privacy. This legislation is not specific to higher education, but may impact on providers according to their legal status (for example, universities established under State/Territory legislation may be subject to financial management and audit requirements by virtue of being a State/Territory statutory body) or general activities in relation to employment of staff and provision of services.

There are inconsistencies across jurisdictions in some provisions. This may result in inequitable treatment of institutions, their employees and students. For example, there are inconsistencies in privacy legislation and schemes across jurisdictions. The 'Information Privacy Principles' in the Commonwealth's Privacy Act 1988 apply to Federal Government and Australian Capital Territory agencies. In addition, the 'National Privacy Principles' in the Commonwealth Privacy Act apply to certain large 'organisations' which have an annual turnover of more than \$3 million.

New South Wales, Victoria, Tasmania and the Northern Territory have privacy legislation, whilst Queensland, South Australia and Western Australia have non-legislative privacy schemes. However, these only apply to State owned institutions and do not apply to non-government institutions.

In order to ensure adequate protection of students' personal information, the Commonwealth therefore included in its *Higher Education Support Act 2003* (HESA) the provision that higher education providers must comply with the Information Privacy Principles of the Commonwealth Privacy Act in respect of personal information obtained for the purposes of Chapters 3 and 4 of HESA (Commonwealth assistance to students). This requirement operates in addition to other privacy obligations of higher education providers, which are governed by whatever privacy legislation or scheme applies to those providers, and achieves consistency of protection across all jurisdictions.

Further investigation is needed to determine whether provisions in general purpose legislation affect institutions' capacity to operate on a level playing field and disadvantage students and employees. It should be noted that Phillips KPA explicitly focuses its proposals on aspects of regulation which are specific to the higher education industry and not general purpose legislation (2005, p.5).

Action to ensure that higher education providers across Australia face similar regimes in terms of the matters covered by general purpose legislation is possible through a number of options.

Options

- While a referral of power in respect of higher education providers is an option, States and Territories may argue that the matters covered by general purpose legislation vary across jurisdictions for legitimate internal reasons. In the absence of a referral of powers, the Commonwealth could pursue the option of cooperative legislation to make regulation of matters covered in general purpose legislation more consistent in its application to universities.

- The Commonwealth has a number of constitutional powers which might support change or strengthening of relevant provisions. One is the use of its appropriations powers to attach conditions to Commonwealth grants. This is the basis on which the changes to workplace relations and governance were achieved. The benefits to students power might support Commonwealth legislation in respect of other areas such as consumer protection (Ombudsman), although this might result in dual reporting arrangements and increased complexity for providers.
- It might also be possible to test the Commonwealth's corporations powers in respect of other matters such as financial management and audit. Corporations power may support regulation of a range of activities in public institutions.

KEY CONSULTATION QUESTION

- Is there a need for greater national consistency for Higher Education Providers in areas where their activities are regulated by general purpose legislation of the relevant jurisdiction (eg. privacy, financial management and audit, consumer protection, industrial relations)?

Treatment of intellectual property

This matter is regulated through Commonwealth legislation and the general law. There is no relevant State or Territory legislation which affects individual universities (Phillips Fox Lawyers 2001, p.8). Given that provisions in these areas are common across Australia, this issue does not appear to warrant further examination in this context.

State taxation of universities

This matter was identified during the *Crossroads* review as a significant burden on universities, which, in the light of the GST arrangements, could be reviewed. A major element is payroll tax, which is charged by all States and Territories according to their own legislation. Currently the rate varies between 4.5 per cent and 7 per cent across States and Territories.

Table 1 below sets out, in respect of Table A providers, payroll tax paid by universities and State government financial assistance to universities for the years 2002 and 2003. It also shows payroll tax as a proportion of State financial assistance.

The Table shows that Australian universities paid payroll tax equivalent to 162 per cent of the financial assistance they received from State governments in 2003, and 140 per cent in 2002. In other words there was a net average loss of revenue from universities to State Treasuries. As can be seen, the situation varied widely by jurisdiction.

The December 2004 issues paper notes that payment of payroll tax diverts Commonwealth funding for universities to general State or Territory revenue, and is effectively an increase in the level of general Commonwealth grants to the States. No State government offers a payroll tax exemption to all universities in its State.

Phillips KPA comment that the extent of State government authority is clearly disproportionate to the extent of State financial input and exposure, especially when the impact of payroll tax is taken into account. Ewan reports that Vice-Chancellors believe payroll tax is an unnecessary imposition.

It should be noted that the Commonwealth has power to exempt Commonwealth-owned universities from payroll tax. If ownership of the legislative regime establishing other universities remains with State governments, the Commonwealth is unlikely to have power to prevent State taxation laws applying generally to universities. While it would have the power to make it a condition of grant that no funding which it provides to a provider could be paid out as payroll tax, this would be ineffective in exempting providers from payroll tax – providers would still have to pay their payroll tax out of non-Commonwealth revenue.

Table 1 - Payroll Tax and State Government Financial Assistance

HESA 2003 Table A Providers - Higher Education sector only financial information - 2002 & 2003

Institutions	Payroll Tax	State Government Financial Assistance	Payroll Tax as a proportion of State Govt Financial Assistance (%)	Payroll Tax	State Government Financial Assistance	Payroll Tax as a proportion of State Govt Financial Assistance (%)
	\$'000	\$'000		\$'000	\$'000	
Charles Sturt University	5,473	170	3219%	7,049	238	2962%
Macquarie University	7,630	1,769	431%	8,381	1,827	459%
Southern Cross University	2,993	1,733	173%	3,213	918	350%
University of New England	4,658	878	531%	4,892	1,110	441%
University of New South Wales	21,000	6,712	313%	19,605	7,787	252%
University of Newcastle	8,910	977	912%	9,430	997	946%
University of Sydney	23,781	2,704	879%	23,523	2,796	841%
University of Technology, Sydney	9,955	2,929	340%	10,002	3,367	297%
University of Western Sydney	10,277	317	3242%	10,092	73	13825%
University of Wollongong	6,115	1,891	323%	6,603	2,237	295%
NSW	100,792	20,080	502%	102,790	21,350	481%
Deakin University	7,703	1,833	420%	8,409	3,735	225%
LaTrobe University	8,353	5,118	163%	8,613	3,794	227%
Monash University	19,361	17,676	110%	21,622	13,759	157%
RMIT	10,067	1,933	521%	9,817	3,065	320%
Swinburne University of Technology	3,549	51	6959%	4,153	2	207650%
University of Ballarat	1,800	4,532	40%	1,679	1,764	95%
University of Melbourne	19,950	42,479	47%	21,352	32,119	66%
Victoria University of Technology	4,864	187	2601%	4,824	166	2906%
VICTORIA	75,647	73,809	102%	80,469	58,404	138%
Central Queensland University	3,585	806	445%	3,976	806	493%
Griffith University	8,404	13,608	62%	8,850	2,309	383%
James Cook University	4,187	1,618	259%	4,467	1,511	296%
Queensland University of Technology	9,013	4,645	194%	9,739	12,990	75%
University of Queensland	15,690	19,999	78%	16,971	20,148	84%
University of Southern Queensland	3,152	2,493	126%	3,342	2,683	125%
University of Sunshine Coast	833	200	417%	955	2,207	43%
QUEENSLAND	44,864	43,369	103%	48,300	42,654	113%
Curtin University	11,746	13,844	85%	11,898	5,393	221%
Edith Cowan University	6,341	8,761	72%	6,661	6,654	100%
Murdoch University	4,968	2,584	192%	5,437	3,124	174%
University of Western Australia	11,347	23,400	48%	12,665	28,298	45%
WESTERN AUSTRALIA	34,402	48,589	71%	36,661	43,469	84%
Flinders University	5,497	5,544	99%	5,612	5,125	110%
University of Adelaide	8,255	14,911	55%	8,157	15,283	53%
University of South Australia	7,267	2,294	317%	9,123	2,636	346%
SOUTH AUSTRALIA	21,019	22,749	92%	22,892	23,044	99%
Australian Maritime College	0	0		0	0	
University of Tasmania	6,122	6,166	99%	6,347	6,462	98%
TASMANIA	6,122	6,166	99%	6,347	6,462	98%
Batchelor Institute	539	6	8983%	456	0	
Charles Darwin University	(a)	(a)	(a)	2,214	3,393	65%
NORTHERN TERRITORY (a)	539	6	8983%	2,670	3,393	79%
Australian National University	15,416	2,851	541%	17,076	1,490	1146%
University of Canberra	4,651	535	869%	4,678	483	969%
ACT	20,067	3,386	593%	21,754	1,973	1103%
Australian Catholic University	2,880	1,020	282%	3,304	21	15733%
MULTI-STATE	2,880	1,020	282%	3,304	21	15733%
TOTAL AUSTRALIA	306,332	219,174	140%	325,187	200,770	162%

Source: Institutions' audited financial statements 2002. For dual sector institutions, where payroll tax for higher education activities were not separately identified they were allocated on the proportion of employee benefits. (a) NT Government assistance to higher education activities of Charles Darwin University is not available for 2002 and therefore no calculations can be included for the State or University for this year.

Recognition and accreditation

State and Territory governments have the main responsibility for the accreditation of new universities and of courses offered by non self-accrediting institutions, and for action to penalise 'degree mills' and the providers of fake degrees. These tasks are a vital element of Australia's higher education quality assurance framework.

The Commonwealth *Higher Education Support Act 2003* (HESA), administered by DEST, determines the eligibility of a higher education provider for Commonwealth funding. Chapter 2 of HESA requires an applicant provider to satisfy additional quality and accountability requirements before being eligible for Commonwealth funding. This function does not duplicate State and Territory functions, but leverages off them as accreditation by the appropriate State or Territory is a pre-requisite for consideration of a provider's eligibility as a Higher Education Provider (HEP).

The Phillips KPA report noted that:

... it is clear that Australia has not fully achieved a nationally consistent approach to higher education recognition and accreditation. This is not an ideal situation as the operating environment becomes increasingly complex, global and competitive, as new providers seek to enter the industry, and as existing 'private' providers seek to expand their offerings. (2005, p.10)

On 2 March 2005, the Australian Government released a discussion paper *Building University Diversity: Future approval and accreditation processes for Australian higher education*, which explores the content of our future accreditation and approval processes but not issues of the responsibility for them. The discussion which follows asks whether it would be in Australia's interest to review the current responsibilities for the Protocols in order to achieve greater consistency of operation.

National approval processes

Recognition of new universities and the accreditation of higher education courses offered by non-university providers are currently regulated under State and Territory government higher education Acts which give force to the National Protocols on Higher Education Approval Processes (National Protocols). The Australian Government is responsible for regulating the operation of the Protocols in the external Territories. The National Protocols were approved by the Ministerial Council on Education, Employment, Training and Youth Affairs (MCEETYA) in March 2000 and are designed to ensure that consistent criteria and standards are used across Australia in the approval processes for new institutions and courses. There are five Protocols:

- | | |
|-------------|--|
| Protocol 1: | Criteria and processes for recognition of universities |
| Protocol 2: | Overseas higher education institutions seeking to operate in Australia |
| Protocol 3: | Accreditation of higher education courses to be offered by non self-accrediting higher education providers |
| Protocol 4: | Delivery arrangements involving other organisations |
| Protocol 5: | Endorsement of courses for overseas students. |

Greater consistency required

In 2004, DEST commissioned a review, *Further Development of the National Protocols for Higher Education Approval Processes, A report for the Department of Education, Science and Training* (Guthrie review), which found significant variation in implementation of the Protocols across States and Territories, in such matters as the recognition of universities from other States/Territories and the arrangements to deal with overseas institutions seeking to operate in Australia. The study team attributed variations between States/Territories to differences in their: legislative and related regulatory frameworks; levels of resources and expertise available; priorities given the relatively small scale of higher education approvals in some jurisdictions; philosophical stances on encouraging expansion or diversity in the sector; and differences in the interpretation of the Protocols.

The Guthrie report noted that these jurisdictional variations may be confusing and costly for universities and other providers seeking to operate in more than one State or Territory, and confusing for consumers. It also noted that, for overseas higher education providers seeking to operate in Australia, there is potential for providers to play one jurisdiction off against another and “move to the point of least resistance” (p.10).

The Guthrie report recommended that, as soon as possible, MCEETYA develop nationally agreed processes, criteria and guidelines that will enable a revised set of the National Protocols to be implemented in a consistent way across all jurisdictions. The report also recommended that the Australian Universities Quality Agency (AUQA) undertake a simultaneous audit of State and Territory Accreditation Agencies to report on consistency issues.

The Ewan report commissioned as part of this process notes that Vice-Chancellors unanimously support strong national enforcement of accreditation and the associated quality framework, but consider that a transfer of jurisdiction is not necessary to achieve it. They express concern that the application of the National Protocols is “patchy” and support a national approach to accreditation, but not necessarily through a change of jurisdiction.

Options to enhance consistency

The development of the National Protocols in 2000 is evidence of a national commitment to a consistent accreditation framework for Australian higher education, and there is consensus among stakeholders (State and Territory governments and Vice-Chancellors) of the importance of this function. A key question for consideration in this paper is whether a change of responsibility for the enactment of the Protocols would be the best way to enhance consistency.

In the absence of a referral of power from the States and Territories to the Australian Government, the Commonwealth’s power to establish new universities is limited to the Territories.

The Commonwealth’s corporations power does not give it the power to establish a university. While it may allow the Commonwealth to assume some accreditation functions (for example, to recognise an established body as a university and to accredit courses and providers), this would only be in respect of constitutional corporations. If a body was legally constituted in another way (eg. as a trust or an individual), the Commonwealth would have no power to prevent it from engaging in educational activities. The Commonwealth could not prevent courses offered by a non self-accrediting body from being recognised under State law and may not be able to prevent recognition of universities under State and Territory law.

Overall, this suggests that, without a referral of power from the States and Territory, the use by the Commonwealth of its legislative powers to unilaterally assume functions in respect of recognition/accreditation may not be effective. Indeed, it could have the potential to undermine the existing national quality assurance framework by creating a dual regulatory regime which lacks the current degree of national consistency.

A viable legal alternative may be a national cooperative scheme, with each jurisdiction enacting uniform legislation. This would extend current arrangements where each jurisdiction has agreed to enact the National Protocols but not through uniform legislative arrangements.

National authority

The Phillips KPA report proposes establishment by means of cooperative action of a Commonwealth authority to administer the National Protocols on behalf of the Commonwealth and the States and Territories. The authority would subsume the functions of AUQA and could also be delegated certain Commonwealth roles such as the approval of higher education providers to access Commonwealth funding under the *Higher Education Support Act 2003* and the registration of providers under the *Education Services for Overseas Students Act 2000*.

Phillips KPA suggests two ways in which the authority could be established: either the States and Territories refer their powers to the Commonwealth or they enact uniform legislation to confer recognition/accreditation functions on the authority, although there are questions about the legal effectiveness of the latter model. Phillips KPA notes that individual States could choose to become involved in the regulatory authority at different times. The Commonwealth could offer incentives to entry through provision of differential funding to providers.

If a national body were to be established to conduct accreditation functions, the scope of its activities would need to be determined. A 'national tertiary education quality body' with a separate arm for the vocational and higher education sectors is one of the options raised in the paper *Skilling Australia: New directions for Vocational Education and Training*. Such a body could respond to the growing number of institutions which deliver both vocational education and training and higher education and are subject to two different quality assurance regimes. A single national quality body to regulate offshore quality in all education sectors has also been canvassed as a way to enhance our current quality assurance of offshore courses.

A national agency may resolve various complexities for both public and private providers which operate across a number of jurisdictions. These complexities include inconsistencies between States and Territories in interpreting the National Protocols, different fees and charges for accreditation and different approval processes. It would be useful to hear views from stakeholders on whether and how best any revised responsibilities for the Protocols should address a wider span of accreditation interests.

If a new authority is considered to be the way forward, there would be costs involved in its establishment and maintenance. Included would be the costs associated with enacting a suitable referral of powers which is the only way the regulatory authority could have effective authority to operate. There may also be delays. For example, Phillips KPA state that establishment of the Australian Securities and Investment Commission, an exercise involving transfer to the Commonwealth of State/Territory functions, required a period of 40 years to achieve an authority established on a legally certain basis.

Ewan reported that some Vice Chancellors raised the possibility of a national authority (or “buffer body”) in a general context and that views were mixed.

An alternative to a new authority for regulation of accreditation functions might be for the Commonwealth to provide funding for the maintenance and development of uniform legislation and detailed guidelines for use in all jurisdictions.

KEY CONSULTATION QUESTIONS

- Is there a need for greater national consistency between jurisdictions in recognition of universities and accreditation of higher education courses and qualifications?
- Would there be benefits in bringing the National Protocols under Commonwealth responsibility?
- If so, would a national regulatory body be an appropriate mechanism through which this could be undertaken?

CONCLUSIONS

This paper discusses a wide range of issues relating to the operation of the higher education sector across jurisdictions. As noted above, it is based on information and views in the commissioned reports and other research projects. It has also been informed by evidence provided to the Commonwealth during both the 'Crossroads' review of higher education and the implementation of the *Our Universities: Backing Australia's Future* package of reforms. Further detailed research about current practices in each State and Territory would be valuable, particularly in the area of commercial activities.

'Ownership' of university establishment Acts and property clearly rests on States' willingness to refer their Constitutional powers to the Commonwealth and hand over or sell their property. While the Commonwealth could potentially offer inducements to States and Territories, 'ownership' may not be necessary, although the Commonwealth could consider proposals which individual jurisdictions may care to submit.

A more practical outcome might be a more collaborative approach. For example, the Commonwealth could take a greater role in a range of regulatory functions aimed at achieving greater national consistency and improving the governance and management framework within which public universities operate, while 'ownership' is retained primarily with the States and Territories. The analysis in the paper suggests that there are three key areas which need to be addressed to promote the efficiency and sustainability of public universities and maximise the international competitiveness of Australia's higher education sector.

Firstly, variations between jurisdictions and establishment Acts of individual institutions mean that some institutions have far broader powers than others to operate in a commercial environment. Research published in 2001 suggests that this applies in particular to powers to invest, use university land and undertake commercial activities outside the institution's jurisdiction of establishment. While the lack of express provisions in an institution's establishment Act does not necessarily prevent it from undertaking particular commercial activities, in general it would need to demonstrate that the activities fall within an accepted range for universities in Australia. While the research report implies that in the contemporary environment this might encompass some commercial activities, action to streamline this situation seems warranted. This is particularly urgent in an environment where institutions are seeking to diversify their sources of revenue.

Secondly, the need for further action to address the governance of universities has also been highlighted in recent months. All State and Territory governments have signed up to the National Governance Protocols and this will undoubtedly improve governance arrangements. However, there is scope for further improvement in areas such as size and composition of governing bodies if universities are to have the flexibility to respond effectively to a complex operating environment. This could involve further development of the trustee model of governance.

Thirdly, the recent Guthrie review into the National Protocols for Higher Education Approval Processes has highlighted the variation in the ways in which the Protocols are implemented across States and Territories and suggested that this may have a negative effect on Australia's international reputation for quality and consistency. There appears to be an emerging consensus between stakeholders that greater consistency would enhance our quality assurance regime.

The Australian Government could initiate cooperative action with State and Territory governments to address current anomalies in each of these areas, although it is possible that cooperative action would take some time and may not be achievable across every jurisdiction. Cooperative action could involve referral of powers to the Commonwealth or enactment of uniform legislation in particular areas.

The Commonwealth's priority is to seek the views and experiences of the States and Territories and key sector stakeholders on the issues set out above. It may be that, following discussion, Commonwealth and State and Territory governments agree that the three areas outlined above are priorities for concerted action. Alternatively, others may be proposed. In either case, the Australian Government believes this is a conversation urgently needed and welcomes any input to the debate.

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PHILLIPS FOX LAWYERS REPORT SUMMARY OF FINDINGS IN KEY AREAS

The report provides an overview of the powers and constraints on universities to engage in commercialisation in a number of major areas.

Investment provisions (including power to invest or borrow monies). The report states that “there are more differences between the varying investment powers, than similarities”. It classifies universities with broad powers as the ANU, and those in Victoria (all), NT, SA, Tasmania and WA (Murdoch). Conversely, it nominates universities with narrower powers as in NSW (all), Qld (all), WA (Curtin), ACT (UC) and the AMC. It notes that government control on this power is exercised at two levels: the establishment Act of a university may include specific limitations on the university’s management discretion and general financial management legislation applicable to the public sector may also apply to constrain the capacity of the university to act freely. This type of “‘public bodies’ financial management legislation is markedly different between each jurisdiction” (p.3).

Land use. One of the most valuable assets of a university is its land and buildings. Most university Acts stipulate that acquisition, use and disposal of university land must be for ‘university purposes’ and this connection must be established. In many cases land use is further constrained by specific provisions in establishment Acts.

The report discusses the legislative situation of universities in respect of land use for commercial activities. It suggests the *Charles Sturt University Act 1989* (NSW) as a sample of ‘most useful, least constraining’ legislation, which provides the university with specific power for ‘the development of entrepreneurial activities to contribute to the development of western and south-western New South Wales’. Other universities are described as having either ‘broad’ or ‘narrower’ powers in respect of land use for commercial activities. Not all universities and jurisdictions are categorised; the report notes that this means there are no relevant provisions in the establishment Acts of these universities.

Establishment of companies. The report comments that the power of universities to establish companies, joint ventures and partnerships is an integral part of their powers to corporatise and commercialise services and enterprises generally. It finds that universities in all jurisdictions can establish and participate in companies where this is within the express or implicitly recognised scope of their purposes or functions. It proposes the relevant provisions of the *Australian National University Act 1991* as a sample of the ‘most useful, least constraining’ legislation, and categorises as having ‘broad powers’ in establishment of companies universities in NSW (all), the University of Tasmania and the University of Canberra. The report also notes that legislation in all jurisdictions impacts on universities as public bodies, primarily in relation to auditing and financial management requirements. In some cases university subsidiaries may be subject to the powers of the State auditor and reporting requirements under these Acts.

Commercial activities outside jurisdiction of establishment. Universities do not have an automatic power to operate outside their jurisdiction of establishment. A number of jurisdictions have recognised this as a constraint on commercial activities and have given them specific powers in this area. These provisions often specify that the usual restrictions in areas such as land use within the university's territory do not apply outside the territory, the implication being that commercial use of this property is more accepted.

The explicit powers of universities to operate outside their jurisdiction of establishment vary widely across jurisdictions and between universities in the same jurisdiction. For example, Charles Sturt University, Newcastle University and the University of Western Sydney are given an express right to exploit international markets, while no specific provision was contained in the establishment Acts of other NSW universities at the time of publication of the Phillips Fox report. A similarly mixed situation existed in respect of universities in Victoria, Western Australia and South Australia. The establishment Acts of all Queensland universities were amended in 1997 to explicitly give each university the ability to exercise their powers inside and outside Queensland, including outside Australia. The University of Tasmania, both Northern Territory institutions, ANU and the University of Canberra are expressly permitted to operate outside their jurisdiction.

In the absence of specific provisions in the establishment Act, it is necessary for a university to establish that it is now an accepted part of its activities to do business beyond its State or Territory. Phillips Fox consider that a broader range of activities would probably be permitted now than in previous years.

**RATIONALISING RESPONSIBILITY FOR HIGHER
EDUCATION IN AUSTRALIA**

Vice Chancellors' views

DRAFT REPORT TO DEPARTMENT OF EDUCATION
SCIENCE & TRAINING

January 30, 2005

Interviews conducted and reported by

Emeritus Professor Christine Ewan, AM

Acknowledgements

I would like to acknowledge with gratitude the efforts of the Vice Chancellors' personal assistants in helping me to arrange a difficult schedule of appointments in a very short time. Without their patient and generous assistance this project would not have been possible.

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Summary

Without exception, the Vice Chancellors regarded the invitation to present their views personally in a positive light and as a constructive opportunity. The views expressed by Vice Chancellors have several underlying common themes but there is a significant range of variation in level of support for the proposal.

All Vice Chancellors of publicly funded universities were approached for their opinions. Twenty seven were interviewed in person, five by phone and two provided written responses. One of those interviewed was in transition between universities and thus spoke for two universities. Two did not provide comments and one had just retired. While no Vice Chancellor offered unqualified support for the proposal and most expressed reservations or concerns, several regarded the proposal as an important opportunity to address more important issues that are currently problematic for the sector.

There was no discernible pattern of response to the proposal. Universities did not divide neatly along the predictable lines ie, between States, regional versus metropolitan, research intensive, technological, new generation etc.

Differences appeared to relate largely to the experiences of the individual university and Vice Chancellor in his or her interactions with the State and Commonwealth bureaucracies.

The most significant conclusions to be drawn from the interviews for which there was virtually universal support are:

1. The relationship with the States and Territories, in spite of its occasional irritations, provides a great deal of support for the universities and is too important to be lost. Transfer of legislation risks the loss or diminution of that support. With the exception of some Vice Chancellors from NSW and some in dual sector institutions, none have experienced problems with State reporting and accountability frameworks that are sufficiently significant to warrant the acceptance of uncertain risk inherent in the proposal. State imposed accountability and reporting frameworks are regarded as a nuisance but insignificant in scope when compared with Commonwealth requirements.
2. The main source of perceived risk inherent in a transfer to Commonwealth jurisdiction is the absence of a moderating influence on the power of a single Minister. All Vice Chancellors, whether supportive or not supportive of the proposal, indicated that some form of moderating influence should reside between the Minister and his Department on the one hand and universities on the other. An independent source

of advice to the Minister is regarded as essential. Currently, State governments do provide a moderating influence and do have the right to comment on and influence Commonwealth proposals for higher education. If legislation were transferred this issue would need to be addressed in some way and the right of the States to participate in decision making retained because of their legitimate interest in university activities.

3. The burden of regulation and reporting is mainly a result of Commonwealth requirements and has increased dramatically since the passage of the Higher Education Support Act despite the Minister's explicit commitment to its reduction. All Vice Chancellors can provide examples to support this observation and it colours their willingness to view a total transfer of responsibility to the Commonwealth as a positive prospect. Three Vice Chancellors cited the cost of implementation of the HEIMS in the vicinity of \$1-2 million for each of their universities. Administration of data collection and reporting diverts significant resources from student service into administrative functions. It is also having the unintended and perverse consequence of enforcing conformity at a time when universities are trying to be more flexible, more committed to specific and diverse missions and more responsive to market forces. The locus of jurisdiction is irrelevant or at worst, if centralised, could exacerbate this serious problem.
4. The reasons advanced in the scoping document in support of the proposal were regarded universally as either minor issues, irrelevant or not necessarily best addressed by a transfer of jurisdiction. Even those Vice Chancellors who supported the proposal did not believe the advantages cited in the paper were relevant. If transfer of responsibility does occur its benefits will need to be counted in areas other than those described in the discussion paper.
5. The time has come for discussion and consultation on the nature of the contract between government and public and private universities. Australia needs a comprehensive national vision for higher education which is not captive to short term expediencies, poorly conceptualised workforce shortages and factional community issues. This discussion should involve the States and Territories and does not necessarily involve transfer of jurisdiction.
6. Nowhere is this national vision and strategy more necessary than in the presentation of "Brand Australia" in the global market for both international students and research and development opportunities. Vice Chancellors, in the majority, are not threatened by external providers entering the Australian market. They believe that they will fare well in competition. However,

they are extremely concerned that the brand identity of “Australian university” not be degraded by lowering the criteria necessary to use that title. Strong national enforcement of criteria for university accreditation and the quality framework are required. Vice Chancellors support a national approach to accreditation as well as quality and since AUQA currently operates it is evident that change of jurisdiction is not required to achieve a national accreditation process.

7. Wherever the locus of control for universities ultimately resides the legislation must preserve the independence of universities’ scholarly activity from political manipulation. If this is not achieved Australian universities risk significant loss of stature in the global community. Since higher education is a major export commodity its integrity must be guaranteed in the same way that Australia’s food exports guarantee safety and freedom from disease. Thus far Australia has concentrated its efforts on the quality of Australian universities’ product. In a more socially and politically aware world we will also have to guarantee the scholarly and academic independence and integrity of our educational product. The legislation and administration that governs Australian universities must guarantee academic integrity as well as quality if market position is to be competitive.

1. Questions about implementation – “the devil is in the detail”.

It was felt strongly that the scoping document provides insufficient detail to allow an informed response to the proposal. A great deal more information is required concerning:

- 1.1 The nature of the proposed legislation and whether it would be a single Universities Act with individual schedules or a range of Acts covering individual universities or groups.

The legislation would need to be uniform, simple and consistent but with different constitutions or charters for individual institutions to protect regional interests.

- 1.2 Safeguards to ensure independence from political direction of academic endeavour.

- 1.3 The cost and impact of the Commonwealth assuming States' responsibilities (for example the auditing and ombudsman functions) and whether the additional cost would be met from the Universities' grants.

- 1.4 The extent to which a transfer of legislation would relieve statutory obligations under State legislation or risk even greater duplication and confusion.

- 1.5 The management and ownership of university assets which in some cases include considerable CBD real estate, and in others involve a range of leasehold, freehold and Crown land, some purchased from sources other than government funding.

- 1.6 The implications for the five dual sector universities (Victoria, Ballarat, RMIT, Swinburne, Charles Darwin).

Where do dual sectors fit – there is a significant level of passionate support in Victoria and they would not yield. Dual sectors have not yet realised full potential as a one stop shop for seamless education. The opportunities are excellent for controlling part of your own supply chain – it gives a huge competitive edge.”

For dual sectors it would be a quagmire of state/Commonwealth conflict.

Any changes to legislative arrangements for higher education that might impact on the relationship with VET need to be very carefully considered.

- 1.7 The national “master plan” for education. How will “Brand Australia” be protected and national accreditation protocols enforced? Where does this proposal sit against future plans for technical and school education? For example, one Vice Chancellor expressed succinctly the concerns of many in relation to the federally funded technical colleges. While these could have been an opportunity to develop a strong upper tier of technical education like the Singapore Polytechnics which could articulate with the Universities profitably they appear to be operating only to compete with TAFE. The reason for this as an academic (as opposed to an industrial or political) objective is a mystery to all Vice Chancellors.

2. Vice Chancellors’ views about the transfer of legislation.

2.1 It would be neater and more logical

Most Vice Chancellors concur that the present situation is not logical and is a historical anomaly. A more logical arrangement has inherent attraction.

In a greenfields situation the current arrangement does not make sense but it does not have a huge negative impact.

It is a more consistent policy in theory. But double reporting is not too bad.

It is tidier conceptually but practically has no impact.

2.2 It is inevitable

A small group (less than 5) regard the transition as inevitable and of little practical consequence for their university or for the sector.

If it happens I’ll do my job and make it work

2.3 What’s the real agenda here?

A larger group regard the transition as unnecessary and carrying high risk for both their institution and for the sector.

Nothing in my recent experience leads me to believe that Commonwealth control over universities will reduce red tape and increase efficiency and effectiveness in the sector.

Ninety nine per cent of oppressive regulation requirements emanate from the Commonwealth so it needs radical revision..... there is considerable anxiety that the potentially moderating impact of the State would disappear.

The logic of one standard legislation and reporting makes sense. But this is the worst time ever to ask for more power because there is a level of distrust with the increase in red tape since the Nelson reforms. The State government is something of a backstop.

2.4 It isn't broken – why fix it?

The majority see no imperative for change and regard the potential impacts as unpredictable in the absence of greater clarity about the ultimate shape of new legislation and its administration.

The potential benefits are small and uncertain, the risks are great.

No coherent case has been made for a takeover.

There is only a small issue with respect to efficiency and effectiveness of dual reporting and this could be fixed by better MCEETYA function.

It would be inevitable that legislation would tend towards making the system more uniform – it would need to safeguard regionality and specific local flavour.

The Commonwealth would need to provide incentives for cooperation. Reassurances about safeguards would not help because reassurances have not been effective in the past.

The state legislation guarantees rights to pursue knowledge, to set profiles and autonomy. Even though the Commonwealth can erode this an overly centralised system could lead to control rather than a facilitatory environment.

2.5 What will be the checks and balances?

All Vice Chancellors acknowledge that the Commonwealth Minister can bring about significant change through funding conditions under the present arrangements, but the need to

consult States can protect against precipitate paradigm shifts. In the absence of this requirement for consultation most express a preference for an alternative type of consultative mechanism as a moderating influence.

The biggest potential threat is merging of regional institutions but the political fallout would be greater for the States than the Commonwealth so the States would protect regional universities from that happening.

Virtually all, even those who are supportive or not concerned about a change, are concerned about the threat to university autonomy. All are aware that “autonomy” is a much maligned and abused concept, but all are adamant that autonomy in its real sense* is critical if Australian higher education is to remain in the first rank internationally.

*[autonomy: 1 self-government. 2 freedom of action. ORIGIN Greek *autonomia*, from *autonomos* ‘having its own laws’ (Oxford on line) OR 1: immunity from arbitrary exercise of authority: political independence (Wordnet Princeton)].

Most Vice Chancellors indicated that State governments can also pose risks to university autonomy although the combination of legislative responsibility with control over funding does increase and centralise the power and therefore the risk.

The transfer of legislation will simply stimulate the debate about who ‘owns’ the universities. Governments don’t own the universities. Universities belong to a number of communities of interest. They must be accountable to an independent governing body for delivery of their agreed mission, not the service of political interests

Universities need an environment where they can make their own future.

Universities need opportunities to take chances in the market and develop product lines – to do otherwise is an anti-competitive position.

Universities need to test boundaries and need broader support in testing new boundaries. Purchaser/provider is a two way deal. Universities should have the right to say that they won’t provide what the government wants to purchase.

Universities should still be able to set their own mission.

Vice Chancellors are not only mindful of, but concerned about their ability to service their mission for local as well as national and international communities. They readily acknowledge a responsibility to be accountable for efficient and effective use of public funds. Without exception, however, they are concerned about political “censorship” of courses and research effort that have been through properly constituted development and approval processes. The recent Ministerial rejection of ARC funding recommendations for several peer reviewed grants was raised by many as an example of “the thin edge of the wedge”.

Universities are the last bastion of free speech.

Universities must remain independent of political influence – the other way is the way of totalitarianism.

Even for those who accepted and supported a transition to Commonwealth legislation a universal caveat was that the legislation and its administration must guarantee autonomy and independence and protect from the arbitrary exercise of political power. This is not to say that Vice Chancellors expect or want freedom from contractual obligations to government.

Central to a guarantee of autonomy is the need for agreement and consultation about the manner of appointment of governing bodies and the clarification of the contract between government and public universities.

2.6 Canberra is too far away

This fact looms large, especially for Western Australia, Northern Territory and for regional universities. Even with the best of intentions ‘Canberra’ (both Ministers’ offices and bureaucracy) are seen as Melbourne/Sydney centric. It is obvious that a deep understanding of local conditions and needs is most likely to exist at local and State levels.

Frequently Vice Chancellors stated that it was difficult to help DEST to understand the peculiarities of specific local circumstances. Instances were cited where certain disciplinary places were provided for a remote area where the real need based on more complex local analysis was for another discipline. Many universities had benefited from support by State Ministers when negotiating such issues with the Commonwealth – they did not wish to lose that source of support.

2.7 Centralisation leads to standardisation

Virtually all Vice Chancellors cited the paradox that while policy and rhetoric encourage diversity in the sector the reporting requirements enforce homogeneity.

If we are encouraged to diversify why are we criticised for being different?

For example, in the Institutional Assessment Framework, some universities are identified as falling outside the sector norm on certain indicators without recognition that the nature of their mission or their local context drives their statistics in ways that do not conform to the sector norm. A good example of this is progression rates and completion rates in universities whose mission rests heavily on access and equity for disadvantaged or mature aged students.

There is a view that the States' interests provide the only counterweight to protect those with such missions against the pressures towards uniformity. Should States lose interest in their universities the trend towards differentiation in service of local contexts may be lost.

Contributing further to this potential problem is the expectation that administering a national set of legislation and governance will be a complex process and would force a tendency towards standardisation in the interests of efficiency.

There is a lot of talk about differentiation but we could end up with universal blandness.

3. The relationship with the States and Territories

There was no discernible pattern of response to this question or indeed to the proposal itself. Universities did not divide neatly along the predictable lines ie, between States, regional versus metropolitan, research intensive, technological, new generation etc.

Differences appeared to relate largely to the experiences of the individual university and Vice Chancellor in his or her interactions with the State and Commonwealth bureaucracies.

It was generally acknowledged that the States and Territories vary in their attitude to the proposal as well. All are aware that New South Wales is in favour of a transfer, that Queensland is not, and most believe that while some States do not favour the proposal they may be prepared to entertain discussion. A few

Vice Chancellors believe that there is “no chance” of agreement, a few believe that it hinges on “the size of the incentive”.

Common themes in the relationship with the States emerge:

3.1 Payroll tax and other local taxes

All universities believe that payroll tax is an unreasonable imposition which siphons Commonwealth higher education funding into State treasuries.

Some universities also have to bear local government land rates, others have fought successfully for exemption with assistance from State government. On the other hand at least one university has received funding from local government for the establishment of several Chairs.

3.2 Partnerships in social and economic development

Virtually all States and Territories regard universities as important contributors to economic and social development. Some express this partnership largely at the level of rhetoric, but some invest considerable resources in joint development projects. For example, Vice Chancellors from Western Australia, Tasmania, Queensland and Northern Territory spoke very positively of the support they received from several portfolios in their State governments in leveraging their capacities with industry, collaborating in research and marketing internationally.

Regardless of levels of support, however, financial contributions occur largely in the establishment of partnerships with research institutes in which the university is often expected to match State grants. In the past there have been a few instances of State funding of student places in areas of need but this is rare. Most States have provided capital funding, most have been helpful in provision of leasehold land. In some instances some universities benefit from considerable CBD real estate assets derived principally from State resources.

Most regional universities enjoy productive relationships with local communities, local governments and local State and Federal Members of Parliament. Regional universities in the larger States tend to believe, however, that State governments' attention is focused predominantly on metropolitan universities, although some concede that they need to be more active in advancing proposals for consideration.

Regardless of the level of resource support available from States, however, it was an almost unanimously held view that universities benefit from their State having some “ownership” and pride in their reputation and achievements. A majority believe that this special relationship would suffer and that States would “walk away” from supporting the universities if they were no longer in their jurisdiction.

Universities are attuned to State agendas. The relationship is based on mutual interest..... the States help to find allies and partners.

There is a lot of fundamental research needed in local areas to fix social and environmental problems – this could get lost at the national level – there are strong social objectives in action based research.

Over time it would be an inevitability that the State government will lose all interest.

There is a real risk that non-metropolitan universities would get lost and not heard or seen. Their voice and clout is different – due to their constituencies and embeddedness in the regions where it is not as easy to have strong friends and advocates and where partnerships are more difficult.

It could decrease diversity with neglect of regionals and drift into the TAFE sector. But on the other hand state legislation doesn't promote diversity. It's all theoretical constraints and constructs.

A small minority of Vice Chancellors took a different view:

I would not anticipate a change in relationship with the State if the Commonwealth took over – it is all about personal relationships. The Minister can direct traffic into priority areas now if he wants to. It would be difficult to disadvantage any state without a fuss erupting anyway. In many ways if one Minister is responsible it makes it even more visible if he plays around. The Minister is much safer in a fuzzy environment. The more centralised the control the more vulnerable he is.

3.3 Governing Councils

While acknowledging scope for some improvements most Vice Chancellors are satisfied with the way their governing bodies

are appointed and function under the new national governance protocols.

The processes of consultation for appointment vary from State to State and in some States there is strong criticism of unnecessary delay in the process.

Vice Chancellors are concerned that appointments to governing bodies should allow for proper governance of the university as a business but be balanced also with membership from within the university sector. There is a concern, which remains whether State or Commonwealth jurisdiction applies, that governing bodies function to advise the individual institution in the achievement of its mission, not to represent political interests.

The university system represents different theatres of interest across the country. Governing boards could be too much at the mercy of local interest groups – if they were determined federally would they be influenced unduly by the local Minister or MP of the day?

I would want a guarantee that the university could put up its own governing body and that the Commonwealth would give that serious consideration.

Council members are independent advocates. There would be huge anxiety about political appointments on the Board.

Many Vice Chancellors fear that Commonwealth ownership of university legislation would result in appointments to governing Councils which represented the business interests of the university well but failed to recognise or support the special features of its academic mission.

We need to balance the corporate and collegiate nature of universities.

There is a risk in the Commonwealth appointing Council that they would see universities just as businesses – it needs a balance between business acumen and guardians of academic excellence.

3.4 Intangible support

Many Vice Chancellors spoke of the benefits of having the State government as “another port of call”.

Some said that when a Commonwealth Minister comes up with “a bright idea overnight” the necessity to consult with the States “slows things down a bit” and allows more consultation to work through the problems and improve the outcomes. Others had found State Ministers helpful advocates in putting a case before the Commonwealth or brokering other difficult issues eg midwifery insurance. All were appreciative of the ceremonial functions performed by State MPs and Governors. In many cases Vice Chancellors undertake overseas trade missions with State Ministers and Premiers and believe that this would be less likely to happen if responsibility were transferred.

Several had discussed the proposal with their Chancellor or Council and reported that they were not supportive of the proposal, others had not yet consulted but believed that they may not be supportive. In one case the view was expressed that the Council believed that its contribution to the University was also a contribution to the development and wellbeing of their State.

Most Vice Chancellors (with only a few exceptions) believed that a transfer of their university to Commonwealth jurisdiction would jeopardise the intangible benefits they gain from their relationship with the State.

At its most explicit the concerns of a few Vice Chancellors are reflected in the statements:

The State government is likely to be much less happy [than the Commonwealth] about ‘disappearing’ a small university.

If universities are under federal control they are vulnerable to ideologies that negate university values, integrity and academic freedom. The states have a post 80s hang up in risk management but are easier to persuade about academic values and integrity. This is not just about personalities or politics it has to do with proximity – the university is closer to home and there is more support for academic values.

4. Issues regarded by Vice Chancellors as higher priority than jurisdiction transfer

Strong views were expressed by the majority that the present proposal is a distraction and diversion from more important issues facing the sector. Those issues include:

- 4.1 The need to engage a debate about “what is a university, what is autonomy, what is the idea of a university in the modern world?”
- 4.2 The declining state and affordability of university infrastructure including libraries and information communications technology and the need for national investment in higher education for the future of Australia.
- 4.3 The high risk to the Australian higher education sector through its growing financial dependence on the international market, and the need for an effective whole of government strategy for market development in an environment of heightened competition and risk (eg SARS).
- 4.4 The need to clarify and enforce the definition of an Australian University. The prospect of “teaching only universities” has been raised by the Minister and is regarded by the great majority of Vice Chancellors as a risk to Australia’s international reputation. Many Vice Chancellors, across the spectrum of universities, dispute the existence of universities without scholarly or research infrastructure and recommend a more detailed survey of both US and European practice before that model is accepted. They argue that the term university should be restricted to institutions involved in teaching and learning in a scholarly environment. The term “college” is preferred for a “teaching only” institution to protect Australia’s international reputation and market position.

Definition of a university – in the good US undergraduate colleges staff who teach senior years all do research and scholarly activity.”

- 4.5 The need to make explicit the contract between the Commonwealth and universities. In a purchaser/provider environment is the university required to provide what the government wishes to purchase or is it free to set its own agenda with earned revenue?

There need to be safeguards on the degree of academic self-determination. It is OK for the Commonwealth to say they won’t fund a course but not OK to say that the university cannot offer it.

- 4.6 The need to address the anomalous situation of public versus private universities. Several anomalies were identified. Public universities’ revenue sources are increasingly “private” and earned revenue exceeds government operating grants in most cases. As government funding has decreased sharply government regulation has increased sharply. At the same time

private universities in receipt of government funding are not subject to the same regulation and reporting costs as public universities.

5 What the higher education sector needs

5.1 A stable policy environment and national vision based on consultation

Vice Chancellors, in the main, want a stable national policy environment to facilitate the difficult job of forging a future for universities which are facing major challenges on several fronts.

This is an opportunity to rethink major issues – go back to basics.

No matter who is in charge of the legislation we need to rethink what is needed – is the government providing base funding or strategic funding?

This should be an opportunity to relook at the whole situation and decide what regulation is really necessary.

We need to ask: what are the objectives, what are we trying to achieve?

“We need to find a way of linking universities and other educational institutions with national and state imperatives for social and economic development rather than leaving it to chance.

There needs to be a balance between State and Commonwealth interests – whether legislation transfer is the answer is not sure – it may be an overcorrection.

If the government is fair dinkum it will take a ‘whole of government approach’ so that universities can get support for all of their endeavours globally. Commercial activities are mainstream business to benefit the running of universities but the government pays only lip service to globalisation.

5.2 Protection from arbitrary or ideologically motivated decisions

A university grants commission could mediate and limit the pork barrelling. There is a risk of manipulation by constant changing of the Act. While

this can occur via funding conditions, changing the Act is a bigger problem.

Role for a buffer body would become increasingly important and highly desirable.

There should be a buffer body with membership negotiated between States and Commonwealth – this could work but it needs to be agreed.

There is no problem with a rationalised reporting and accounting system but a partnership [State and Commonwealth] responsibility is probably the ideal one.

At the moment the states get glory without cost – it is a good and sensible thing but better way forward is ACCC type body – national regulation without transfer of assets – should pursue a joint State/Commonwealth independent regulatory body.

There would need to be a tripartite agreement on how state interests would be protected and how universities' interests would be protected from political manipulation.

We need to create a Council that is independent of government and DEST - a CTEC body with appropriate terms of reference and composition, restriction of political appointments – but that might create another form of double handling.

However, a sizeable minority doubt that a buffer body would be helpful or feasible:

The risk is that it might end up like hospitals in a bunfight between State and Commonwealth.

No real safeguards are possible – there is always a risk of legislation change – even the states can do it but presumably there would be widespread debate before the Commonwealth changed it [legislation]. In the State every new government looks at the legislation to see if they can get more control.

All universities will have issues at federal, state and local levels. Nothing will protect us from capacity of all levels to legislate.

Inevitably some sort of buffer body would be needed but buffer bodies have not really worked in the past.

A buffer body is desirable but CTEC and its NZ equivalent just result in an expanded bureaucracy.

An independent buffer body could moderate but may also decrease the capacity of the VC to get to the Minister.

5.3 A National Accreditation Process and Collaboration

There is unanimous support for a national collaboration to oversee accreditation of private providers and facilitate other types of national activities. There is an equally unanimous view that transfer of jurisdiction is not necessary to cause this to occur.

Most Vice Chancellors are also concerned that application of the National Accreditation Protocols is patchy and that “BRAND AUSTRALIA” will suffer as a result.

We need greater consistency in the way the States work – this could be done through MCEETYA as a consultation process.

We need to encourage collaboration and cooperation but we don't need control we need incentives. Decentralising DEST could also help it. A lot could be done to improve the present situation and it does not make a lot of sense to do it state by state.

National accreditation would be a positive and would avoid some States having to deal with the problems more than others.

We have to trust government to maintain standards – government should be all about quality – single government won't make a difference.

We could have a national accrediting body but why not a State/Commonwealth panel?

Would prefer a strong national accreditation system – at the moment too loose with approvals. National protocols are not always followed – private providers go bust and the public system picks up the pieces and the bad publicity. Need to define it in more detail and stick to it. It seems that the Commonwealth is

not prepared to bite the bullet on the small businesses. It's a disgrace to Australia.

One Vice Chancellor would:

welcome a national approach to credit transfer, accreditation of providers, recognition of overseas degrees. National profiling could also help eg the debate about whether we have too many law students needs to be discussed not just based on the mythology..... Could also benefit from national protocols to help universities working across state boundaries more effectively. At the moment it works like piracy where you repel all boarders.

Only one Vice Chancellor expressed a concern about increased competition from private providers:

A national accreditation body could be useful but we need to fend off competition. The States are more likely to want to support local universities rather than let in competitors from overseas so we might be worse off with a national accreditation body.

5.4 More flexibility to set their own agenda

A unanimous and strongly expressed view was that the sector had never been more tightly regulated or controlled but that the benefits of that regulation were not apparent and were, in many cases, inhibiting achievement of stated policy objectives such as sector diversity. Most pointed out the contradictions between the rhetoric of university reform and the reality.

The Commonwealth needs to walk the walk as well as talk the talk.

The new arrangement in which universities enter a contract for specific student places gives limited if any capacity to shift load – need to increase flexibility. Can understand some need to contract for teaching and nursing places but others need to be more flexible.

Even subtle changes in load resulting from students changing their electives can distort the load profile in such a way as to require Commonwealth permission to change the profile. This is perverse – we want to offer students flexibility and choice.

A companion to any legislation change should be a decrease in regulation.

At the moment the government wants universities to behave like business but makes it impossible by interfering at every level.

Conclusion

In conclusion there is more commonality in Vice Chancellors' views than might have been anticipated. It is not possible to say that a certain percentage support the proposal and a certain percentage do not because their final views depend on details which are not yet available.

There is a virtually universal view that States bring a lot to the partnership and any arrangement that jeopardises that input should be viewed with considerable caution and avoided.

There is an equally universal view that regulation of the sector is "out of control" and making unreasonable demands on universities' scarce resources. Since assurances from the Minister that red tape and bureaucracy would be reduced as a result of recent reforms have proven to be the reverse of the actual outcome Vice Chancellors are reluctant to trust further assurances of a similar kind.

Recent experiences of this kind have confirmed for all of the Vice Chancellors a need for a moderating influence on decisions that affect the sector. While the States' role as a moderator may be present more in theory than practice there is a strongly felt need for some process that will guarantee debate and consultation before changes to the sector that have far reaching impacts can be made.

Wherever the locus of control for universities ultimately resides the legislation must preserve the independence of universities' scholarly activity from political manipulation. If this is not achieved Australian universities risk significant loss of stature in the global community. Since higher education is a major export commodity its integrity must be guaranteed in the same way that Australia's food exports guarantee safety and freedom from disease. Thus far Australia has concentrated its efforts on the quality of Australian universities' product. In a more socially and politically aware world we will also have to guarantee the scholarly and academic integrity of our educational product.

The legislation and administration that governs Australian universities must guarantee academic integrity as well as quality if market position is to be competitive.

Appendix A

Process of Interviews.

A letter from DEST to the AVCC announced the purpose and process of the interviews.

Interviews were informal and of about one hours duration. Vice Chancellors were invited to comment and specific issues were followed up. Interviews were not recorded for privacy reasons but notes were taken and transcribed.

All interviewees were assured of anonymity

Appointments for interviews in person or by phone were arranged by the consultant for the period from December 13 2004 to January 28 2005. Owing to time constraints four universities were invited to submit written input in response to the same questions as were addressed in interviews.

The following Vice Chancellors were interviewed in person:

Professor Denise Bradley	University of South Australia
Professor Gavin Brown	University of Sydney
Professor Ian Chubb	Australian National University
Professor Paul Clark	Southern Cross University
Professor Peter Coaldrake	Queensland University of Technology
Professor Roger Dean	University of Canberra
Professor Anne Edwards	Flinders University
Professor Liz Harman	Victoria University
Professor John Hay	University of Queensland
Professor Richard Larkins	Monash University
Professor Daryl Le Grew	University of Tasmania
Professor Ross Milbourne	University of Technology Sydney
Professor Bernard Moulden	James Cook University
Professor Michael Osborne	LaTrobe University
Professor Millicent Poole	Edith Cowan University
Professor Alan Robson	University of Western Australia.
Professor Nick Saunders	University of Newcastle
Professor Peter Sheehan	Australian Catholic University
Professor Gerard Sutton	University of Wollongong
Professor Paul Thomas	University of Sunshine Coast
Professor Lance Twomey	Curtin University
Professor Mark Wainwright	University of NSW
Professor Sally Walker	Deakin University
Professor Chris Whittaker	Royal Melbourne Institute of Technology
Professor Di Yerbury	Macquarie University
Professor Ian Young	Swinburne University
Professor John Yovich	Murdoch University

The following Vice Chancellors were interviewed by phone:

Professor Kerry Cox	University of Ballarat
Professor Glyn Davis	Griffith/Melbourne
Professor Helen Garnett	Charles Darwin University
Professor Bill Lovegrove	University of Southern Queensland
Professor James McWha	University of Adelaide

The following Vice Chancellors responded in writing:

Professor Ian Goulter	Charles Sturt University
Professor Ingrid Moses	University of New England

The following Vice Chancellors had not provided a response at the time of writing

Professor Jan Reid	University of Western Sydney
Professor John Rickard	Central Queensland University

REGULATORY FRAMEWORKS AND GOVERNMENT RESPONSIBILITIES FOR A DIVERSE HIGHER EDUCATION INDUSTRY

G. Craven
D. Phillips
P. Wade

1 INTRODUCTION

Much of the recent public discussion about the respective roles of the Commonwealth and State Governments in relation to higher education has focussed on the question of which level of government should ‘own’ the established public universities. This paper takes a broader perspective, considering the possible responsibilities of the two levels of government for the increasingly diverse and competitive higher education industry as a whole, including the existing public universities, existing private institutions, and any new public or private providers that may seek to operate in Australia in the future.

The paper examines the changing context in which higher education institutions operate, the implications of the current division of governmental responsibilities between the Commonwealth and the States from the perspective of the industry as a whole, then considers some alternative models. In developing the models we have considered the range of approaches adopted to the establishment and ‘ownership’ of universities in Australia and other countries. We have also had regard to examples in sectors outside of higher education where the Commonwealth’s constitutional authority to establish a national legislative and regulatory structure has not been clear cut.

2 CONTEXT

The *Crossroads* discussion paper, Meeting the Challenges: The Governance and Management of Universities, correctly observed that:

Over the past decade the environment in which universities operate, and the academic enterprise itself, have changed dramatically. This presents a range of challenges to the way in which universities are governed and managed and poses questions about what they are accountable for and to whom. (p2)

This situation is not unique to Australia. For example, the US Association of Governing Boards of Universities and Colleges recently observed that:

both states and their higher education enterprises are asking whether their traditional relationship remains viable in an increasingly market-driven

*higher education environment, one in which the state agency model of governance may no longer make sense.*¹

The changes noted in the *Crossroads* discussion paper include:

- Expansion in the provision of higher education;
- Diversification of university revenue ‘*characterised by very rapid growth in commercial activity that embraces the sale of education services, the sale of consultancy services, the management of intellectual property and the commercialisation of research*’ (p3);
- Dramatic growth in the export of education services, with the most rapid recent expansion occurring offshore; and
- A major reduction in the share of university revenue provided by the Commonwealth Government.

It is important to understand the dimensions of these changes.

Since the start of the Dawkins reforms in 1988, the number of students has doubled. The number of overseas students has increased more than nine fold. Over the last decade, from 1993 to 2003, the total number of students has increased almost one and a half times over and the number of overseas students has increased more than four and a half times. The number of students offshore has nearly doubled in just the last four years.

While the large majority of higher education students are taught by the ‘public’ universities, there are now around 100 registered ‘private’ providers of higher education. Further rapid growth in this area is anticipated following recent policy changes which extend income contingent loans to students in recognised higher education providers and increase the amount of Commonwealth funding for teaching provided to ‘private’ institutions. It is reported that almost 30 ‘private’ institutions have already been approved for the FEE-HELP scheme.

Over the decade to 2003, ‘public’ university revenue almost doubled (in dollar terms). Fees and charges (excluding HECS) almost quadrupled. As a proportion of revenue, fees increased from 12% to 23%, while Commonwealth Government grants (excluding HECS) fell from almost 56% to under 40%. Australia’s most privately-funded ‘public’ university, Central Queensland University, derives only 26% of its operating revenue from the Commonwealth.

Commercial activities in addition to the teaching of fee-paying students have multiplied. The *Crossroads* discussion paper notes that in 2002 there were more than 300 commercial entities operated by Australia’s ‘public’ universities.

These changes have been influenced by Government policies, but they have been driven by more fundamental forces that have been felt in the higher education systems of every developed country: globalisation; growth in demand for higher education linked to the development of the knowledge-based economy and rising incomes; the

¹ Association of Governing Boards of Universities and Colleges. Center for Public Trusteeship and Governance, *State Governance Action Annual 2004 Balancing Act: Public Higher Education in Transition*, 2004.

inexorable advance of technology; constraints on public expenditure; and increasing competition both domestically and internationally.

In short, the Australian higher education sector is much larger in scale and in the number and range of providers than it was when even the most recent of the 'public' universities was established. Australian 'public' universities are much more complex and commercial entities than they have ever been, and all providers operate in a much more complex, global and competitive environment than ever before.

It is now surely correct to characterise higher education in Australia as a major industry. It shares many of the characteristics of the health care industry: offering a mix of both public and private benefits; being funded from a mix of public and private sources; involving an increasingly diverse range of 'public' and 'private' providers; and presenting complex challenges for regulation, accountability and ownership.

Higher education is also a genuinely national and international industry, with providers offering services and recruiting staff and students across State, Territory and national boundaries. Australian higher education qualifications provide entry to national and international labour markets and are recognised nationally and in many other parts of the world. Australian institutions compete with institutions from all over the world, especially for international students. Most Australian higher education providers teach at least some students from other States and overseas, a substantial number of providers operate campuses in more than one State and some operate campuses in more than one country.

While it is clearly a national and international industry, higher education is also a highly significant industry at a regional level and, in our federal system, at a State level. It is a major contributor to regional economies and labour markets and interacts directly with the school and vocational education and training (VET) systems in each State. Even in the absence of the constitutionally determined responsibility of the States for education, State and Territory governments would have a strong and legitimate interest in the establishment, output and quality of higher education institutions, and in the regulation of the higher education industry within their borders.

Higher education providers and students also have particular interests in the way in which governments discharge their responsibilities in relation to the industry. Providers need a stable, nationally consistent regulatory framework that sets a fair basis for competition and does not unreasonably infringe their autonomy to determine the nature of the teaching and research they undertake. Students need reasonable levels of assurance about the quality and continuity of the programs in which they enrol and the status and recognition of their qualifications.

So how might the responsibilities of State, Territory and Commonwealth governments best be configured to maximise the public benefit from the higher education industry while recognising the particular interests of the other key stakeholders in the industry and the increasingly complex, global and competitive environment in which it operates?

3 Government responsibilities

It is useful to distinguish three types of functions performed by both the States and the Commonwealth under current arrangements. These three functions are not the only ones performed by governments in relation to higher education but, significantly, they are currently shared in various ways between the two levels of government. The three types of functions are:

1. Contributions to land and infrastructure
2. Purchase of educational and research services
3. Regulation of the industry
 - Including establishment and ‘ownership’ of ‘public’ higher education providers.

3.1 Contributions to land and infrastructure

Both State and Commonwealth governments provide financial and in-kind contributions to the land and infrastructure of higher education providers². The extent of the contributions varies greatly between institutions, related in an ad hoc way to history, location and effectiveness of political lobbying.

While the majority of land and infrastructure contributions have been made to the ‘public’ universities, both levels of government have also made contributions to ‘private’ institutions. Both ‘public’ and ‘private’ institutions themselves also purchase land and infrastructure from their own resources and some have received substantial private donations and bequests. As a consequence there are complex and varying mixes of provisions relating to the legal ownership of land and buildings and to the capacity of institutions to sell or lease out their land and infrastructure or otherwise vary the purposes for which it is used (see section 4.1.2 below).

3.2 Purchase of services

Given the public benefits of higher education and research there are clear reasons for government to be involved in the purchase of these services. Government has a responsibility to ensure the provision of an optimum number and quality of higher education places, fair access to those places on the basis of merit, and an effective research base to support innovation and a civil society. These outcomes could not be secured without public funding.

This type of public funding has moved over the last 20 years from undifferentiated block grants for general recurrent purposes to an increasingly specific purchase of defined services. Basic research is purchased in the form of specified projects or programs. Applied research is purchased in the form of R&D contracts. Teaching

² In general, the States’ contributions have been in-kind, for example through land grants, while the Commonwealth’s contributions have been financial, through direct capital funding. As a result the full contribution of the States to higher education finances is not captured in annual revenue statistics.

services are purchased either on a fee-for-service basis or in the form of funding agreements for a defined number and discipline mix of student places.

Again, both State and Commonwealth governments purchase services, including student places, from both 'public' and 'private' providers. The Commonwealth is the principal player and it has moved quite deliberately in recent years to clarify the purchaser-provider nature of its relationship with universities and other higher education providers, even if the relationship is not yet formally described in those terms.

While the majority of the services are purchased from the 'public' universities, there is no reason in principle why a greater share could not be purchased from 'private' providers – as occurs in the secondary school and VET sectors – provided that there is an adequate regulatory and accountability system in place. Indeed, it seems clear that the Commonwealth is moving cautiously in this direction. The new *Higher Education Support Act 2003* establishes the conditions under which any body corporate may be recognised by the Commonwealth as a higher education provider and become eligible for funding for student places in national priority areas and for the FEE-HELP loan program.

3.3 Regulation of the industry

There is a clear case for government regulation of the higher education industry given its economic and social importance, its complexity, the need for consumer protection, the risk of reputational damage to the industry as a whole from individual provider failures, the need to protect the integrity of qualifications and titles (including the title 'university'), and so on. There are additional regulatory and accountability requirements that governments may wish to set as conditions if public funds are used to purchase services from a higher education provider. There are also particular requirements where students have access to government-supported loans that are repayable through the tax system.

We can identify five different types of regulation affecting the establishment and operation of higher education providers. These relate to:

1. The operation of higher education providers as public or private corporations
2. Conditions attaching to the purchase of services or access to other forms of government support and systems (like HECS-HELP and FEE-HELP)
3. The provision of educational services to overseas students
4. The accreditation and recognition of higher education courses and providers, both 'public' and 'private', Australian and overseas
5. The establishment of 'public' providers and the specification of their scope and powers.

The first of these categories encompasses the wide range of provisions that apply under State and Commonwealth law to any corporate entity that employs people, conducts business, owns land and buildings and so on. These provisions are, in general, not specific or unique to higher education providers. For this reason we have not focussed on these types of provisions in this paper.

The second category, relating to conditions attaching to the purchase of services and related activity, covers for example most of the provisions of the *Higher Education Support Act 2003* which set out the requirements on higher education providers that receive Commonwealth funding and offer Commonwealth supported student loans. These types of provisions would continue to apply regardless of the level of government that 'owns' the 'public' universities or the form that ownership might take.

The third category sets the conditions which apply to providers that offer services to overseas students. The principal legislative instrument is the *Commonwealth Education Services for Overseas Students Act 2000*, but that Act is given effect through co-operative arrangements between the Commonwealth and the States.

The fourth category covers the range of provisions governing the recognition of higher education providers, the use of the title 'university' and related terms, and accreditation of higher education programs. These provisions rely principally on the constitutional responsibility of the States for education.

The fifth category, relating to the establishment of 'public' providers and the specification of their scope and powers, includes all of the Acts used by both State and Commonwealth Governments to create the 'public' higher education institutions and determine their functions.

Together the second, third, fourth and fifth categories comprise what might be called the regulatory framework for the higher education industry, as opposed to the general legislative provisions that are not unique to higher education (category 1).

Given the increasing number and diversity of higher education providers, it is highly desirable that the regulatory framework for the higher education industry should indeed set an effective framework for the industry as a whole and not be overly focussed on (the minority of) providers established by government statute.

Given the national character of the industry, the regulatory framework should also ideally be genuinely national as far as that can be achieved having due regard to the realities of our federal system. For example, the regulatory framework ideally should be blind to the location within Australia that a provider operates or seeks to establish. International students should have the same degree of consumer protection regardless of where in Australia they study. The term 'university' should carry the same legal meaning in all parts of the country. 'Public' universities should have much the same scope and powers in all States, and so on.

Currently the Commonwealth regulates and sets accountability requirements for those providers from which it purchases services or which have access to Commonwealth supported student loans (category 2 above). However the Commonwealth has no direct powers in relation to the general regulation of educational services and providers (categories 3 and 4) and only limited powers to establish higher education providers (category 5).

Because it has no direct powers to regulate the industry generally, the Commonwealth has sought to establish co-operative arrangements with the States to secure nationally consistent approaches in key areas. There are three principal examples of such arrangements:

- The National Protocols for Higher Education Approval Processes (the National Protocols)
 - whereby State authorities perform institutional recognition and course accreditation functions in line with a single agreed set of broad ‘protocols’
- The Australian Universities Quality Agency (AUQA)
 - which conducts quality audits of self-accrediting Australian higher education institutions and State and Territory Government higher education accreditation authorities
 - AUQA was established by the Ministerial Council on Education, Training and Youth Affairs (MCEETYA) and is jointly owned and funded by the Commonwealth, State and Territory Ministers for higher education who are members of MCEETYA
- The National Code of Practice for Registration Authorities and Providers of Education and Training to Overseas Students (the National Code)
 - the purpose of which is to provide nationally consistent standards for registration by the States and Territories of providers of services to overseas students and for the conduct of those providers. The National Code relates to all education and training sectors, not just higher education.

It is inevitable that a system based on the implementation of broad protocols and codes by nine separate jurisdictions will feature differences in application and duplication of effort. A first question for the current debate is whether the present configuration of responsibilities for the general regulation of higher education services and providers between the States and the Commonwealth is the best we can achieve.

In relation to the establishment of ‘public’ providers and the specification of their scope and powers (category 5), under current arrangements the Commonwealth has no general authority to establish and ‘own’ universities, although it has relied on particular areas of constitutional power to establish the Australian National University (ANU) and the Australian Maritime College. All of the ‘public’ universities other than ANU have been established by State or Territory legislation which specifies their purposes, powers and governance arrangements. Inevitably, and to a limited extent intentionally, there are substantial variations between States and between universities within States. (See also section 4.1.2.)

It should be also be noted that universities may be established and owned entirely outside of government. For example, the Australian Catholic University (ACU) is a public company limited by guarantee of the Catholic Church (although it has been given statutory recognition as a university in New South Wales) and Bond University is a not-for-profit company similarly given statutory recognition in Queensland. RMIT University and the Faculty of Pharmacy at Monash both were originally not-for-profit companies.

In addition higher education institutions have been created as companies by existing public universities in Australia. For example, Melbourne University Private is a

public company limited by guarantee and a subsidiary of the University of Melbourne. It received recognition as a university under the National Protocols by Victoria. Seven public universities formed Open Universities Australia as a not-for-profit company. It enrolls fee-paying students and provides on-line and distance teaching for them which can ultimately result in the students earning a degree from one of the owning universities.

The National Protocols explicitly contemplate the possibility of overseas universities operating and being recognised in Australia. In other countries, especially the USA, universities have been established in a range of different ways outside of government statute.

In the eighteenth and nineteenth centuries universities were established by Royal Charter in the USA and Canada. This form of establishment has been used in the UK into the late twentieth century. In Australia, The University of Sydney was created by Royal Charter, subsequently overtaken by state legislation in 1900.

In the USA endowments of money and land from private individuals through trusts or not-for-profit companies formed many universities which were then duly accredited. Examples include the University of Chicago, Stanford University and Carnegie Mellon University.

In 1976 the University of Phoenix was formed as a for-profit company which was subsequently listed on the NASDAQ in 1994 by its owner Apollo Group Inc. It operates 163 campuses and learning centres mainly in USA and Canada and is accredited as a university in the USA.

It is clear that there is a range of different ways in which universities in Australia and other countries are established and ‘owned’. A second question for the current debate is whether the different forms of establishment and ‘ownership’ of the ‘public’ higher education providers in this country matters and, if so, whether it could or should be addressed by some re-configuration of Commonwealth and State responsibilities, or perhaps some different form of ‘ownership’ of ‘public’ institutions altogether.

4 Impact of the current division of responsibilities for higher education

The first term of reference for the Review seeks to *‘identify and assess the extent of the difficulties and limited opportunities resulting from the current division of responsibilities for higher education between the Australian Government and the States/Territories’*.

A number of the ‘difficulties and limited opportunities’ have been identified in the Issues Paper released by Dr Nelson in December. Rather than repeat the matters raised in the Issues Paper, this section highlights the matters that we see as the most significant for the future of the Australian higher education industry.

4.1 Differences between the States/Territories

4.1.1 General regulation of higher education services and providers

State, Territory and Commonwealth Governments are committed to the principle that there should be a nationally consistent regulatory framework for the general regulation of higher education services and providers. They have taken very significant steps in that direction and have even backed their commitment with funding – for AUQA and for the necessary bureaucracy in each jurisdiction. The Preface to the National Protocols, which were approved by MCEETYA in 2000, states that the Protocols:

have been designed to ensure consistent criteria and standards across Australia in such matters as the recognition of new universities, the operation of overseas higher education institutions in Australia, and the accreditation of higher education courses to be offered by non-self-accrediting providers.

The Introduction to the Protocols emphasises that:

The introduction of nationally agreed Protocols for the recognition of universities is seen as particularly desirable to protect the standing of Australian universities nationally and internationally.

However, the agreed principle of a nationally consistent framework for the general regulation of higher education services and providers has been realised only partially in practice. The recent review of the National Protocols³ has highlighted the gap between the goal of national consistency and the reality:

Two striking aspects of the study were the variation of approaches across States and Territories to the implementation of the Protocols, and the different stages that each State or Territory is at with respect to implementing the Protocols. It is clear that although the Protocols were intended to provide a nationally agreed and consistent framework for HE approvals, this has not yet occurred. There is considerable variation among States, and there is a long way to go to achieve the consistency across jurisdictions envisaged in the Preface to the Protocols. A repeated message to the study team was a strong need for greater national consistency in implementing the Protocols. (p9)

The Review went on to note that:

For universities and other HE providers seeking to operate in more than one State or Territory, these jurisdictional and their associated administrative variations are confusing and often costly. For consumers, there is also the potential for confusion. For overseas HE providers seeking to operate in

³ Guthrie, G, Johnston, S and King, R, Further Development of the National Protocols for Higher Education Approval Processes, DEST, 2004

Australia, there is potential to play one jurisdiction off against another and move to the point of least resistance. (p10)

These observations accord with the professional experience of **PhillipsKPA** as consultants in the education and training sector. We are aware of cases of 'jurisdiction shopping' by private providers seeking the fastest and least costly route to accreditation of their courses. Conversely we are aware of cases where individual State authorities have imposed requirements and processes that would not have applied in other States and which were extremely costly and time consuming for the provider.

In some instances private providers have reached the view that a State authority was implementing the National Protocols in a way intended to keep new entrants out of the industry. In other instances, the interpretation of the Protocols has arguably not been rigorous enough.

Differences between the States in their approach to registration and accreditation are also reflected in differential application of the National Code and hence in the requirements imposed on the providers of education services to overseas students and in the consumer protection for those students.

Despite the intention of Ministers in 2000, it is clear that Australia has not fully achieved a nationally consistent approach to higher education recognition and accreditation. This is not an ideal situation as the operating environment becomes increasingly complex, global and competitive, as new providers seek to enter the industry, and as existing 'private' providers seek to expand their offerings.

4.1.2 Establishment of 'public' universities

There is also a set of issues arising from the differences between and within States in the way in which individual 'public' universities are established and the constraints that apply to them⁴. Some of these differences are the inevitable result simply of the number of jurisdictions involved and the varying points in time at which the universities were established. Others relate, for example, to differences in the way in which States have viewed the commercial functions of universities. The extent and nature of some of these differences mean that there is not a level competitive field for the 'public' university players in the national higher education industry.

Potential limits on power to operate outside State of establishment

A first issue, which thankfully has never seriously been tested, is the power of some universities established by State Acts to operate outside the State in which they have been founded. Such a power is of course crucial in the competitive, global environment for the higher education industry.

⁴ There are also differences between the States in relation to other types of regulation to which 'public' universities, along with other public corporations, may be subject in each jurisdiction. As noted in section 3.3 we have chosen to focus on those aspects of regulation which are specific or unique to the higher education industry.

However, the capacity of State Parliaments to make laws operating outside their jurisdictions is itself a complex question, and their university acts sometimes are very unclear on the question of whether a university has the power to operate interstate or overseas. On one view, unless a university has clear legislative authority on this point, it would be acting beyond its powers to do so. It is clearly unsatisfactory that such a matter could even potentially be open to question.

The ideal position would be for all the 'public' universities to have an equal degree of legal authority to operate nationally and internationally. This is a first reason to consider greater uniformity in the form of establishment of 'public' universities, an option explored in greater detail in section 6.

Differences in powers in relation to commercial activities

Similarly, in a national, competitive industry, it ideally should be the case that all the 'public' universities have equal legal authority and equal operational freedom to engage in commercial activities. This is not the case.

Most university Acts are the product of a previous time when universities were heavily dependent upon government grants for their revenue. Seventeen have been established as universities since 1974 when student tuition fees were abolished and the Commonwealth took over the main responsibility for university funding. They were therefore established in an environment where Commonwealth Government funding was the major source of university income.

The public universities established prior to 1974 were created in an environment of student tuition fees but where there was little else of a commercial nature in their operations. Their revenue was heavily dependent upon government grants (State and Commonwealth) and fees.

A consequence of this history is that, as a generalised statement, the Acts establishing the public universities for the most part fail to reflect the more commercial environment in which universities now operate. The various Acts also reflect the differing attitudes of the times when the universities were created and of the governments that created them.

All university Acts focused upon the creation of the university as body corporate, the composition of the governing body and its ability to teach, undertake research and award degrees. The State Governments all had significant legislated influence upon the make up and membership of university governing bodies. Government controls upon a university's ability to buy, sell or lease its land were the main area of commercial focus in all university Acts and there was usually also provision for government controls over university borrowings.

As the environment in which Australian universities operate has evolved, additional powers to do such things as create companies or enter into joint venture arrangements have been added and amended in a piecemeal manner, usually including requirements for Ministerial involvement by a system of notifications or approvals along the way.

There are substantial variations in all of these areas between universities and between States. These variations have been noted in the Issues Paper and in the Victorian Review of University Governance.

For example, the ability of a university to establish a company or enter into a joint venture arrangement, and the constraints and oversight imposed by the States on such activities, vary significantly with some States imposing tight guidelines and controls over these activities and others requiring notification. Australian universities are competing with universities throughout the world and are often dealing with international companies in their commercial activities. The differences between States and universities impact on the relative competitiveness of individual Australian universities, in part simply because the restrictions and controls imposed by States on the commercial and entrepreneurial activities of 'public' universities add varying increases to the cost of undertaking those activities.

Differences in powers in relation to land

A further significant consequence of the variation in university Acts is wide differences between universities in their powers in relation to their land. The variations in the Acts add complexity to a picture already complicated by the varying ways in which university lands have been acquired.

First, different classes of land held by a single university may be subject to very different processes of disposition, with a distinction typically being drawn between crown land granted to the university and land that it subsequently acquired. Other classes of land, however, may considerably confuse this picture. Second, the property regimes of different universities within a single State may not be identical, with the result that one institution may be disadvantaged when compared to another. Thirdly, there is no common approach to university property across Australia, so that different universities have markedly varying rules concerning the acquisition and disposition of land.

It also should be noted that State governments themselves hold complex interests in university lands, a fact which poses certain potential complications for some options to change the 'ownership' of universities.

4.2 Involvement of the Commonwealth

In addition to the differences between State/Territory jurisdictions, the regulatory system is made more complex by the involvement of the Commonwealth. Any provider wishing to be eligible for Commonwealth funding or Commonwealth supported student loans must either already be listed in the *Higher Education Support Act 2003 (Cth)* or must go through another process to satisfy Commonwealth legislative requirements in addition to meeting the registration and accreditation requirements of each of the States and Territories in which it operates.

The Commonwealth's requirements set out in the *Higher Education Support Act* for recognition as a Higher Education Provider (see for example the tuition assurance requirements and the quality and accountability requirements in Chapter 2 of the Act)

have been designed where possible to build on rather than duplicate State requirements. There are some Commonwealth specific requirements and a separate application and assessment process is involved.

Each of nine jurisdictions thus maintains legislation, guidelines and staff to enable it to discharge regulatory functions that are essentially the same or very similar in purpose. This involves costs to the public purse as well as to providers seeking to navigate the system. The arrangements reflect the federal distribution of responsibilities for the regulation of the higher education industry and the provision of public funding discussed in previous sections.

These issues to date have had relatively little impact on the established, self-accrediting, 'public' universities. However they are very important issues for all non-self-accrediting providers and for potential new entrants to the industry, including those, like Melbourne University Private, that may be established by the 'public' universities. They are therefore also very important issues for the future development of a diverse higher education industry.

In relation specifically to the State 'public' universities, it could be argued in principle that it is a flawed arrangement for the Commonwealth Government to be the largest single source of funding to institutions that are, in effect, State statutory corporations. For example, to varying degrees, the State university acts give State Ministers authority over the way in which universities use funds and infrastructure provided by the Commonwealth. Some States also impose controls on all university financial investments. The University of Melbourne has a remarkable provision in its Act giving any Minister in the Government of Victoria the power to require the academic staff of the University to carry out an investigation, albeit on agreed terms, and report to the Minister. As set out in the Issues Paper, the extent of State government authority is clearly disproportionate to the extent of State financial input and exposure, especially when the impact of payroll tax is taken into account⁵.

The practical impacts on the State 'public' universities of the overlapping Commonwealth and State roles, such as differing and complex reporting responsibilities to two levels of government, have been well documented. From a broader perspective however, the risk of policy tensions and conflicts may be of potentially greater significance. There is certainly an inherent risk in the current arrangements of policy tensions and conflicts between the Commonwealth and the States/Territories either individually or collectively. While this could be seen as a strength as well as a weakness (see section 4.3), it should be acknowledged that higher education providers may end up the meat in the policy conflict sandwich. For example, it is conceivable that, as part of a policy of increasing diversity, the Commonwealth may wish to purchase services from a 'private' provider while a State, which is opposed to increasing 'privatisation' of higher education, introduces barriers to its registration/accreditation. There is currently a degree of policy tension

⁵ In 2003 State financial assistance to all universities' operations, including their TAFE components where relevant, totalled \$506 million. But in 2003 universities paid \$339 million in payroll tax so the net cost to the States of their university financial assistance was \$167 million. This compares with \$4,920 million from the Commonwealth (excluding HECS). (These figures are subject to the caveat noted in footnote 2.)

between the policy thrust from the Commonwealth toward the entrepreneurial university (more commercial activity, more non-government income, more competitive environment) and the restricted powers in University Acts and provisions in some States that constrain the capacity of universities to operate commercially.

4.3 The benefits of divided responsibility

However, it does not necessarily follow from the previous discussion that the best or only way forward is to locate all responsibility for the regulatory framework for the higher education industry with the Commonwealth. In sections 5 and 6 below we conclude that it is not necessary to the achievement of key objectives and we examine alternative approaches. There is also a range of reasons to conclude that it may not be desirable.

The most fundamental of these reasons, as noted in section 2, relate to the legitimate interests of the States and Territories in an industry that has such a direct regional impact and such a direct intersection with schools and VET systems.

Universities have always placed importance upon their community responsibilities, especially to their region, and for those in the capital cities this effectively means their State. As well as their economic and labour market impact they make significant contributions to the cultural, artistic, social, sporting and welfare activities in their communities. These contributions are in addition to their traditional roles in teaching and research.

Universities engage directly with State and Territory Governments in many ways. Research activities, for example, are often focussed in areas of particular interest to the State – indeed in Tasmania the State’s research centres are integrated with the University. University academics serve with distinction on a very wide range of State committees and boards of both a standing and ad-hoc nature.

The case for sole Commonwealth legislative and regulatory responsibility is also questionable in light of:

- The substantial financial and in-kind contributions made by State/Territory governments and the risk to their continued willingness to make such contributions;
- The potentially positive role played by State/Territory governments in planning and advocacy for the higher education sector; and
- The potential benefits to universities in the immediacy of their relationships with State Ministers and Premiers.

There is also a psychological benefit, and probably a very real one, in avoiding a situation in which a single government has full legal control, as well as primary public funding responsibility, for institutions whose public benefit derives, at least in part, from their autonomy.

5 Alternative models for the regulation of the higher education industry

5.1 Introduction

We believe that the case is clear for a constitutionally robust, genuinely national regulatory framework for the increasingly diverse higher education industry. As discussed in section 4.1.1, Australia has not fully achieved the nationally consistent approach envisaged by Ministers in their agreement to the National Protocols, the National Code and in their collaborative formation of AUQA. As discussed in section 4.1.2, there are significant differences between and within States in the way in which individual ‘public’ universities are established and the constraints that apply to them. As discussed in section 4.3, we do not believe that sole Commonwealth responsibility for the regulatory framework for the industry is necessarily desirable.

A critical question is whether or not the Commonwealth’s constitutional authority is sufficient to allow it to act unilaterally to establish sole responsibility for the regulatory framework for the higher education industry. We have not seen any legal or constitutional advice that the Commonwealth may have on this matter, but we note the history of collaborative action with the States (see section 3.3) and the Minister’s recent statement that *‘the Australian Government neither can – nor should – coerce other governments in this regard’* (media release 20 December, 2004). This is consistent with our own detailed review of the constitutional issues, not included in this paper, which leads us to the view that no individual constitutional power or combination of powers would confidently provide the Commonwealth with comprehensive legislative authority for higher education.

The way forward therefore lies in an extension of the co-operative federalism already demonstrated in this area.

5.2 Example of corporations law

The Australian corporations law provides an interesting example of a successful move to one national legislative and regulatory structure despite the lack of Commonwealth constitutional power to legislate for such a structure.

Before 1961 each State and the Commonwealth had their own companies legislation and their own regulator. The legislation varied between governments as did the regulatory arrangements. In 1961 Victoria led a move for all governments to enact uniform companies legislation although the separate regulatory regimes remained and the legislation was not exactly the same in each jurisdiction.

National legislation and regulation was required to reflect the evolving national and international activities of Australian companies but the Commonwealth lacked the constitutional authority to establish such a structure. By agreement the Commonwealth and the States each enacted uniform legislation in 1981-82 and established the National Companies and Securities Commission (NCSC). Government

oversight was provided by a standing committee comprising the Attorneys General of all the governments and the State regulatory offices were subject to direction by the NCSC.

The NCSC was the product of a cumbersome structure and was replaced in 1990 by a new arrangement agreed to by the Commonwealth and the States whereby the Commonwealth enacted corporations legislation in respect of the Commonwealth territories and the States legislated to adopt that legislation to apply in each of the States. The new legislation established the Australian Securities and Investments Commission (ASIC) to replace the previous NCSC. The new Commission was responsible to the Commonwealth Treasurer and the State regulatory offices were transferred to the Commonwealth to become part of ASIC. A Ministerial Council of Commonwealth and State Ministers was established to consider overall policy.

In 2001, following a High Court decision, the States all legislated to remove any uncertainty over the legislative basis of the ASIC structure by referring to the Commonwealth the relevant constitutional powers for the ASIC legislation.

5.3 An Australian Higher Education Industry Commission?

The Review of the National Protocols identified that:

The variations among States/Territories appear to result from a number of factors:

- *differing existing legislative and regulatory frameworks on to which changes must be grafted*
- *differing levels of resources and expertise available in different jurisdictions to undertake the necessary legislative and regulatory changes to implement the Protocols*
- *differing priorities because of the relatively small scale of the issue in some jurisdictions – some have few non self-accrediting HE providers and report limited interest from overseas providers*
- *differing philosophical stances with respect to encouraging expansion or diversity*
- *differing interpretations of the Protocols. (p9)*

The Review concluded that:

Given that HE legislation is largely a State or Territory responsibility (and to a limited extent the Commonwealth Government's), it seems inevitable that it will be difficult to eliminate completely inconsistencies in the implementation of the Protocols across Australia. (p9)

This is not necessarily the case. Indeed it would be possible to eliminate differences, inconsistencies and duplication if the States and the Commonwealth were to collaborate in the formation of a single higher education industry regulator. Such a move could also provide the opportunity to review the higher education regulatory

framework and update it to reflect and facilitate the development of an increasingly diverse and competitive industry.

Such a body, which we might call the Australian Higher Education Industry Commission (AHEIC) would not be a funding body like the former Commonwealth Tertiary Education Commission (CTEC) or similar bodies in other countries. Rather, in line with best public administration practice, the functions of regulator and funder would be separate.

Similarly the AHEIC would have no powers to establish, 'own' or operate universities or other providers.

The functions of the AHEIC would be regulatory and quality assurance related only. It would discharge the responsibilities for the Higher Education Approvals Processes on behalf of all the States and Territories and the Commonwealth. These processes relate to:

- Recognition of universities;
- Overseas higher education institutions seeking to operate in Australia;
- Accreditation of higher education courses to be offered by non-self-accrediting providers;
- Higher education delivery arrangements involving other organisations; and
- Endorsement of higher education courses for overseas students.

The AHEIC would be the sole Australian agency conducting registration and accreditation processes. Providers subject to those processes would deal with only this one agency regardless of the number of States in which they operate.

The AHEIC would also rationally subsume the functions of AUQA, and its constitution could feature some of the characteristics of AUQA, notably the type of groups represented on its board⁶. The quality assurance functions would then be directly empowered by legislation (see section 5.4 below) and would be located appropriately in a broader national regulatory agency for the higher education industry as a whole. The precise functions and mode of operation for higher education quality assurance may need to be reviewed in this context.

The AHEIC could also advise on the approval of institutions as higher education providers for the purposes of Commonwealth funding and access to student loans. The Commonwealth would still specify the conditions to be met before it would purchase services from a provider or provide access to Commonwealth supported student loans, but could delegate to the Commission the role of determining and auditing compliance with those conditions. The AHEIC itself would have no role whatsoever in the negotiation or determination of funding agreements or other purchasing provisions, which would continue to be matter between the relevant government agency (principally DEST) and the provider.

⁶ The AUQA Board comprises: three directors appointed by the Commonwealth Government; three directors appointed by the State and Territory Governments; four directors elected by the Chief Executive Officers of Australian self-accrediting higher education institutions; one director elected by the Chief Executive Officers of Australian non-self-accrediting institutions; and a chief executive officer.

The introduction of the AHEIC would simplify and bring national consistency and independence to the higher education regulatory functions, but, of itself, would imply no new functions and no change to existing policies. For example, the current distinctions between self-accrediting and non-self-accrediting providers would remain unchanged, as would other elements of the policy framework, until such time as Ministers determine it should be changed. We believe that there is a case for change, but that is a separate issue.

5.4 *Establishing the Australian Higher Education Industry Commission*

In our thinking, the AHEIC would be an executive authority of the Commonwealth Government charged with the regulation of the higher education industry.

Establishment of the AHEIC as a fully-articulated legal entity of the Commonwealth, with the necessary governance features, organs and regulatory powers, inevitably would require the enactment of an appropriate legislative regime. There is no obvious means by which the AHEIC could be established with a general regulatory brief over the Australian higher education industry through legislative action of the Commonwealth Parliament alone. No combination of the Commonwealth's particular legislative powers (such as the corporations and nationhood powers) could be regarded as safely providing the necessary constitutional basis over the full range of matters involved, nor would the Commonwealth's spending power provide such support.

It follows that the most certain route for the establishment of the AHEIC as a body with regulatory powers in respect of the entire Australian higher education industry would be through co-operative legislation between the Commonwealth and the States, made according to a Commonwealth legislative blueprint. There is a variety of ways in which this could be achieved, with two broad variants being the most obvious, though other models might emerge.

The first would be legislation of the Commonwealth Parliament to the full extent of its powers, establishing the AHEIC and conferring upon it the relevant regulatory powers, but accompanied by supplementary State legislation under section 51 (xxxvii) of the Constitution referring to the Commonwealth all necessary power to effectuate that legislation on a national basis. State referring legislation might be in relatively broad terms, conferring necessary power to establish the general type of body concerned, or might much more narrowly reflect the particular Commonwealth model proposed.

A referral scheme of this type undoubtedly would be constitutionally effective. In formal terms, the final outcome would be discrete Commonwealth legislation establishing the AHEIC as a sector-wide regulatory agency.

The second variant of shared action between the Commonwealth and the States would be through a co-operative legislative scheme that did not involve a referral of power, or did so only in a relatively minor, supporting role. There are many potential variants

of co-operative legislative schemes, and the one detailed here is offered by way of example.

Acting under its undoubted power to legislate for its own territories under section 122 of the Constitution, the Commonwealth could legislate to establish the AHEIC as the higher education regulator within those territories. As part of a pre-negotiated co-operative scheme, the States could then pass legislation of their own conferring upon the AHEIC the same functions in respect of higher education within their jurisdictions.

Such a scheme would have some analogy with that used in the past to secure co-operative companies legislation, and would not seem obviously vulnerable to constitutional challenge. It could expect a warm reception in the High Court as an appropriate exercise in co-operative federalism (see e.g. (*R. v. Duncan; Ex parte Australian Iron and Steel Pty.* (1983) 158 C.L.R. 535). Were there any minor points of constitutional doubt, they could be removed through small, specific references of State power.

It may be that the States would prefer the establishment of a body like the AHEIC to be based significantly upon their own mirroring legislation, rather than upon substantial references of power, in which case this second option would be more palatable. While this would not give the Commonwealth an entirely independent legislative base for higher education regulation, it would nevertheless provide a substantially enhanced national capacity, through the AHEIC, to that end.

Two further points should be made. First, either of these options could accommodate the entry by individual States at different times into the national scheme. Secondly, it would be entirely open for the Commonwealth to provide incentives for the entry of State systems into the scheme by providing differential funding to higher education providers who were or were not subject to regulation by AHEIC.

6 Alternative models for the establishment and 'ownership' of 'public' universities

6.1 Introduction

The previous section examined a possible path to a genuinely national approach to the registration, accreditation and quality assurance aspects of a regulatory framework for the higher education industry as a whole, but there remains the related issue of the establishment and 'ownership' of 'public' universities.

For the reasons set out in section 4, we believe there is a strong case for measures that give all 'public' universities equal and unquestionable powers and freedoms to operate commercially and in locations outside of their State or Territory of establishment. To the extent that it might be possible, it would also be desirable to achieve more nationally consistent provisions in areas such as:

- Universities' powers in relation to land;

- Their obligations in relation to financial and other forms of accountability; and
- Their degree of autonomy from government.

It would also be desirable to find ways to reduce the risk of universities being caught in policy tensions and conflicts between the Commonwealth and the States. The Commonwealth has also argued for change and greater consistency in governance arrangements.

Are their options for changes to university establishment and ‘ownership’ arrangements that would achieve these ends?

There are four broad types of establishment and ‘ownership’ regimes that might be contemplated. The first is to look outside of government ownership altogether to other organisational forms involving higher degrees of private ownership. The second is to create government companies, either Commonwealth or State owned. The third is a transfer of existing university acts in some way to the Commonwealth, to establish Commonwealth ‘ownership’ (in the legislative sense), as floated originally by Dr Nelson. The fourth is some form of more nationally consistent approach to statutory establishment by the States.

Private ownership, either partial or total, is a conceivable option for new institutions or perhaps even for some existing universities at some point in the future. However it does not stand as a credible option for a general change to the establishment and ‘ownership’ arrangements for the ‘public’ universities as a group. There is also little clear advantage in a privatised model that cannot be achieved by appropriate specification of powers under the existing statutory entity approach.

Similarly, there is little clear advantage in a government-owned company model. That model may offer some minor advantages in terms of commercial flexibility, but again it would appear that much the same flexibility could be achieved by appropriate specification of powers under the existing statutory entity approach.

For the reasons cited in section 4.3, we do not see Commonwealth ‘ownership’ (in the legislative sense) as necessarily desirable. A struggle with the States over legislative ownership of universities would be likely to be a bitter and largely symbolic one, distracting participants from policy objectives and the positive possibilities of co-operation. Legislative re-location of universities also might well give rise to problems connected with the compulsory acquisition of State property.

In our view the most important objectives from a public policy perspective could best be achieved once again through a co-operative federalism approach.

6.2 National legislation?

In section 5 we discussed the possibility of establishing a single industry regulator through co-operative legislation between the Commonwealth and the States, made according to a Commonwealth legislative blueprint. It would be possible to use the same legislative approach, and potentially the same Commonwealth Act, to establish a common set of institutional criteria to be met by all Australian ‘public’ universities.

These criteria theoretically might be met by ‘public’ universities possessing a wide range of legal structures, from the traditional statutory entity to a number of forms of incorporation. The vital consideration would be not the legal and business structure of the entity concerned, but its capacity to comply fully and effectively with the national criteria.

The type of national legislation envisaged here could go to any matter that the Commonwealth regards as essential or desirable in the powers, functions, governance or accountability provisions of all Australian ‘public’ universities. It could include, but would not necessarily be limited to, the types of matters typically covered in the establishing acts of universities. With the agreement of the States it could, for example, be used as the vehicle to secure nationally consistent approaches to the commercial powers of ‘public’ universities and to provide a common approach to financial and other accountability and reporting obligations.

If valid universities legislation could be established, applying on a national basis through State co-operation, that legislation would apply effectively to ‘public’ universities regardless of their legislative origin. By way of example, were such legislation to provide that universities should adopt a particular form of governance or a particular form of financial administration or annual reporting, then those stipulations would be operative even if a university remained grounded in State legislation.

The relevant issue therefore would not be the legislative ownership of the university, but the efficacy of the regulating legislation. In our view, the Commonwealth should therefore not be distracted by the issue of direct ‘ownership’ but rather, taking the ‘public’ universities as established entities, should concentrate upon promoting better governance, regulatory and policy outcomes through co-operative legislation.

In a legislative sense, there could be a single piece of Commonwealth legislation with two related purposes: creation of the AHEIC and articulation of the criteria or model provisions for Australian ‘public’ universities. The two most obvious options again are either Commonwealth legislation to the full limits of its powers, supplemented by State referring legislation; or a fully co-operative legislative scheme, such as one under which the Commonwealth enacted legislation for the territories that was then applied and adopted by the States.

The Commonwealth already has a useful starting point in the form of the Australian National University Act 1991 which provides an example of what a modern university Act might contain. This Act, which substantially amended the University’s preceding 1946 Act, is much more in the nature of a company constitution and provides the University with a comprehensive range of powers to operate in the modern business environment while preserving an emphasis on its public benefit role. The Act also contains some explicit protections of the University’s autonomy. Some instances exist of recent State University Acts which incorporate some of the features of the ANU Act but none appear to have dealt with the issues on such a comprehensive basis. Relevant extracts from the ANU Act are provided in [Appendix A](#).

An advantage of either of the forms of State-Commonwealth co-operative legislation suggested here – both in connection with the establishment of the AHEIC and the

enactment of national universities legislation – is their capacity to accommodate a gradual process of acceptance by the States, a process that will be influenced strongly by the views of the ‘public’ universities themselves. Thus, these schemes could be initiated with the agreement of all the States, some States, or conceivably only within the territory of the Commonwealth itself.

Nevertheless, given the role of the Commonwealth as predominant financier of Australian higher education, and its capacity to provide incentives to enter a national scheme, the logical tendency over time would be for States, encouraged by their ‘public’ universities, to enter the scheme. That entry would be readily facilitated through the passage of the relevant State coordinating legislation.

7 Conclusion

Australia needs a robust, effective regulatory framework for the higher education industry that recognises the national and international character of the industry, the increasing number and diversity of providers, and the increasingly complex, global and competitive environment in which they operate. It must also recognise the constitutional basis of our federal system and the legitimate interests of the States, providers and consumers as well as the dominant public funding and policy role of the Commonwealth. This has implications for the current arrangements in relation to both the regulation of the industry and the form of establishment and ‘ownership’ of the existing ‘public’ universities.

For constitutional and historical reasons, both regulation and legislative ownership have resided principally with the States, but the reality of Commonwealth funding authority, and recognition of the public benefits of nationally consistent approaches, have prompted substantial co-operative developments in recent years, especially in relation to the regulatory and quality assurance framework.

In our view, the way forward lies in an extension of the co-operative federalism that has already been displayed. Through co-operative legislation between the Commonwealth and the States, made according to a Commonwealth legislative blueprint, it would be possible to establish a streamlined, genuinely national regulatory framework for the higher education industry managed through a single industry regulator. It would also be possible to develop a genuinely national, consistent, modernised set of provisions for the ‘public’ universities that preserves an appropriate emphasis on their public benefit role, secures appropriate degrees of autonomy from government, produces a more level competitive field, and clarifies and strengthens their powers to operate commercially on a national and international basis.

**EXTRACTS FROM THE AUSTRALIAN NATIONAL UNIVERSITY ACT
1991**

4(2)The University:

- (a) continues to be a body corporate; and
- (b) has a seal; and
- (c) may acquire, hold and dispose of real and personal property.

Note: Subject to section 4A, the Commonwealth Authorities and Companies Act 1997 applies to the University. That Act deals with matters relating to Commonwealth authorities, including reporting and accountability, banking, and conduct of officers.

- (3) The seal of the University must be kept in such custody as the Council directs and may be used only as authorised by the Council.
- (4) All courts, judges and persons acting judicially must take judicial notice of the imprint of the seal of the University appearing on a document and must presume that it was duly affixed.

4A Modification of the Commonwealth Authorities and Companies Act 1997

- (1) Section 14, subsection 18(3), and sections 28 and 29, of the Commonwealth Authorities and Companies Act 1997 do not apply in relation to the University.
- (2) Nothing in section 16 of the Commonwealth Authorities and Companies Act 1997 requires the members of the Council to do anything that will or might affect the academic independence or integrity of the University.

5 Functions of the University

- (1) The functions of the University include the following:
 - (a) advancing and transmitting knowledge, by undertaking research and teaching of the highest quality;
 - (b) encouraging, and providing facilities for, research and postgraduate study, both generally and in relation to subjects of national importance to Australia;
 - (c) providing facilities and courses for higher education generally, including education appropriate to professional and other occupations, for students from within Australia and overseas;
 - (d) providing facilities and courses at higher education level and other levels in the visual and performing arts, and, in so doing, promoting the highest standards of practice in those fields;
 - (e) awarding and conferring degrees, diplomas and certificates in its own right or jointly with other institutions, as determined by the Council;
 - (f) providing opportunities for persons, including those who already have post-secondary qualifications, to obtain higher education qualifications;
 - (g) engaging in extension activities.
- (2) In the performance of its functions, the University must pay attention to its national and international roles and to the needs of the Australian Capital Territory and the surrounding regions.

6 Powers of the University

- (1) Subject to Division 2 of Part 3, the University has power to do all things that are necessary or convenient to be done for, or in connection with, the performance of its functions.*
- (2) The powers of the University under subsection (1) include, but are not limited to, the following powers:*
 - (a) to buy, take on lease or otherwise acquire real and personal property, and to sell, grant leases of, or otherwise dispose of, such property;*
 - (b) to develop commercially any discovery, invention or property;*
 - (c) to make charges for work done, services rendered and goods and information supplied by it;*
 - (d) to form, and participate in the formation of, companies;*
 - (e) to subscribe for and buy shares in, and debentures and other securities of, companies;*
 - (f) to enter into partnerships;*
 - (g) to participate in joint ventures and arrangements for the sharing of profits;*
 - (h) to enter into contracts;*
 - (i) to erect buildings;*
 - (j) to occupy, use and control any land or building made available to the University by the Commonwealth for the purposes of the University;*
 - (k) to employ staff;*
 - (l) to invest money of the University, and to dispose of investments;*
 - (m) to make astronomical, seismological, meteorological and other scientific observations;*
 - (n) to make loans and grants to students;*
 - (o) to accept gifts, grants, bequests and devises made to it;*
 - (p) to act as trustee of money and other property vested in it on trust;*
 - (q) to do such other things as it is authorised to do by or under this Act or any other Act;*
 - (r) to do anything incidental to any of its powers.*
- (3) In spite of anything contained in this Act or the Commonwealth Authorities and Companies Act 1997, any money or other property held by the University on trust must be dealt with in accordance with the powers and duties of the University as trustee.*
- (4) The powers of the University may be exercised within or outside Australia.*