Commonwealth government funding of private schools in Australia has occurred since 1962. Opponents of public funding consider it a dilution of funding available to public schools and overgenerous to schools where parents pay fees. Since 1992, areas where such funding is available to private schools (and public schools) have increased. The longstanding requirement of such funding has been financial accountability initially provided through general provision funding acts. Since 1996, Commonwealth governments have introduced legislation stating further requirements including ‘educational accountability’, requiring public, and increasingly private, schools in receipt of public funding to agree to new national policy agendas and reporting requirements to government and the community. This article describes the law around processes for establishing private schools in Australia and the nature of current educational accountability requirements for public funding. We consider whether the consequences of both of these are not publicly-subsidised private schools but privately-subsidised public schools, as part of overall strengthened Commonwealth government national control of all education policy and practice in Australia through the appropriation of revenue to the States and Territories.

I Public and Private Schooling in Australia

Schooling in Australia is governed by strongly centralised Commonwealth and state or territory government statute and funding. All schools must be accredited at state or territory level. Schools include government schools administered and run by or on behalf of the state or territory governments, hereafter referred to as public schools, and non-government schools that are not conducted ‘by or on behalf of the government’ or ‘for profit’, hereafter referred to as private schools. Private schools in Australia include secular, that is, not associated with religious authorities, and nonsecular, associated with religious authorities, schools. The latter can be independent or systemic, including Catholic systemic, schools. The Catholic systemic schools have played a major role in the development of Australian Commonwealth funding policy, as discussed later, and have frequently been accorded a differential status from other private schools, and even private school systems.

The Australian Commonwealth government, and by implicit accord, State and Territory governments, states that parents have a right to choose the school for their child, whether public or private. The right is taken seriously by parents. Thirty-four per cent of Australian school...
students attend private schools, with nearly 60 per cent of these in Catholic schools, hence the historical political power of this sector.\textsuperscript{4}

Legislation has not only endorsed the right of parents to choose schools, it also endorses this to be attended by a right to public funding for all students in all schools, even schools of a religious nature: ‘every child is entitled to a base level of public funding towards their education’.\textsuperscript{5} However, such funding has come at increasing cost of independence to private schools in Australia, a key focus of this article. The question that can be posed is whether the private schools have become parent-subsidised instruments of government education, and in particular national education policy agendas increasingly promoted by the Commonwealth government, the second key focus of this article. Overall, Australian education maintains a high standard, and in general performs at a high level on any standardised international comparisons of student achievement.\textsuperscript{6} How much this is due to the private school sector is not known, as comparative performances of public and private school sectors as a whole on any standardised achievement measures are not released.

To examine the growth in the authority of the Australian Commonwealth government in education in Australia, it is necessary to examine briefly three historical aspects of school funding: Commonwealth government constitutional roles in education and the interpretation of reserve powers; Commonwealth funding power; and, funding to private schools, particularly nonsecular private schools.

\textbf{A \boldmath{Who Controls Education: Australian Constitutional Powers and the Interpretation of ‘Reserve’ Powers}}

The Australian Commonwealth came into being in 1901 by an act of British parliament which included an \emph{Australian Constitution}, proscribing the system of intergovernmental operations of the Commonwealth government and the state (and subsequently territorial) governments comprising the Commonwealth. While the \emph{Australian Constitution} nominates specific Commonwealth powers, specific state powers, and areas where the Commonwealth government cannot intrude on states, matters on which the Constitution is silent are not interpreted as ‘reserved’ powers to the states. While such an interpretation, following the US and Canadian models, did exist for some time after federation in 1901, it was reversed in 1920 in the seminal \textit{Engineers’ case}. The Australian Constitution mentions ‘education’ in only one context: the provision of (financial) benefits to students.\textsuperscript{8} However, section 96 of the \textit{Constitution} provides the Commonwealth government with power to provide financial assistance to the states (and territories) ‘on any such terms and conditions as the Parliament thinks fit’.

\textbf{B Financial Power of the Commonwealth Government}

The \emph{Australian Constitution} refers to financial assistance from the Commonwealth government to the States and Territories. However, since the formation of the Commonwealth in 1901, the structure of government revenue-raising in Australia has changed considerably. In Australia, the Commonwealth government has the sole role in collecting income tax within Australia from individuals and corporations. Australia has three levels of government: local governments, which collect property taxes;\textsuperscript{9} State and Territory governments, which collect payroll tax, land tax, stamp duty and special provision levies; and the Commonwealth government, which collects income tax, special levies, taxes associated with customs and excise, and so on. While customs and excise taxes are the sole province of the Commonwealth government under the constitution,\textsuperscript{10} states (and territories) may raise a range of taxes including income tax.\textsuperscript{11}
This was the revenue-raising status of the early Commonwealth, with states applying diverse income tax rates to individuals and using state resources, such as staff and offices, to collect both state income tax and also income tax on behalf of the Commonwealth government. However, during World War II, the Commonwealth government introduced a suite of acts that imposed a high tax rate on all high-income earners, cooption of State and Territory resources for tax collection, and a requirement for priority in payment of Commonwealth tax over state tax. Subsequent appropriations of the raised revenue were to be made to States and Territories for their activities. The tax acts were introduced ‘with a view to the public safety and defence of the Commonwealth and for the more effective prosecution of the war in which His Majesty is engaged’.

While several states challenged the constitutionality of the Commonwealth acts on the basis that they removed the states’ constitutional right to raise income tax and interfered with constitutionally-derived roles, the High Court held by majority all acts to be constitutionally valid and not affecting the right of a state to raise income tax. While aspects of the legislation were to be temporary, the Commonwealth government advised in 1946 that the scheme would be continued indefinitely.

The continuation of this income tax practice has in effect removed major State and Territory sources of revenue. While States and Territories retain the right to impose income tax, none have done so, due to effects on any Commonwealth tax revenue appropriations to the State and Territory, and on State and Territory populations, who would most likely move to a state or territory without additional income tax. The introduction in 1999 of a further national tax system the Goods and Services Tax (GST) has effectively further centralised revenue-raising under Commonwealth government power.

As a result, the Australian Commonwealth government has the major source of revenue for expenditure on public services, and the power through its appropriation bills for expending Commonwealth revenue to place conditions on States and Territories for receipt of these funds. While Commonwealth appropriations must be within constitutional power, and not extinguish constitutional powers of a state, the constitutional authority of the Commonwealth government over the States and Territories is, as a result of the Australian interpretation of reserve powers and recent case law, broadly interpreted in favour of the Commonwealth government.

Therefore, under current constitutional, statutory and caselaw authority, the Australian Commonwealth government has great financial power to direct activities by the States and Territories through funding grants and conditions. While dicta have indicated, and continue to indicate, that education is the responsibility of the states, despite lack of specific constitutional authority, the Commonwealth government increasingly uses its ‘power of the purse’ to direct policy initiatives in this area.

C Australian Public Funding of Private Schools and Religious Affiliation

Commonwealth public funding to private schools in Australia was introduced to gain electoral popularity. In 1962, a crisis occurred in New South Wales when Government health inspectors ordered the installation of three additional toilets at a Catholic Primary School in a small country town. As the school did not have the finances to do this, the parents of Catholic schools’ students held a ‘strike’, enrolling more than 1000 Catholic school children in the town’s ‘already overcrowded’ state schools. As noted earlier, the Catholic school sector has always been a powerful lobby group in Australia.
Although the strike ended after a week, lobbying for state aid for private schools continued. In 1963, internal party politics prevented the New South Wales Labor government, linked strongly to the Catholic population of the state, from its proposed state funding for science laboratories in private schools. However, the Prime Minister of Australia successfully campaigned at a snap election on ‘State Aid for science blocks and Commonwealth scholarships for students at both Government and non-Government schools as part of the platform’. Following this election, the first Commonwealth ministry portfolio involving education was created, with a full ministry position in education and science created after the next Commonwealth election in 1966. In five years in this role, Minister Gorton presided over a major controversial foray of the Commonwealth government into ‘education areas which had been the business of the States and promoted State aid to non-government schools’.

Initially, funding for private schools was for specific activities such as science and library facilities. However, Commonwealth cabinet papers from the 1960s show increasing funding for capital works and recurrent costs in private schools. In submissions to Cabinet on new policy directions, ‘New and Expanded Measures in Education’, the Minister-in-Charge, Commonwealth Activities on Education and Research, John Gorton, stated several assumptions on the future role of the Commonwealth government in education, including:

[T]he Commonwealth does not adopt the position that education is the exclusive constitutional responsibility of the States and therefore must be financed entirely from State Revenue and Loan funds available to the States ... [this is] simply not acceptable to the bulk of the population.

The public want and expect a greater Commonwealth involvement in education and ... both the extent to which we accept this commitment and the methods we choose in accepting this commitment will be a matter of considerable influence at the next election and an action which will have considerable effect on the improvement of educational facilities available in Australia.

These are perhaps the first clear statements of the intent of this and many subsequent Australian Commonwealth governments to engage in, if not direct, national policies in education.

Challenges to public funding of private schools have occurred on the basis of religious affiliation. The Australian Constitution has an establishment clause that prohibits government engagement in the establishment of religion. In the United States of America (US), a somewhat similarly-worded Establishment Clause is interpreted to prevent the use of public funding for private non-secular schools. However, in the seminal Australian constitutional challenge to public funding of non-secular private schools in 1981, the Victorian state government mounted an unsuccessful challenge that the use of Commonwealth funds for such schools contravened the Australian establishment clause. In the leading decision for the High Court, Barwick CJ stated,

I have been unable to find any statutory authorization by the Commonwealth of any religious activity on the part of the non-government schools in the course of their educational activities. That there is no statutory prohibition of such religious activities in the course of authorized educational activities is scarce enough to make the appropriation and granting statutes, laws for establishing a religion in the only sense, in my opinion, those words can have in the Constitution. What the Constitution prohibits is the making of a law for establishing a religion. This, it seems to me, does not involve prohibition of any law which may assist the practice of a religion and, in particular, of the Christian religion.
Justice Wilson further stated that in Australian non-secular private schools, religion was

… an incidental or indirect consequence of the pursuit of the educational purpose. In no
case is religion a criterion which attracts a grant. Even the most ‘religious’ of the schools
which have received assistance are first and foremost educational institutions which are
required to strive for a range and quality of education which is at least comparable to
government schools.\textsuperscript{32}

In 2004, the teachers’ union in New South Wales indicated that it would again challenge
the constitutional validity of public funding for non-government schools as it argued evidence
was available that public funding was being used to promote religious education.\textsuperscript{33} However, the
challenge did not eventuate, possibly due to lack of public support for the position. Hence, no
successful constitutional challenges have been mounted about the use of Commonwealth funding
for private schools, whether secular or non-secular.

**D Summary**

Thus, at this time, the Commonwealth government through its national revenue-raising
capacities has great capacity to provide funds to the States and Territories for educational
purposes, including both public and private, secular and non-secular schools. The Commonwealth
has authority to place whatever conditions it considers necessary on such funding. The States and Territories
are in weak bargaining positions to resist such conditions. Commonwealth conditions
on funding have grown, particularly over the last decade, conditions that have increasingly
applied to both public and private schools. While grants are provided to States and Territories
for public schooling, grants are notionally applied through the States and Territories for private
schooling, with the States and Territories required by legislation to pass on such grants ‘as soon
as practicable’.\textsuperscript{34} However, to receive funding, private schools must meet a number of criteria.

**II CONDITIONS TO ESTABLISH A PRIVATE SCHOOL IN AUSTRALIA AND PUBLIC FUNDING**

It was noted that the establishment of a private school is highly controlled in Australia. Such
establishment requires state or territory accreditation with ongoing monitoring of compliance.
The main accreditation requirements are quality of educational provision and resources, including
facilities, qualified staff and policies (for example, student safety). The school must indicate the
curriculum model that it will teach, and the curriculum must be accredited or able to be accredited
by states or territories and meet state learning standards.\textsuperscript{35} In the majority of private schools, the
curriculum taught will be curriculum developed and/or endorsed at state or territory level and
used in both public and private schools.

As an example, initial accreditation of a school and ongoing assessment of compliance in
Queensland occurs under the *Education (Accreditation of Non-State Schools) Act 2001 (Qld).*\textsuperscript{36}
In Queensland, school curriculum will generally be curriculum developed by the Queensland
Studies Authority, a tripartite quasigovernment authority with representation of state public,
Catholic and the ‘independent’ (private but non-Catholic systemic) school sectors.\textsuperscript{37} Further, the
impact of a new school on enrolments at any existing school, particularly public schools, will be
considered,\textsuperscript{38} with a further consideration ‘the extent of religious, philosophical, or educational
delivery, choice in education that students residing in the school’s catchment area have with the
existence of the school’.\textsuperscript{39} Funding eligibility is determined by committee with the final decision.
resting with the (state) Minister on the basis of a recommendation from the board on the basis of deliberations by the Non-State Schools Eligibility for Government Funding Committee. While the school statement of its philosophy and aims must be consistent with the Australian national goals of schooling, state accreditation requirements do not specify educational accountability requirements, although the requirement to meet state curriculum standards may implicitly require adherence to new national curriculum. Similar procedures exist in other States and Territories.

Once a school has state or territory accreditation, further Commonwealth government requirements must be met to obtain Commonwealth funding. Most importantly, schools must be non-profit. Private schools or systemic school representatives sign individual agreements with the Commonwealth Minister to meet any requirements for funding. These agreements include the financial, and increasingly educational, accountability requirements of the Commonwealth government.

One major consequence of the growth of private schooling in Australia is the reduction in overall government expenditure. Public funding of private schools can be a contentious issue with sectors of the public, and expenditure figures can be used in various ways. However, on available figures, public funding of a student in a private school costs the Commonwealth and State and Territory governments less than funding of a student in a public school. In 2003, the average per student government funding (both Commonwealth and State and Territory) was $9,908 for a student in a public school, and $5,092 for a student in a private school. The then Commonwealth Minister for Education, Science and Training stated:

… government [public] schools enrol 68 per cent of students and receive 76 per cent of total public funding; non-government [private] schools enrol 32 per cent of students and receive 24 per cent of total public funding. If every student in the non-government school sector enrolled in the government sector [and the current level of funding to public schools were maintained], taxpayers (through federal and state governments) would need to contribute an additional $3 billion.

In 2009, this amount was estimated at $5 billion.

Many private schools will have more resources than public schools because of the revenue raised through fees. However, if all students attended public schools, and Commonwealth and State and Territory governments could not increase overall funding, the current standards of public schools would have to fall. Through parental subsidy of a large proportion of school students, Australian schooling across both public and private schooling sectors maintains its overall high standard of provision.

III Australian Commonwealth Education Policy and Funding Provisions

The question that arises is what do the respective players in public funding of private education explicitly gain or lose, beyond financial subsidy to the governments for expenditure. Private schools get access to a range of funding they need to operate and innovate, but what other benefits does the Commonwealth government gain, apart from subsidised expenditure?

Examination of the appropriation bills and funding legislation over the last thirty years shows that while the Commonwealth government has expanded its national policy-setting role in education over State and Territory governments, it has simultaneously increasingly drawn private schools under such policy control. These directions are not necessarily negative — examination of the Commonwealth acts shows increasing recognition of the diversity of the Australian community and young Australian educational needs, as well as the changing nature of...
workplaces and technological innovation. Initially, the Commonwealth government required only financial accountability — that states pass on funds for private schools, and that both public and private school expenditure occur in a timely manner and for appropriate purposes.\textsuperscript{49} If financial accountability conditions were not met, funds had to be repaid.\textsuperscript{50}

For example, over the decade from initial Commonwealth public funding to private schools to 1973, appropriation grants for recurrent expenditure and for specific education programs or initiatives evolved to include science and library buildings and projects (including library resources), as well as the training of special education teachers and teacher education centres.\textsuperscript{51} The Commonwealth grants also funded up to $6m annually for special projects or innovations by a state. States could work with other states with no restrictions on sector (public/private) stated.\textsuperscript{52}

In 1973, with a change from a Liberal-National coalition to a Labor Commonwealth government, further changes were introduced in appropriation bills. Funding for recurrent expenditure (management, teacher salaries, other resources) in private schools changed from a fixed rate (for example, in 1971, $35 per primary student and $75 per secondary student at the school’s census date, and in 1972, $50 and $68 respectively)\textsuperscript{53} to a sliding scale based on the wealth, or inversely, the ‘need’ of a school, ranked from A to H, where H indicated the schools with greatest need.\textsuperscript{54} At this time, Catholic systemic schools received special funding arrangements, separate from both public and other private schools. Total funding for recurrent expenditure for the Catholic systemic schools was determined and allocated to schools within the system ‘in such proportions as the Minister, in accordance with the advice of the Board for Catholic Systemic Schools for the State, determines’.\textsuperscript{55}

The new Commonwealth government also established the Schools Commission,\textsuperscript{56} a body to provide advice to the Commonwealth government. Membership of the Commission consisted of from four to 11 full-time and part-time positions, including a full-time Chair, with the Commission to consult with representatives of State and Territory education, both for public and private schooling.\textsuperscript{57}

Although not publicly stated, the Schools Commission may have been a way to distance the new Labor Commonwealth government from direct oversight of public and private schools, particularly non-secular private schools. The Commission’s primary ‘obligation, in relation to education, [was] for governments to provide and maintain government school systems that are of the highest standard and are open, without fees or religious tests, to all children’.\textsuperscript{58} The Schools Commission had delegated authority from the Commonwealth Minister\textsuperscript{59} to oversee the approval of expenditure on matters such as innovative projects and private school buildings, and was the body to receive financial accountability reports.

In 1973 Commonwealth intervention in education was also heightened through pursuance of social justice agendas. The purpose of the Schools Commission was to provide advice on matters such as ‘acceptable standards for buildings, equipment, teaching and other staff and other facilities at government and non-government primary and secondary schools in Australia’; ‘needs of such schools in respect of [facilities], and the respective priorities to be given’; and ‘[a]ny other matter relating to primary or secondary education in Australia’. Focuses included ‘handicapped children and handicapped young persons’ and ‘needs of disadvantaged schools and of students at disadvantaged schools, and of other students suffering disadvantages in relation to education for social, economic, ethnic, geographic, cultural, lingual or similar reasons’, as well as encouraging diversity and innovation, and excellence.\textsuperscript{60} Private schools were also required to provide ‘such statistical and other information in respect of the school as is required by the regulations to be so furnished’,\textsuperscript{61} although regulations at the time were very limited in detail.
In the next decade (1974–1983), despite the change to a Liberal-National coalition Commonwealth government from 1975, subsequent provision acts to the States and Territories for education showed very little substantial change. Private special education schools gained support, and accountability authority returned from the Schools Commission to the Minister. The power of the Catholic systemic sector weakened a little, through recognition of systemic schools in general, not just Catholic systems, and reduced authority for the state Catholic systems to advise the Minister on expenditure. During 1980 and 1981, new areas of funding included projects of multicultural significance and migrant education and provision of English as a second language, recognising Australia’s development as a multicultural nation. By 1982, funding was provided to systemic and non-systemic schools for: building projects and equipment projects, recurrent expenditure, short-term emergency assistance, general education in English as a second language (ESL) for continuing students and new arrivals, disadvantaged schools, and special education.

From early 1983 to 1996, with a Labor government once more in place, under two successive prime ministers (Bob Hawke to December 1991, Paul Keating from December 1991 to March 1996), two programs of national education reform and policy setting can be discerned. First came strong commitment to student participation and equity agendas, although not necessarily equal for all students, with $40m in grants provided for public schools, but only $4.5m for the combined private sector of Catholic and non-Catholic private schools. A national technological push putting computer education on the agenda also occurred.

The second reform agenda in 1984 brought moves to a stronger national education identity — the establishment of a Curriculum Development Centre to work on national curriculum, and the establishment of a Schools Council to provide advice on this area, and an identified need for Commonwealth and State and Territory government partnerships in education as essential to moving forward. While the rhetoric of collaboration was somewhat contradictory to the earlier comments of John Gorton who had inserted Commonwealth government policy into State and Territory education, collaboration would not have been a possible direction if the earlier Commonwealth national policy forays into education had not occurred.

The planned collaboration of the Commonwealth government and State and Territory governments in education was acknowledged in the introduction of the 1984 provisions bill, but with public reinforcement of the primary responsibility of the state and territories in education policy.

In proposing that the Commonwealth play a positive role in this process the Government fully recognises that State governments have the prime responsibility for education. However, the Government believes it is possible, and indeed highly desirable, for the Commonwealth to participate and for the Curriculum Development Council to work in partnership with the States in building on the work now being done in the States and to seek ways of co-operatively developing new approaches to traditional subject matter as well as new subjects, new organisational and structural patterns, and forms of teaching and learning that will make school a more interesting and constructive experience for all students.

The first emphasis on ‘basic learning’ emerged in 1984. Funding for private schools was changed to a 12-point scale using a socio-economic index, while accountability requirements became clarified within the act itself. Private schools now had to provide detailed demographic information including information on teaching staff, all forms of income and expenditure, and
enrolment data. Further, systemic private school authorities had to provide information on individual school governance.75

The early to mid-1980s showed growing concern about new arrivals, English language learning needs (ESL) and migrant education. However, during this time, no further major changes occurred to funding provision or accountability, which remained focused on expenditure and appropriate expenditure. During this period, private school funding appears to have been limited by minimum and maximum enrolment numbers per school.76

The returned Labor Commonwealth government in 1990 and change of prime minister in 1991 introduced a new era of Commonwealth education policy. Grant areas listed in funding legislation in 1992 increased to include specific recurrent expenditures for ESL, for eligible new arrivals, special education and intervention support, and capital projects for children or students with disabilities.77 Equity projects addressed disadvantaged schools, country areas and literacy and learning. National priorities included secondary education in prescribed country areas; enhancing literacy and learning; projects to assist students at risk in government secondary schools and non-government secondary schools; and national projects to assist gifted and talented students.78 ‘Incentive’ grants included initiatives to improve the learning experiences of girls; students with disabilities attending government schools or non-government schools; and a priority languages program;79 while grants for joint programs to support primary and secondary education included approved education centres, and projects of national significance80.

From the period 1989, the proposed partnerships between Commonwealth and State and Territory Ministers of education finally emerged. Over the next two decades, three statements of national goals of schooling were developed and published by the combined ministers. All three statements have endorsed the need for education to meet the needs of all students and to provide broad, not narrow outcomes for students, for education provision to be equitable, and for education to be high quality. The rhetoric of educational agendas in the period, then, still reflected issues of equity, participation and social justice for all Australian students. However, the three agreements introduced the age of educational accountability tied to Commonwealth education funding, and accountability in terms of outcomes of expenditure, not just financial accountability for appropriate expenditure.

IV The Australian National Agreements on Education

The Australian Education Council (of Ministers) released the first national agreement in 1989, The Hobart Declaration on Schooling.81 In this agreement the ministers agreed to establish common agreed learning goals for students, common key curriculum areas and agreement for national collaboration on curriculum development, establishment of the Curriculum Corporation, a common entry age, and national reporting on State and Territory education outcomes. Work commenced on statements of national benchmarks in literacy and numeracy for key ages of schooling, the minimum standards that all students should achieve. The ministers agreed to a National Report on Schooling which would:

- monitor schools’ achievements and their progress towards meeting the agreed national goals. It will also report on the school curriculum, participation and retention rates, student achievements and the application of financial resources in schools. The annual national report will increase public awareness of the performance of our schools as well as make schools more accountable to the Australian people.
The next national statement, *The Adelaide Declaration on National Goals for Schooling in the Twenty-First Century*, released a decade later in 1999, stated:

Common and agreed goals for schooling establish a foundation for action among State and Territory governments with their constitutional responsibility for schooling, the Commonwealth, non-government school authorities and all those who seek the best possible educational outcomes for young Australians, to improve the quality of schooling nationally.82

In 1999, then, public government documents identified constitutional authority for education, presumably policy as well as provision, with the States and Territories. However, the Adelaide Declaration also brought the statement that reporting on education required ‘explicit and defensible standards that guide improvement in students’ levels of educational achievement and through which the effectiveness, efficiency and equity of schooling can be measured and evaluated’.83

Another decade on, and the most recent statement, the *Melbourne Declaration on Educational Goals for Young Australians*84 released in 2008, established a new form of Commonwealth and State and Territory partnership. Once again, equity and quality were core focuses but accountability was stated more strongly — information should be available to the community to ensure schools are accountable for the results they achieve with the public funding they receive, and governments are accountable for the decisions they take.85

The Melbourne Declaration was accompanied by an ‘Action Plan’ of the ‘strategies and initiatives that Australian governments will undertake, in collaboration with all school sectors’86 to support the national goals. The four-year action plan was to promote various educational goals (participation, equity, excellence) as well as strengthening accountability and transparency.87 The four-year plan fitted with a new agreement among the Commonwealth, states and territories through the Council of Australia Governments (COAG) to

a new performance reporting framework (for education) and … that the new Australian Curriculum, Assessment and Reporting Authority will be supplied with the information necessary to enable it to publish relevant, nationally comparable information on all schools to support accountability, school evaluation, collaborative policy development and resource allocation.88

Among the strategies in the four-year plan was agreement by the Australian governments to ‘review their engagement with government and non-government schools and systems to ensure that school regulation supports the achievement of agreed outcomes and that all schools participate in and comply with national reporting requirements’89.

**V IMPACT OF THE AUSTRALIAN NATIONAL DECLARATIONS**

The major outcomes of the national declarations were not only an increased focus on common national education policy but also increasing authority to the Commonwealth government to require States and Territories, public and private schooling sectors, to provide ‘educational outcome’ data.

The first national declaration in 1989 introduced the concept of a national report and common State and Territory curriculum components. While it resulted in development of minimum literacy
and numeracy benchmarks for some years of schooling, and some testing for State and Territory-level reporting, little other change ensued.

However, following the second national declaration in 1999, and agreements for a national report on school outcomes, the nature of the funding provisions acts changed considerably. Standard financial accountability requirements remained for private schools, with special emphasis on removal from funding for failure to meet minimum enrolments. State governments had to sign agreements with the Commonwealth government for public schooling. Minor changes were provision of instruction in languages other than English and the specification of national priority languages, and for programs for students with disabilities in secondary schooling to make the transition from secondary education to further education, employment or adult life. Later specifications of national priority languages still reflected a commitment to social communities rather than economic advantage.

March 1996 had signalled another change to the nature of the Commonwealth government, with the election once more of a Liberal-National coalition government, led by Prime Minister John Howard, remaining in power until November 2007. In November 2007, a Labor Commonwealth government was returned, led by Prime Minister Kevin Rudd. The period since 1996 has seen the most activist Commonwealth government education policy engagement and direction, regardless of the party in power. The 1996 funding act saw the introduction of educational accountability requirements in return for funding, in addition to the longstanding financial requirements. During the previous decades of funding bills, the Commonwealth had become increasingly prescriptive with respect to areas of funding and where states and governments, and private school sectors, should direct their attention. The use of the term ‘incentive’ in the 1992 funding provisions reflected the general approach of the Commonwealth government to that time. Funding was provided for specific activities that the Commonwealth identified as priority educational initiatives and needs, in areas where both public and private schools could participate. The incentives for schools and school authorities were to accord with the Commonwealth agendas, and in return receive funding to spend, only needing to demonstrate such money had been spent on appropriate initiatives. Each new area of funding, however small, became a carrot to lead State and Territory, public and private education.

By 1996, one senses a frustration of the Commonwealth government that despite all the funding initiatives, little appeared to have altered, although no data were readily available. In the 1996 act, areas of funding were rationalised from the plethora of individual grant areas that had developed to three in this act (literacy, languages, and special learning needs) with two areas (‘school to work’, ‘quality outcomes’) to be funded through other legislation. Parental choice and private schools were to be enhanced by 1996 legislation, removing the “[previous government’s imposition of] a bureaucratic, unfair and inequitable burden on non-government schools seeking Commonwealth funding”. States and Territories were still identified as having constitutional responsibility for education.

The 1996 act introduced the first ‘sticks’ by requiring different types of accountability to the Commonwealth government and to the community for public funding, in accord with the previously agreed National Report on Schooling.

For the first time, the bill contains provisions to ensure comprehensive reporting on the application of financial assistance provided to schools. This will be achieved through a strengthened national report on schooling in Australia with a range of core data showing what our students are learning and where the greatest needs lie.
Educational accountability requirements were introduced both for public and private schooling sectors:

**Specific condition: educational accountability**

An additional condition applying for the purposes of paragraph 10(b) is a condition that the State will, not later than a date or dates determined by the Minister, do any of the following:

(a) take part in the preparation of a national report on the outcomes of schooling;
(b) provide to the Minister a report or reports, of a kind or kinds agreed to between the State Minister and the Minister, on matters agreed to between them;
(c) take part in evaluations of the outcomes of programs of financial assistance provided under this Act.99

The nature of the educational accountability data for the National Report on Schooling at this stage was limited, the literacy and numeracy benchmark testing programs were still being developed. However, the intention from the 1989 Hobart Declaration was that information on student achievement of these benchmarks would be included.

Educational accountability requirements became more defined in 2000. State and Territory governments had to commit to the National Goals for Schooling and to ‘achieve[ment of] the performance measures (including the performance targets) set out in the regulations as in force from time to time’,100 and, further to ‘[any] other conditions that the Minister thinks appropriate in relation to financial assistance to the State’.101

Education accountability requirements expanded on the 1996 appropriations act to include: provision of ‘a report or reports, of a kind or kinds required by the Minister, addressing the requirements for performance information that are set out in the regulations as in force from time to time’; and participation in evaluating programs of financial assistance.102 Private schools had to sign agreements with the same financial and educational accountability requirements.103 By 2001, the regulations accompanying the act became much more specific than in the earlier years; the performance targets for school reporting were the percentage of students in Years 3, 5 and 7 achieving national benchmark standards in reading, writing, spelling and numeracy.104 At this stage, these student achievement data were obtained through State and Territory literacy and numeracy tests, which were then statistically scaled across States and Territories to provide an approximate equivalence of standards.

One consolation for the private school sector in the Act of 2000 was the funding for Catholic systemic schools on an aggregated model, based on the new funding scales, set at 56 per cent of the average government school recurrent costs per student (except for ACT which was at a slightly lower level), giving the Catholic system continued control over how funds were allocated to individual schools.105 Funding ranks for other private schools were now calculated on more complex socio-economic data comprising 46 levels, ranging from a score of 85 (or less) to 130 (or greater).

However, by this stage, the Commonwealth government had achieved State and Territory agreement to national priorities and national goals, with both the public and private school sectors agreeing to participate in state or territory standardised tests in literacy and numeracy for children in Years 3, 5 and 7 and to contribute outcomes data to the State and Territory reports. While initially, such testing was based on samples of students to provide a state or territory overview of performance, this soon became cohort testing of all students in these years, leading to the possibility of individual school data.
VI ESCALATING CHANGE TO NATIONAL CONTROL OF EDUCATION

The increase from 1962 to the 2000 appropriate act in Commonwealth education policy setting, collaborative agreements, educational accountability requirements, and control of both public and private schooling in return for funding, appears a gradual drift, with State and Territory governments and the private schooling sector quietly seduced by the range and necessity of funding available. The next two major funding arrangements in 2004, under the continuing Liberal-National coalition government, and in 2008, under the new Labor government, created a new level of Commonwealth government control of education.

In 2004, the then Minister for Education, Science and Training, Dr Brendan Nelson, introduced the *Schools Assistance (Learning Together — Achievement Through Choice and Opportunity) Act 2004* (‘Schools Assistance’), a new badging of an appropriation act that reflected, albeit in a more positive manner, the well-known US legislation of 2001, *An Act to Close the Achievement Gap with Accountability, Flexibility, and Choice, So That No Child Is Left Behind*, or, the *No Child Left Behind Act of 2001*. Dr Nelson highlighted specific strengths of the new act in his Second Reading speech to the House of Representatives: every student would be ‘financially supported regardless of the school that the child attends’; all Catholic schools were integrated with the basic socio-economic funding model (although individual amounts could still be aggregated); increased funding for core areas of geographically isolated students; literacy and numeracy; English language instruction for new arrivals from non-English speaking backgrounds; and, instruction in second languages. In return there would be increased performance reporting for all students and greater national consistency in schooling with States and Territories and school authorities to agree to:

- a common starting age by 2010
- common national tests in Years 6 and 10 in English, mathematics, science, and civics and citizenships, with these tests to ‘provide authoritative measures of the standard of achievement of children against national benchmarks’
- common national tests for literacy and numeracy in Years 3, 5 and 7.

The *Schools Assistance* bill also contained instructions to schools and systems about how reporting to parents was to occur including use of plain language and relative to peer groups, as well as against national benchmarks. All schools would be required to provide information to parents about:

- students reaching literacy and numeracy benchmarks as previously
- improvements against previous years in benchmark performance
- average Year 12 [final year of schooling] results
- percentage of Year 12 completions
- school leaver destinations
- teacher qualifications
- proportion of teachers participating in professional development
- staff retention rates
- student retention rates
- staff and student absenteeism rates
- value added measures of student performance [although not yet established]
- and a range of other indicators.
Through these accountability requirements, the Commonwealth government exerted considerable control of the educational activities of schools. For example, the reporting requirements for parents specified that an individual child’s report in each subject must be labelled from ‘A’ to ‘E’ (or equivalent), be against ‘clearly defined against specific learning standards’, and include a comparison ‘relative to the achievement of the child’s peer group at the school by at least quartile bands’. School information overall had to be published in at least two forms such as hard copy (available to parents and prospective parents on request) or internet site or billboard.

The 2004 act placed additional controls on schools — requirements to put in place safe schools frameworks, and a commitment that each child would have two hours of physical activity a week.

The Commonwealth government, however, also exerted pressure on state government control of public schooling. In the new act, all school principals were to be given ‘significant say over staffing issues in their own schools’ and State and Territory governments and school authorities were to commit to providing ‘principals [with] strengthened autonomy over, and responsibility for, education programs, budgets and other aspects of school’s operations’. With the Commonwealth government controlling education policy, albeit with State and Territory ‘collaboration’, and individual schools being given more autonomy over school management, the role of the States and Territories in managing their previously-identified ‘constitutional’ responsibility of education must be reduced, if not removed.

Neither the introduction of the 2008 bill, nor the Schools Assistance act itself, makes reference to a state or territory constitutional responsibility, or even primary responsibility, for education — a departure from 1981 High Court dicta, 1984 and 1996 parliamentary introductions to appropriations bills, and the 1999 Adelaide Declaration. Conversely, Minister Nelson stated to parliament that the Schools Assistance bill ‘strengthen[ed] … the performance framework for Australian government funding’ and would build ‘national consistency’. State and Territory collaboration was to be sought on a national framework of ‘values education’ for Australian schools with a condition of funding to ‘prominently display this in all Australian schools’. Schools would also be required to have a ‘functioning flag pole and fly the Australian flag’ and acknowledge Commonwealth government support to receive Commonwealth education funding. Interestingly, this component of the funding was sufficiently contentious to raise the ire of some states regarding Commonwealth government controls of states through the appropriation bill.

While some aspects of the Commonwealth government accountability requirements were refined over the next three years, no further major changes occurred. Subsequent funding provisions ‘empower[ed] the school community — … teachers, parents, students, counsellor and friends of the school, along with the school principal’ to determine infrastructure needs. In the 2007 amendment to the 2004 act, the Commonwealth minister berated the State and Territory governments for their ‘chronic neglect of state government schools’ and the reported inadequacy of ‘state and territory bureaucracies’ to provide basic infrastructure items.

Some expectations, such as the common national tests and reporting could not be implemented until the tests were actually developed, with the first common national testing in literacy and numeracy not occurring until 2008. Other national tests specified in the act and regulations were still to be developed when the Liberal-National coalition government lost power at the end of 2007. However, by 2012, all of the federally-legislated or COAG expectations and requirements for schools and state and territory systems have been implemented.
VII NATIONALISED EDUCATION IN AUSTRALIA: THE NEXT (FINAL?) PHASE

The national agendas developed over successive Commonwealth government appropriation bills and different Commonwealth governments have come to full fruition. The incoming Labor government in 2008, despite its different political persuasion, did not reduce the goal of Commonwealth educational policy setting or national consistency, and has been energetic in further pursuit of national goals. In 2008, the third collaborative Ministerial agreement, the Melbourne Declaration was released. The *Australian Curriculum, Assessment and Reporting Authority (ACARA) Act 2008* (Cth) came into force in 2008 to create a new body to oversee the development of national curriculum from preparatory or kindergarten years to the end of secondary schools in four subject areas, English, mathematics, science and history. ACARA was established on behalf of all Ministers to be under their control and cooperation. Its function is to

(a) develop and administer a national school curriculum, including content of the curriculum and achievement standards, for school subjects specified in the Charter; and

(b) develop and administer national assessments; and

(c) collect, manage and analyse student assessment data and other data relating to schools and comparative school performance; and

(d) facilitate information sharing arrangements between Australian government bodies in relation to the collection, management and analysis of school data; and

(e) publish information relating to school education, including information relating to comparative school performance ... .

The national curriculum has been under development with rollout to be implemented by all states and territories during 2013.

A new Commonwealth provisions bill was enacted in 2008, the *Schools Assistance Act 2008* (Cth). This act was distinguished from any previous act as it applied only to the private school sector. The departure from the processes of the previous decades of government was explained simply by the then new Minister for Education:

… [Educational] goals will be achieved through a new National Education Agreement, an agreement between governments in Australia that will set the terms of funding and accountability for all schooling over the next four years. *Commonwealth funding for government schools does not require specific legislation* and is being negotiated through the National Education Agreement which will be finalised by the end of 2008.

The national goals continue requirements for accountability for Commonwealth funding for schools, including a ‘new era of transparency’, while acknowledging that private schools and school systems were ‘vitally important stakeholders in this national endeavour’. Private schools were publicly to be brought into the same fold as public schools: the new act would apply to private schools ‘the same principles of quality and accountability, excellence and equity that have shaped our national reform agenda’.

Further, the Council of Australian Governments (COAG) National Education Agreement (NEA) was signed, a schedule to overall financial agreements between the Commonwealth government and State and Territory governments for Commonwealth revenue, an agreement which incorporated many of the same focuses as the previous appropriations bills for financial and educational accountability. The new agreement and act were presented as having a ‘simpler, stronger and better focused framework for performance information and reporting’, with private
schools required to participate in the same way as public schooling, if they wish to receive public funding. 125

The 2008 Act and National Education Agreement did present a simpler legislative structure, which remain in place in 2012 with updating amendments. Previously, a considerable component of the provisions acts addressed matters relating to private schools, structures, conditions, changes and so on. The acts had increasing detailed areas of funding and accountability that the 2008 Act and the National Education Agreement were able to subsume under simpler, but all inclusive and potentially expansive, headings. Reporting requirements to parents dropped the ‘quartile’ comparisons. However, reports are still to use plain language, provide an ‘accurate and objective assessment of the student’s progress’, including achievement against ‘any available national standards’ and ‘relative to the performance of the student’s peer group at the school’. Reports are also to meet any other requirements in regulations and be provided to each person responsible for a student in a way prescribed by the regulations and with the frequency prescribed by regulations. 126 However, in the 2008 Act, the Commonwealth Minister may approve a different form of student report. 127

Under the 2008 legislation, private schools were also required to participate in the National Curriculum and National Assessment (testing) Program. 128 The latter includes national literacy and numeracy tests in Years 3, 5, 7 and 9 for all students, and tests for randomly-selected schools and samples of students in mathematics for Years 4 and 8, science for Years 4 and 8, civics and citizenship for Years 6 and 10, ICT literacy for Years 6 and 10, and an international reading literacy survey. This totals 17 national assessments covering all year levels from Year 3 to Year 10. 129 When the NAP is combined with the requirement to implement National Curriculum in four subject areas across all school levels, controlled formats for reporting to parents, publication of school data, and the allocation of resources to financial accountability reports and provision of statistical data, the discretion of private schools to manage their own educational programs and content has been severely eroded. Private schools could well become parent- and public-funded shells that provide public education. The Commonwealth government control of the private school sector is almost complete.

The National Education Agreement is of interest not just because of the now almost standard expectations for public and private school and education authority provision of accountability information, but for the insights into the expected collaboration of State and Territory governments with the Commonwealth government. The Agreement outlines the respective roles of the Commonwealth, the States and Territories, and both levels of governments in joint activities. 130

Joint responsibilities for the Commonwealth and State and Territory governments are ‘developing, progressing and reviewing the national objectives and outcomes for schooling’, ‘funding school education to enable improved performance in the nationally agreed outcomes and to achieve national objectives’, and ‘the development and maintenance of a National Curriculum and for participating in the work of the national education authority that manages national curriculum, assessment and data management, analysis and reporting’. 131 These sound like the management of education policy at large in Australia.

The Commonwealth government is responsible for provision of funding to the States and Territories ‘to support improved service delivery and reform to meet nationally agreed outcomes and to achieve the national objective, including for students with particular needs’. 132

The States and Territories are responsible for safe, equitable and quality education provision for all students and the development of education policy, delivery of services, monitoring and
reviewing performance of individual schools, and regulating schools ‘so as to work towards national objectives and achievement of outcomes compatible with local circumstances and priorities’. States and Territories have undertaken to ensure reporting to parents follows the national requirements, implementation of the national curriculum, but remain independent in their accreditation of schools and regulation of the teacher workforce, although the National Education Agreement has signalled involvement in teacher education and professional development in general. In 2012, eight policy areas in education are targeted for ‘reform’ through COAG.

The National Education Agreement no longer references constitutional or primary responsibilities of the state and territories in matters of education. Under the Agreement, the states appear to have assigned all State and Territory rights to the advancement of the Commonwealth national policy agendas. Although this agreement is portrayed as a collaborative effort, the Commonwealth government holds the purse strings. The previous private Commonwealth government had required more empowerment of school principals and school communities in both public and private schools in matters affecting the management of the school, staffing and infrastructure resources. Policy of the new government maintains this approach — the four year plan to implement the Melbourne Declaration argues for ‘increased school-based decision-making about recruitment, staffing profile and budget’, being trialled in a number of schools. The role of State and Territory governments and systems in individual school governance continues to be reduced.

A second policy direction that emerges strongly from the responsibilities of the National Education Agreement are the clauses about each level of government ensuring that private schools and school systems will ‘toe the line’ with Commonwealth government agendas, portrayed also as State and Territory requirements. A Commonwealth government undertaking is to ‘ensur[e] that the funding arrangements for non-government school systems and schools are consistent with, and support the responsibilities of the States and Territories in respect of regulation, educational quality, performance and reporting on educational outcomes’ and, further, that ‘funding agreements between the Commonwealth and non-government authorities will include a provision that the non-government school sector will work with Governments within each state or territory to ensure their participation in relevant aspects of this agreement’. States and Territories have agreed to ‘[work] with the non-government school sector in their State or Territory to ensure their participation in relevant aspects of this agreement’. Despite being a ‘vitaly important stakeholders in this national endeavour’, private schools have now become a schooling sector that is to be controlled by Commonwealth, and, in their monitoring role on behalf of the Commonwealth government, by State and Territory governments. Does this truly reflect the right of freedom of choice for parents?

VIII CONCLUSION

This discussion has not addressed all aspects of the education appropriation provisions over the last three decades: they also include areas such as teacher professional development, teacher preservice courses in higher education institutions, and the nature and purpose of school buildings.

What the discussion has shown is the changing nature of the acts over time, showing changing national public interests, changing demographics, the focus on financial accountability, the shift from carrots and incentives to the use of sticks in return for funding, and eventually moves to ‘educational accountability’. These developments have shown each successive
Commonwealth government building on the national authority and power established by the previous government, regardless of political persuasion. No Commonwealth government has shown signs of reducing its authority. Various public and legislative statements have woven in and out of whether the Commonwealth government has a constitutional role in education, or whether it is the responsibility of the States and Territories.

Who is regarded as having primary responsibility for education and what is balance of Commonwealth and state or territory powers remain ambiguous. Without specific constitutional authority to either Commonwealth or States and Territories, but previous recognition of traditional responsibilities of States and Territories for education, education until at least 1999 was stated to be a State and Territory constitutional (or at least primary) responsibility. However, through the recent Commonwealth funding provisions, working towards ministerial agreements and national agreements replacing legislation, the Commonwealth government appears to have all but won the battle for educational policy development. As noted in 1991,

> [t]he operation of the [Commonwealth funding conditions] depends on the State’s acceptance of the grant. It is no answer to the consequence of this fact that economically speaking a State may have little choice.141

The ‘collaborative’ agreements of the present clearly reflect the Commonwealth government policy agendas of the past. Furthermore, the Commonwealth government has annexed private schools to participate fully in Commonwealth national education policy agendas. The once strong Catholic school system that caused the initial Australian Commonwealth government foray into public funding of private schools has lost its voice and any apparent authority over core educational content in its schools.

The Commonwealth government is directing education activity in Australia while states manage the services. Each successive appropriation act for provision of funding to education over the last two decades has increased the control of the Commonwealth government over state policy and school activity.

Constitutional change in Australia requires authority through public referendum.142 At this time, the Commonwealth government, whether Conservative or Labor, does not need constitutional authority, or to seek such authority through constitutional amendment to direct education. The constitutional responsibility of the States and Territories is now to manage a Commonwealth education system, and to use Commonwealth revenue to the states for general purposes to subsidise Commonwealth education policy in public schools. What the constitutional reserve powers doctrine, case law dicta, and statements or previous legislation did not remove has been achieved by stealth — education in Australia is now a Commonwealth policy responsibility that encompasses public schools, and private schools that draw heavily on parental subsidies. The prevailing questions that remain for Australian education are whether state authority in education will again raise its head, and whether private schools will ever emerge again from national government education instrumentality.

**Keywords:** public funding education provisions; private schools; Australia, educational accountability; constitution.
Endnotes

1 The Commonwealth of Australia (‘Cth’) was formed in 1901, and comprises 6 states (New South Wales, Queensland, South Australia, Tasmania, Victoria, Western Australia) and two territories (Australian Capital Territory and Northern Territory).

2 Private schools not in the Catholic school systems are often referred to as the ‘independent’ school sector.

3 Schools Commission Act 1973 (Cth) s 13(4)(b) (the prior right of parents to choose …); Employment, Education And Training Act 1988 (Cth) s 24(2)(b); and more recently:

   The Australian government remains committed to school choice as a fundamental democratic right. The bill recognises the right of parents to choose the type of education they want for their children. (Commonwealth, Parliamentary Debates, House of Representatives, 23 June 2004, 31207 (Brendan Nelson, Minister for Education, Science and Training)).

   These statements are interesting as the Australian Constitution does not contain a Bill of Rights as in the Constitution of the United States of America (US), for example, and any individual rights are generally implied or statutory. The relevant acts and statements therefore create this right described as a ‘prior’ right.

4 In 2010, there were 2 725 private schools in Australia, of which 1 708 were Catholic schools, and 6 743 public schools. Overall, 34% of students are enrolled in private schools. This includes all levels of schooling (primary, secondary and special education). (Australian Curriculum, Assessment and Reporting Authority (ACARA), National Report on Schooling in Australia 2010 (2012), Part 9 Table 1, Table 10. <http://www.acara.edu.au/reporting/national_report_on_schooling_2010/national_report_on_schooling_2.html>.

5 Nelson, above n 3.

6 For example, among 57 participating nations in the 2006 Programme for International Science Achievement (PISA) testing, Australia is generally around the second to third band of achievement on scientific literacy of 15 year-olds: see, eg, Sue Thomson and Lisa De Bortoli, Exploring Scientific Literacy: How Australia Measures Up (2008) 66 <http://www.acer.edu.au/documents/PISA2006_Report.pdf>. While such results are extremely limited in their generalisability to the full value of education, they do not indicate problems with the Australian education system, given our full participation by students until at least the age of 16 years, including students with physical and intellectual disabilities.

7 Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (‘Engineers’ case’) [1920] HCA 54; (1920) 28 CLR 129.

8 Australian Constitution s 51(xxiiiA), an amendment introduced in the Constitution Alteration (Social Services) Act 1946 (Cth).

9 Local governments in Australia are known as ‘councils’. Councils in different states can have quite different regional geographic size; Queensland with an area of 1.7m sq km has 73 local councils, which can cover a region of 70 000 sq km. Local governments are mainly concerned with planning and development and provision of local services.

10 Australian Constitution ss 86, 90.

11 Following original state constitutions and, implicitly, under s 114 of the Australian Constitution.

12 In most instances, individuals only had to complete one state income tax form with columns for the state and Commonwealth tax. Tax liability in more than one state required additional returns.

13 States Grants (Income Tax Reimbursement) Act, No. 20 of 1942; the Income Tax (War-time Arrangements) Act, No. 21 of 1942 (the act coopting state resources); the Income Tax Assessment Act, No. 22 of 1942; and the Income Tax Act, No. 23 of 1942.

14 South Australia v Commonwealth (‘First Uniform Tax Case’) [1942] HCA 14, (1942) 65 CLR 373 [unpaginated].

15 South Australia, Victoria, Queensland and Western Australia.
First Uniform Tax Case. Most dissent focused on the War-Time Arrangements Act, found by Latham CJ to be invalid but accepted by 3 of the 5 justices. The Act was to continue only until the end of the financial year following the end of the war.

Peter Hanks and Deborah Cass, Australian Constitutional Law (Butterworths, 6th ed, 1999) [9.6.7]. Despite a further challenge by two states, the system has remained in place (Victoria v Commonwealth (The Second Uniform Tax Case) (1957) 99 CLR 575), in essence supporting the original constitutional interpretation of financial power of the Commonwealth government.

Introduced in 1999 by the Commonwealth Government, A New Tax System (Goods and Services Tax) [GST] Act 1999 (Cth), the GST was a new national tax introduced to replace various state and territory taxes, by agreement with and cooperation of the states and territories, with revenues to be provided to the states and territories (s 1-3(a)).

Latham CJ stated in the First Uniform Tax Case, ‘Equally, it is said, the Commonwealth cannot lawfully make an offer of money to a State which, under the conditions which actually exist, the State cannot, on political or economic grounds, really refuse’. However, in Attorney-General (Vic.); Ex Rel. Black v The Commonwealth (‘DOGs case’) ([1981] HCA 2, [38]), Barwick CJ stated with respect to Commonwealth appropriation grants: ‘The operation of the conditions depends on the State’s acceptance of the grant. It is no answer to the consequence of this fact that economically speaking a State may have little choice’. Most states would not be able to provide any public service without Commonwealth grants and most grants have substantial conditions reflecting Commonwealth government policy.

Australian states challenge the constitutionality of new Commonwealth legislation on occasion. The extent of Commonwealth power was tested in the WorkChoices case (New South Wales v Commonwealth (‘Work Choices case’) [2006] HCA 52), when the Commonwealth government introduced legislation involving employment and industrial relations matters using its corporations power (Australian Constitution s 51: The (Commonwealth) Parliament shall, subject to this Constitution have power to make laws for the peace, order and good government of the Commonwealth with respect to: … (xx) foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth.) Five states, with the remaining state (Tasmania) and the two territories intervening, argued that the proper head for the matter was industrial relations, not corporation, power, with Commonwealth government constitutional authority in the area restricted to conciliation and arbitration of industrial disputes beyond state boundaries, not matters within states (Australian Constitution s 51(35v): The (Commonwealth) Parliament shall, subject to this Constitution have power to make laws for the peace, order and good government of the Commonwealth with respect to: … (35v): conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State). The states lost, with the High Court ruling the use of the corporations power was valid for the Commonwealth government purposes. Given the extent to which corporations are the basis of modern capitalistic societies such as Australia, this ruling gives the Australian Commonwealth government widespread possibilities for any future legislation.

See, eg, the DOGs case, the seminal Australian case on funding to non-secular private schools: education is ‘within the State legislative area’ with its ‘furtherance … undoubtedly a concern of the State’ (Barwick CJ at [38]); and, Kirby J dissenting in Workchoices, [5349]):

The States, correctly in my view, pointed to the potential of the Commonwealth’s argument, if upheld, radically to reduce the application of State laws in many fields that, for more than a century, have been the subject of the States’ principal governmental activities. Such fields include education, where universities, tertiary colleges and a lately expanding cohort of private schools and colleges are already, or may easily become, incorporated. … All of the foregoing fields of regulation might potentially be changed, in whole or in part, from their traditional place as subjects of State law and regulation, to federal legal regulation, through the propounded ambit of the corporations power.


The Commonwealth government has a maximum term of three years in Australia, but no set minimum term. Terms are not fixed and elections can be called on provision of appropriate notice.
24 ABC, above n 22.

25 Minister John Gorton, in conjunction with his major responsibilities, became the first Commonwealth Minister for Education, as the ‘Minister assisting the Prime Minister in Commonwealth activities relating to research and education which fall within the Prime Minister’s Department’.


29 Australian Constitution s 116 (The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion … ).

30 DOGs case. The judgment states that other states supported the Commonwealth legislation.

31 Ibid 584.

32 Ibid 656. The High Court in DOGs also argued that the establishment clause in the Australian Constitution, and the constitutional papers, did not establish a separationist view of church and state (at 654). While the US and Australian establishment clauses appear similar on the surface, the US Establishment Clause states ‘Congress shall make no law respecting an establishment of religion …’. Barwick CJ stated that the use of the term ‘for’ rather than ‘respecting’ was deliberate: ‘The divergence in language to which I have earlier referred is apparent from the use of the word “respecting” in the American text and the word “for” in s 116. What the former may fairly embrace, quite clearly the latter cannot: and that is so, in my opinion, even without placing critical significance on the purposive nature of the Australian expression and the lack of such an element in the American text. … However, in the interpretation and application of s. 116 the establishment of religion must be found to be the object of the making of the law. Further, because the whole expression is “for establishing any religion”, the law to satisfy the description must have that objective as its express and, as I think, single purpose. Indeed, a law establishing a religion could scarcely do so as an incident of some other and principal objective. In my opinion, a law which establishes a religion will inevitably do so expressly and directly and not, as it were, constructively.’ at 579.


34 Schools Assistance (Learning Together — Achievement Through Choice and Opportunity) Act 2004 (Cth) s 39(a)(i). Further the state must describe such funds as ‘a payment made out of money paid to the State by the Commonwealth’ (s 39(a)(ii)). This mechanism is considered necessary because ‘[t]he Australian Government has no constitutional authority to make direct payments to non-government schools but uses its power under various sections of the Australian Constitution to make payments to States for schools’ (Independent Schools Queensland, Australian & Queensland Government Funding for Independent Schools Choice & Diversity An Information Booklet for ISQ Member Schools (2009) 8). The amount of funding for private and public schooling is always contentious. Following a review (David Gonski, Your School, Our Future: Review of Funding for Schooling—Final Report (Australian Government, 2012). <http://apo.org.au/research/review-funding-schooling-final-report>), Commonwealth funding for schools is still to be advised at the time of publication of this paper. However, the principle of funding to private schools is not an issue.

35 See eg, Education (Accreditation of Non-State Schools) Regulation 2001 (Qld) reg 7.

36 For requirements, see <http://www.nssab.qld.edu.au/>.

37 See eg, the Queensland Studies Authority, responsible for statewide curriculum and assessment and certification for all schooling sectors <http://www.qsa.qld.edu.au>.

38 See eg, Education (Accreditation of Non-State Schools) Act 2001 (Qld) s 85(3)(a).
39 *Education (Accreditation of Non-State Schools) Act 2001* (Qld) s 85(3)(b).
40 Ibid s 71.
41 Ibid s 133.
42 *Education (Accreditation of Non-State Schools) Regulation 2001* (Qld) reg 6(2): ‘The statement [of philosophy and aims] must be consistent with the Melbourne Declaration on Educational Goals for Young Australians’.
43 *Education (Accreditation of Non-State Schools) Act 2001* (Qld) s 17(1)(b)(i).
48 This does not address the issue as to whether Australian expenditure on school education is commensurate with its international standing and quality of life. See, eg, a 2010 analysis that indicated that Australia was ‘second last on education spending compared to other OECD nations: ABC (10 September 2010) <http://www.abc.net.au/news/stories/2008/09/10/2360520.htm?section=australia>.
49 For example, *States Grants (Schools) Act 1973* (Cth) s 5(1)(a).
50 Ibid s 5(1)(b).
51 *States Grants (Schools) Act 1973* (Cth).
52 Ibid s 52.
54 *States Grants (Schools) Act 1973* (Cth) s 15.
55 Ibid s 14(1)(b)(i)(B) (emphasis added).
56 *Schools Commission Act 1973* (Cth).
57 Ibid s 13(1).
58 Ibid s 13(4)(a).
59 See, eg, *States Grants (Schools) Act 1973* (Cth) s 52(1)).
60 *Schools Commission Act 1973* (Cth) s 13.
61 *States Grants (Schools) Act 1973* (Cth) s 16(1)(b)(iv).
64 *States Grants (Schools) Act 1976* (Cth) s 3(1), and s 14(3) where the Minister would ‘have regard to the needs of the school system for assistance in respect of recurrent expenditure in respect of that year’.
66 In more recent times a new category of student has emerged, an ‘eligible humanitarian new arrival’ (Schools Assistance Act 2009 (Cth) ss 92, 93).
67 *States Grants (Schools Assistance) Act 1982* (Cth)
68 *States Grants (Education Assistance — Participation And Equity) Act 1983* (Cth).
69 *States Grants (Schools Assistance) Act 1983* (Cth).
70 A move to national curriculum in Australia failed at this time, despite considerable work, as states and territories could not agree on basic elements. However, the work of the time underpinned state and territory curriculum from that point with many similarities developing.
71 *Commonwealth Schools Commission Amendment Act 1984* (Cth), amending the *Schools Commission Act 1973* (Cth), and particularly s 23.
73 *States Grants (Schools Assistance) Act 1984* (Cth) ss 22 (public schools), 46 (private schools).
74 Ibid.
75 Ibid ss 28(6)(b), 29(6)(b).
76 *States Grants (Schools Assistance) Amendment Act 1985* (Cth).
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77 States Grants (Primary And Secondary Education Assistance) Act 1992 (Cth): ESL ss 62, 64 public, private schools respectively; new arrivals ss 63,65; special education ss 66, 67; intervention support s 68; capital projects s 69.
78 Ibid: country areas s 74, literacy and learning s 7; students at risk in secondary schools ss 76, 77; gifted and talented students s 78.
79 Ibid: learning experiences of girls s 79; students with disabilities ss 80, 81; priority languages program s 85.
80 Ibid: approved education centres s 100; projects of national significance s 102.
83 Ibid.
85 Ibid 17.
86 Ibid 18 (emphasis added).
90 States Grants (Primary And Secondary Education Assistance) Act 1992 (Cth) s 46 (Non-Government Schools - Change if Failure to Meet Minimum Enrolments).
91 Ibid s 95 (Federal–State Government Agreement for Government Schools).
92 States Grants (Schools Assistance) Amendment Act 1991 (no. 2) (Cth), States Grants (Primary And Secondary Education Assistance) Act 1992 (Cth).
93 States Grants (Primary And Secondary Education Assistance) Act 1994 (Cth) ss 78A.
94 Priority languages specified in 1995 were Aboriginal languages, Arabic, French, German, Italian, Modern Greek, Russian, Spanish, Thai and Vietnamese (s 85A States Grants (Primary And Secondary Education Assistance) Act 1995 (Cth)).
95 States Grants (Primary And Secondary Education Assistance) Act 1996 (Cth).
96 Commonwealth, Parliamentary Debates, Senate, 16 October 1996, 4290 (Senator Campbell).
97 ‘The bill fosters a partnership approach with states and territories which recognises both the constitutional responsibility of states and territories for education and the Commonwealth’s role in guiding national directions and priorities.’ (Commonwealth, Parliamentary Debates, Senate, 16 October 1996, 4290 (Senator Campbell)).
98 Ibid.
99 States Grants (Primary and Secondary Education Assistance) Act 1996 (Cth) s 12 (public schools), see also s 16(6) for the same requirements for private schools.
100 States Grants (Primary And Secondary Education Assistance) Act 2000 (Cth) ss 12(1)(a), 12(1)(b).
101 Ibid s 12(4) (emphasis added).
102 Ibid s 15.
103 Ibid ss 19, 20, 24.
104 States Grants (Primary and Secondary Education Assistance) Regulations 2001 (Cth) regs 4,5.
105 States Grants (Primary And Secondary Education Assistance) Act 2000 (Cth) s 76(3)(b).

107 Ibid. The Years 6 and 10 English and mathematics tests may refer to age-based international comparison tests as other national tests in these Year levels have not emerged. However, the Minister omitted national Years 6 and 10 Information and Communication Technology tests which are in the reporting framework.

108 Ibid.

109 Schools Assistance (Learning Together — Achievement Through Choice and Opportunity) Regulations 2005 (Cth) regs 2.3(d), 2.3(e); although such information should accord with privacy regulations and ‘not interfere’ with the privacy of the individual (reg 3).

108 Ibid reg 2.7(a).


112 As noted, in Attorney-General (Vic.); Ex Rel. Black v The Commonwealth (‘DOGs case’) [1981] HCA 2, 146 CLR 559, Barwick CJ stated: ‘The conditions of the grant in this case relate to a subject matter of State power. Education is within the State legislative area: and its furtherance is undoubtedly a concern of the State.’: at 585 [38]. See also, previous notes: Commonwealth, Parliamentary Debates, Senate, 31 May 1984, 2274 (Senator Walsh); Commonwealth, Parliamentary Debates, Senate, 16 October 1996, 4290 (Senator Campbell); Ministerial Committee on Education, Employment, Training and Youth Affairs (MCEETYA); The Adelaide Declaration on National Goals for Schooling in the Twenty-First Century (1999).


114 Ibid 31207.

115 ‘The ridiculous nature of this political condition .... I will not have Western Australian schools politicised in this manner. I have made it clear to all schools throughout the state, be they government or non-government, that if they wish to upgrade their flagpoles or build new flagpoles, the government will provide the funding. The state government will also ensure that the school community makes the decision about the flag ceremonies, not a federal government hell-bent on establishing its will throughout Australia, despite established conventions, the federal tradition and the diversity that makes Australia the great place it is today. I have made it clear that that will be the case. There is a simple message for the federal government today from right around Australia. The Australian flag belongs to all Australians. Commonwealth money is not owned by the federal government; it is the people’s money. The way it is spent should not be linked in this way to narrow political purposes. I am very pleased that the Western Australian government will provide funding for those flagpoles, and will not have the conditions that the federal government is imposing on it. I will make sure that this federal politicisation of schools does not happen in our state.’ (Premier Gallop, ‘Question Time’ Western Australia (2005) <http://www.parliament.wa.gov.au/pq/qsearch.nsf/49a9e326e1c1a39848256d870006cd8a/580ad346b395a9ef4825700e007bacc2?OpenDocument&Click=>.


117 Commonwealth, Parliamentary Debates, House of Representatives, 28 February 2007, 3 (Minister Bishop).

118 Australian Curriculum, Assessment and Reporting Authority (ACARA) Act 2008 (Cth) s 6.


121 Ibid 8359.

122 Ibid.


125 It is not clear if state or territory accreditation may be withheld from a school if it does not agree to participate in these activities, if the proposed or existing school does not intend to seek public funding from Commonwealth and state or territory governments.

126 *Schools Assistance Act 2008* (Cth) s 20(3).

127 *Schools Assistance Regulations 2009* (Cth) reg 5.1(2). Perhaps this may indicate a return to Catholic education authority, given the comparative reporting system required by funding was contrary to Catholic education ethos.

128 *Schools Assistance Act 2008* (Cth) s 22(3).

129 It is interesting to note that many international test programs specify voluntary participation by schools and students and parent approval. Whether the current acts allow such voluntary participation, or violate the terms of international programs, is not clear at the present time.

130 There has been considerable change in the Commonwealth and State governments in the following four years, however, as at the time of the first COAG agreements the governments were politically-aligned, a status that is no longer in place.


132 Ibid [18].

133 Ibid [19].

134 Ibid [19].

135 Ibid 12.

136 Improving Teacher Quality; Bringing Our Schools Into the 21st Century; Improving Literacy and Numeracy; Better Outcomes for Low Socio-Economic Status School Communities; Better Information About Schools; Working Towards a National Curriculum; Supporting Students Through Supporting Schools; Supporting Students with Disabilities; Helping Students Make the Transition from School to Further Education, Training or Employment: COAG (2012) *School and Education — Reform Agenda* <http://www.coag.gov.au/schools_and_education#Transitions>.


138 Council of Australian Governments (COAG) *National Education Agreement* (2008) [18(b)], [18(e)].

139 Ibid [19(f)].


141 *DOGs case*, Barwick CJ: at [38].

142 *Australian Constitution 1901* s 128.