The constitution, the
‘nationhood power’ and
education before 1950

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This article seeks to offer a general explanation of the Commonwealth’s emergence in education, particularly in higher education before 1950. It does this by exploring the sources of constitutional legislative powers that expose a common purpose in these Commonwealth initiatives, rather than by seeing these initiatives as a series of isolated changes in higher education activities. In adopting this strategy one is guided by two principal events in Australian law and politics that shaped national political action in the period 1920 to 1940. These were the introduction of Commonwealth income taxation powers during World War One, and the impact of the High Court’s Engineers’ decision (1920), which elevated the Commonwealth’s authority and capacity to engage in nation building in peace time (Sauer 1956, pp.136, 145, 216-17). Within these two contexts, I have examined closely the empirical evidence on the early national education project and the legal commentary on constitutional developments (Sauer 1956, 1963, 1967; Zimz 1977, 1992a, 1992b; Saunders 1992; Birch 1975). Ultimately I have settled on the application of a ‘new’ implied federal power, the nationhood power, to education, to provide the first general explanation of the Commonwealth’s entry into higher education in the inter-war period.

CONSTITUTIONAL ARRANGEMENTS FOR EDUCATION BEFORE 1950

This last point should be restated.
The ‘national’ power in play.
However we see it as being created,
Has mainly executive sway.
(Gerard 1977, p.112)

The Commonwealth’s involvement in education after 1950 is clearly grounded in the politics of federal/state relations in ‘welfare state’ services and within a constitutional framework of the application of section 96 (specific, conditional financial grants to the states), and s.51, xxiia (financial benefits to students). The growth of Commonwealth support of all levels of education has been amply documented and forms the basis of the argument that the Commonwealth has been the strategic partner in the national development of education for at least the last 30 years. The first half of the Commonwealth’s presence, and especially the period between 1910 and 1940, however, poses genuine problems of locating critical events, their constitutional authority and explanation of ‘purpose’ of Commonwealth government intervention. For it is in this period that the Commonwealth enters the educational field in a blurred mosaic of seemingly unrelated initiatives.

The Commonwealth’s emergence in education before 1940 suffers from an absence of close academic scrutiny. We find Education in Australia (Browne 1927) declaring: ‘The Federal Government takes no part in Education’. Thirty years later in The Constitution of Australia it is stated: ‘Before 1951 Commonwealth aid to universities was confined to grants for research and subsidies for ex-servicemen and the funding of the ANU’ (Paton 1957). These views are propagated by the Department of Employment, Education and Training (DEET) in a bicentennial tribute to its origins, which starts its history at 1945 (DEET 1988; Jackson 1982). Fortunately, the early historians of Commonwealth involvement in education (Birch 1975, pp.20-55; Bowker 1972; Semple 1970 & Tannock 1969) paint a more intimate detail and take a longer view of these developments, but as they did not consult Commonwealth public records even the research studies are superficial accounts, save for Birch’s legal history of the students’ assistance scheme.

Furthermore, this stage of Commonwealth involvement in education, an emergent stage I argue, frequently occurred without constitutional security, so there was always the potential for federal action in education to be struck down by the courts if challenged by the states or education institutions located in the states. That they were not challenged tells us something about the political nature of early federal/state relations in education, research and public health. But no education power existed in the Constitution (other than for the territories) until the 1946 social services amendment, which included the benefits to students provision. This was clearly enunciated in the Report of the Royal Commission on the Constitution (1927), and by Chief Justice Latham in the Drummond case (1943): ‘The Commonwealth Parliament has no power to legislate with respect to the subject of education as such’ (R v University of Sydney 1943, 67 CLR 95).

Of course, there was no question of the validity of certain Commonwealth activities in education when they were covered by incidental powers (s.51, xxxix) in relation to an enumerated Commonwealth legislative power, such as in national broadcasting, which developed in the states in the 1930s and was covered incidentally to the legislative power (s.51, v): ‘posts and telegraph’ services. But this occurred rather later in the period, whereas the Commonwealth had been involved in educational activities incidental to its defence power (s.51, vi) since 1906. The three main applications to this legislative power were: ‘military science’ education and training at Sydney and Melbourne universities between 1906 and 1915; the Commonwealth school cadets training schemes (established 1910); and the Commonwealth Vocational Training scheme (1919-26) for World War One veterans under the Repatriation Act (1920) and the Soldiers’ Children Education Scheme under the same Act, which since 1921 has provided financial benefits to the post-primary
students of killed or seriously maimed service personnel engaged in armed hostilities. As I have demonstrated in studies of veterans' education and training, and as I will argue at a later date for the soldiers' children scheme, the Commonwealth government funded, managed and directed these educational and/or training programs, which were undertaken by the states on behalf of the Commonwealth (Spaul 1997, 1998). It should be noted that it was not necessary to summon solely the defence power to establish the national officer academies for the army, navy and, later, the airforce and other military training institutions, for these activities are covered under the exclusive powers of the Constitution at s.52, i, pertaining to 'the seat of Government'. Thus the military training colleges, all of which were not, and are not, located in the federal territory of the ACT, have similar national institutional functions to the Institute of Anatomy and the National Library of Australia, which were regarded as important for the location of Canberra as the federal seat of power. Similarly, the establishment of University College Canberra as an affiliate college of Melbourne University between 1930 and 1959 was authorised by the Commonwealth government under its exclusive responsibilities to establish, control and train the federal public service, as covered by matters in s.52, ii, the Commonwealth public service power. (It is misleading to describe the University College Canberra as the antecedent of the Australian National University, founded in 1946. The latter was to be a federally funded research university, which because of doubts about the Commonwealth's spending power on education, and intergovernmental tensions, was located in the ACT under the territories power (Spaul 1998, pp.112-5).)

THE APPROPRIATION POWER AND EDUCATION

The problem in the emergence of Commonwealth involvement in education lies not in these uncontested constitutional arrangements, but in the use by the Commonwealth in the inter-war period to support various educational activities, in higher education, research and public health, which were made by Commonwealth financial grants under the appropriation power (s.81). As can be seen in Table 1, the Commonwealth provided finance (and direction) to specific educational activities of its instrumentalities and agencies, or to existing public education institutions in the states, and especially to the University of Sydney. All of these were made to support activities that were without, or were not incidental to, a specific Commonwealth legislative power.

As a result, these direct grants under s.81 to individual universities or university researchers had the same constitutional status as the Commonwealth funding of the Maternity (Welfare) Bonus 1912-1946 or the Council of Scientific and Industrial Research and its predecessor. All were made as appropriations without the benefit of constitutional certainty.

Table 1: Section 81 — appropriation power

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

Commonwealth direct grants to:

- Establish Chair of Oriental Studies (etc.) (Sydney) 1919
- Fund and staff Australian Forestry School, Adelaide University 1926; ACT 1927
- Establish and maintain Department of Anthropology (Sydney), 1925-1948
- CSIR Research Studentships, Australian overseas universities, 1926
- Cancer Research Institute (Sydney), 1926
- Commonwealth School of Public Health and Tropical Medicine (Sydney) 1929
- CSIR Research Grants to Australian Universities, 1936
- Establish and maintain Chair of Aeronautical Engineering (Sydney), 1938
- Establish and maintain Associate Professorship in Meteorology (Melbourne), 1939
- Lady Gowrie Child Study Centres (preschools) one in each state, 1938
- Provide training for Education Department teachers and Lecturers in Primary Education, 1938
- Commonwealth Literary Fund: Special Lectures on Australian Literature in all universities, 1943
- Special Grant to ACER for Educational Research and Testing, 1942-43
- Commonwealth X-ray and Radium Laboratory (Melbourne)

At law, as distinct from politics, Commonwealth funding of these welfare, education and research activities was open to a questioning as to their validity, specifically in terms of the phrase in s.81 'for the purposes of the Commonwealth'. The extent of the power had been subject to divergent official opinions in the early years of the new Federation, for, as Sawyer observed, the authors of the Constitution had 'no clear idea' what they intended for the federal spending power (Sawer 1956, p.329; Dealin, Groom & Hughes in Brazil & Mitchell 1981, pp.59-4, 297-80, 612-3). But, as the Royal Commission on the Constitution noted in 1929, the Commonwealth had made direct allocations to public health and forestry in the states, scientific research, higher education, Antarctica research and economic development programs that were not covered by the specific legislative powers. None of these appropriations, it observed, had been 'attacked in the courts', the spending had relieved the states of expenditures, and it had provided the nation with scientific experts and other advisers that had assisted the states' development (Report of the Royal Commission 1929, pp.168-200). But, as it also noted in 'Chapter XIII — Appropriation', the crucial question was whether, and if so how far, these words ('for the purposes of the Commonwealth') limit the power of
appropriation. Leaders of the bar in Victoria and South Australia, Owen Dixon and Sir Edward Mitchell, viewed the appropriation power as limited to the subjects assigned to the federal executive and legislative powers in the Constitution. But it continued:

Sir Robert Garran regards this doctrine as being in effect applicable to appropriations by the Commonwealth Parliament, notwithstanding some differences between the Australian and American Constitutions, including the words under which Congress may provide 'for the welfare of the United States', and the words under which the Consolidated Revenue Fund of the Commonwealth is to be appropriated by the Commonwealth Parliament 'for the purposes of the Commonwealth', and he cited a number of American cases in which the validity of appropriations by Congress had been unsuccessfully called in question, among them being the case of Massachusetts v. Mellon (262 U.S. 447), which was concerned with money appropriated by congress to the States for the purpose of reducing maternal and infant mortality and of protecting the health of mothers and infants, and in which it was held, in 1923, that questions raised by a State as to the right of the Treasury to disburse the money was not justiciable. (p.139)

The chapter concluded by upholding Garran's pragmatic view that: 'In practice, the Commonwealth Parliament has, it is said, always acted on the assumption that section 81 gives it an absolute power of appropriation for general purposes ...' (p.160). Robert Menzies, then Victoria's Attorney General, agreed with Garran (and borrowed from Sir John Quick) when he said in 1934 that s.81 provided for Commonwealth spending for any purpose 'under the Sun and the Commonwealth had always acted upon that assumption' (Menzies in Proceedings of Conference on Constitutional Matters 1934; Quick 1919).

The official view, as propounded and applied by Garran as the Commonwealth's first Solicitor-General (1917-1932), and before that as Secretary of the Attorney General's Department (1901-1917), was that this phrase meant the widest definition of the power, and that therefore the Commonwealth government could spend its revenues as it saw fit. This was readily acknowledged in an Attorney General's Department opinion written for the Universities Commission in September 1943:

It is suggested that a not unreasonable interpretation of government practice over the past twenty years is that the Commonwealth, when an urgent need was found, has supplemented State activities in the field of education. The need for a central government supplementing State provincial activities in education has been evident in other countries. Examples in the Empire are Great Britain and South Africa. The United States of America has found it necessary to appropriate Federal funds for education. There is every reason to believe that, in Australia, post war needs for Commonwealth expenditure on education will be as great as wartime needs ...

The Commonwealth has no power to control education (the recent High Court decision on a National Security (Universities Commission) regulation suggests that even the Defence Power cannot be employed for this). If Commonwealth funds are to be used for educational purposes after the war, they may take the form of grants in aid to the states, under Section 96, or possibly, of appropriates under Section 81. The first would mean that the Commonwealth could exercise only a nominal supervision over the use made by the States of funds so provided. The second assumes that the High Court would construe the appropriation power as wider in its limits than the legislative power. As this submission shows, successive Commonwealth Governments have followed this assumption (which follows the clear American constitutional position) and it is submitted that this is the correct position. (National Australian Archives SP 435/2/1 Bundle 1, 'EJFF (Hook) Draft ... 16 Sept. 1943, p.2)

The opposing legal view, but not an official view (nor until 1946 an opinion offered by the courts) was that the phrase was limited to Commonwealth spending in areas where it had specific legislative powers, i.e. s.51 and s.52. By implication, as education, research, social services or even public health schemes were not covered in the details of these legislative powers, s.81 could not be used by the Commonwealth government to fund or administer any particular areas of these activities. That it did, in the payment of maternity benefits, the development of applied scientific research, and later research grants to all universities, or the encouragement of particular teaching and/or research activities at select universities, was the result of 'good' intergovernmental politics — the donors and recipients both seeing the advantages of the spending — rather than the lack of grounds or lack of opportunities for constitutional challenges.

The dubious legal status of the appropriation power was addressed by Professor Kenneth Bailey in advice to Melbourne University's vice-chancellor in 1935 on the prospects of obtaining Commonwealth funding for university research:

The practice of the Commonwealth, like that of the U.S.A. in the face of similar though not identical constitutional provisions, has been to regard its power to appropriate moneys as being legally unlimited. Some exceedingly important items of Commonwealth expenditure are stated by Sir Robert Garran to depend, in whole or in part, upon the correctness of this view. The maternity bonus is one illustration. The endowment of scientific and industrial research is perhaps the most important of all.

As it appears in the constitution, the power does seem to have a much more limited scope than this, and many well-known lawyers (including Mr Justice Dixon, before his appointment to the Bench) have expressed their considered opinions accordingly. On the other hand, the illustrations given above suggest that a challenge is not very likely. But the Commonwealth is quite justified in approaching with caution any proposal for the extended use of the power. Its legal basis is genuinely insecure, and there is always the risk that a successful challenge of some relatively unimportant expenditure might involve a definition of the power which would destroy the whole structure which has been built up on it. The whole organisation of the dried fruits industry in Australia, to take from another sphere an illustration of the possibilities, is at the moment imperilled because of a challenge from a single litigious and determined producer, labouring under a strong sense of grievance. (Melbourne University Archives, UM 312, 1936 (96), Bailey, Commonwealth Assistance ... , 29 July 1935, pp.2-3)

In passing, Bailey's advice persuaded the Australian Vice-Chancellors' Committee to accept the argument that their bid for Commonwealth research funds would have more chance of success if they were attached as a separate item to the annual vote for CSR; the
Commonwealth agreed and the first funding for research in all universities in 1936 and subsequent years was administered by the CSIR Executive.

It was not until 1945 in the *Pharmaceutical Benefits case* that the High Court was asked to define the boundaries of the phrase 'for the purposes of the Commonwealth' in s.81. Although the court ruled against the Commonwealth's free medicine scheme, it did not reach its decision on the basis of the appropriation power. But various judgements in the decision offered opinions on s.81 that in sum favoured a narrow interpretation of the phrase, and they warned that Commonwealth government spending was probably limited to areas where the Parliament had clearly defined legislative powers (*Dale v The Commonwealth*, 1946, 71 CLR 237; Sawyer 1953, p.221). As a result of the 1946 decision, while the Commonwealth government did not abandon its existing funding of the CSIR, university teaching or research, or public health programs, it became sufficiently wary of the court's thinking on the appropriation power, to find other means to fund new initiatives in education and other services — hence the use of the successful 1946 referendum to establish the 'Social Services Amendment' (s.51, xiiiia) for child endowment and other financial benefits, including to students, that allowed it to continue and extend its wartime Commonwealth university scholarships into the postwar period. The government also decided that, because of the possible challenge to its appropriations for its new national university, it would be safer to locate it in the ACT. Moreover, the Chifley government planned to use s.96 conditional grants for university education to all the states, which in fact the Menzies government introduced in 1951 as grants to the universities' capital programs.

For the next 30 years the spectre of the 1946 decision hung over Commonwealth spending provisions. Section 96 grants came instead to dominate the period, while s.81 grants were limited to those areas covered by specific legislative powers contained in s.51. Professor Geoffrey Sawyer of the ANU, when asked for a legal opinion on Commonwealth financial assistance to education in October 1974, counselled the Whitlam Labor administration that, because of the past uncertainty by the courts about the extent of the appropriation power, 'the Commonwealth would be well justified in spending its revenue on the wide view of the appropriation power, leaving it to the states if they so wish to object' (Sawyer 1974, p.20; also Evans 1977, pp.37-76). The Whitlam government did in fact make the break-out from the 1946 decision, not in education, but by directly funding local and regional government welfare services. This produced, somewhat predictably, the first new challenges by the states to the legislation that allocated funds under s.81.

**THE EMERGENCE OF A NATIONHOOD POWER**

Successive Commonwealth Labor governments, when challenged on the validity of s.81 for their actions, asked the High Court to give an ambulatory construction to the appropriation power, so that it would meet the political realities of the modern nation state of Australia. The High Court has attempted in the *AAP decision* (1975), *Tasmanian Dams case* (1983) and *Davis v Commonwealth* (1988) to do this, not by varying the narrow construction of s.81 offered in the *Pharmaceuticals Benefits case*, but by connecting it to s.61, 'the Executive Power' (134 CLR 338; 166 CLR 79; 158 CLR 1). Section 61 reads:

> The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.

Again the High Court has not advanced a settled set of reasons, or a doctrine, but it does favour the view found in *Davis v Commonwealth* that the Commonwealth government can undertake and fund executive action, appropriate to its responsibilities under the Constitution. These responsibilities are derived from either the distribution of its legislative powers (s.61) or, to quote from Justice Mason in the *AAP decision*, from 'the character and status of the Commonwealth as a national government' (s.61) (Mason, J. 1975, CLR 338 at 396). The latter allows the Commonwealth government to engage directly in activities especially adapted to a national government that otherwise would not be carried out by the states or public institutions.

When the appropriation power is connected with the executive power an implied nationhood power comes into operation, which provides the necessary validity for various s.81 appropriations that, in the words of Justices Dean and Wilson in the *Tasmanian Dams case* (1983), 'preserve or promote 'artistic, intellectual, scientific or sporting achievement or endeavour' that are of national concern and that 'will advance the nation' (Deane and Wilson, J. J. 1983, 158 CLR 1 at 233). It was put another way by Justice Brennan in *Davis v Commonwealth*, 1988:

> The Executive Power is not restricted to the Commonwealth legislative heads of power. So cramped a construction of the power would deny to the Australian people many of the symbols of nationhood or the benefits of many national initiatives in science, literature and the arts. (Brennan, J. 1988, 166 CLR 79 at 119-1)

The court now seems to accept that the implied nationhood power, which resides in s.61, or in s.61 and s.81 when combined, permits the Commonwealth government the widest application of the appropriation power. It therefore allows the Commonwealth to fund or organise activities outside of its legislative powers contained in s.51. Academic opinion has documented the gradual emergence of a nationhood power concept since the *AAP decision* in 1975, but with varying degrees of prudence (Saunders 1983-4, pp.267-75; Currie 1977-78, pp.189-222). Thus the Centenary of the Constitution Committee's recent commentary on *The Australian Constitution* writes of s.81:

> Section 81 refers to the appropriation of money 'for the purposes of the Commonwealth'. There was once a question whether this limited the Commonwealth's power to spending for purposes that otherwise were within its constitutional powers (mainly the powers in section 51). The High Court's view now appears to be that the Parliament can appropriate money for any purpose under section 81, but that expenditure requires use of the executive power in section 61. The executive power is limited to the heads of legislative power plus some additional purposes that are peculiarly 'national' in character. This extension of the executive power allows, for example, Commonwealth spending on scientific research. (Saunders 1998, p.92)

Lumb and Moores (1995), in the chapter on the executive power in their annotated constitutional text, state: 'It could be said that the Commonwealth has a power to fund
research, education and awareness programs which is derived from its status as a national government" (p.430), while Spry (1996) combines the appropriation and executive powers to observe of the scope of the executive power:

The words, 'execution and maintenance of the Constitution and the laws of the Commonwealth' in section 61 are no longer words of limitation.

It contains those common law Crown prerogatives (e.g., treaty-making, declaring war) that vest in the right of the Commonwealth rather than in the States.

It allows the Commonwealth to engage in activities peculiarly adapted to the government of a nation which cannot otherwise be carried out (including, for example, celebrations of the bicentenary, establishing the CSIRO and promulgating flags and other national symbols).

It includes the power to enter into contracts and commercial arrangements without the sanction of the Parliament. (p.68)

Finally, Blackshield and Williams (1998) in their latest edition of theory, commentary and materials on Australian constitution law devote a new chapter (ch.20) to the nationhood power, under the heading 'The Appropriation and Nationhood powers'. They argue at the end of the chapter:

Much about the nationhood power remains unclarified and unexplained. It is clear, however, that it may prove a significant, though limited, source of Commonwealth power. The power may be particularly important in combination with s.81 if a narrow definition of 'the purposes of the Commonwealth' is adopted. (p.846)

THE NATIONHOOD POWER AND EDUCATION IN THE INTER-WAR PERIOD

The question that now needs to be addressed is whether this concept of an implied nationhood power in the Constitution, a concept that has only emerged gradually since the mid-1970s, can be transported back to an earlier period, to provide a general set of explanations about the Commonwealth's role in high education. The answer to this question resides in an equation that focuses on both the origins of the legal construct of the power, and the actual historical experience of Commonwealth spending between c.1920 and 1940.

The various opinions of the High Court after 1974 on the nationhood power appear to be footprints from the *Pharmaceuticals Benefits decision* 1946 on the use of s.81 in Commonwealth spending up to the 1940s. Justice Dixon, who was against a wide application of s.81, nevertheless found that the power includes 'whatever is incidental to the existence of the Commonwealth as a state and to the exercise of the functions of a national government'. Chief Justice Latham was more specific, for, in reaching his opinion that the Commonwealth had a general power of appropriation, Latham constructed two lists: 'appropriations for purposes stated' and 'establishment of organisations for purpose of spending'. In the first category he referred to appropriations made in the past, including for public health campaigns, medical research and literary grants. In the second category Latham illustrated his point from the titles of Commonwealth statutes pertaining to research and science between 1901 and 1935. Latham argued that these were valid appro-

prations as they did not interfere with the rights of the states, or any persons, and concluded that, in his opinion, s.81 could be read as it was intended to mean, that it is for the Commonwealth Parliament and not any court to determine what shall be for the purposes of the Commonwealth (Dixon, J. 1946, 71 CLR 237 at 269; Latham, C.J. 1946, 71 CLR 237 at 254; see also *Report of the Royal Commission* 1929, pp.199-202).

It is not surprising that Latham appeared to draw on both his earlier roles as Attorney-General in the Bruce/Page government, later legislation, and the *Report of the Royal Commission on the Constitution* to construct his categories of appropriations. But in doing so he did not refer to the main items of Commonwealth spending on higher education, as were outlined in the *Report* at pages 183-185. Instead he acknowledged Commonwealth spending on scientific, economic and medical research, public health, advocacy, literary grants and forestry services, including forestry education. This omission does not appear to be deliberate, but rather an indication of the shadowy presence of Commonwealth initiatives in higher education, compared with its national organisation of applied scientific research and public health. As such, one can extend the arguments about national purpose in Commonwealth science and public health to the Commonwealth's initiatives in higher education.

In the creation of the CSIR in 1926, which in part, like its forerunner the Institute of Science and Industry, relied on the application of the s.81 power, Latham, the Attorney-General, told Parliament that the government needed 'to take action on a national basis'. The new Commonwealth agency was expected to become the 'great coordinating authority for Australian scientific research; it was not to be an organisation that would duplicate research already undertaken by the states or other bodies. Finally, it was as Bruce foreshadowed, to act as an instrument of national development' (CPD, v.113 1926, p.2442 (Latham); pp.2330-6 (Bruce); Curne & Graham 1966, pp.135-8, 181-2). In sum, the CSIR became the centrepiece of the Commonwealth Parliament's use of the appropriation power to develop new research initiatives for national purposes, i.e., a practical expression of Australia's nationhood in this period. As the *Report of Royal Commission on the Constitution* reminds us: 'Among the bodies or councils of which the appointment cannot be traced to any of the powers enumerated in sections 51 and 32, are ... the Council for Scientific and Industrial Research'. Moreover, as a later report on constitutional review (Report of Joint Committee 1959) observed:

The growth in the number and importance of matters affecting the people of the Commonwealth as a whole requires the vesting of additional legislative powers in the national parliament. Some of the more significant aspects of developing nationhood are listed below:

... scientific progress ...

The Commonwealth should have a research power.

And in its recommendations for altering the Constitution it declared that none of the Commonwealth's research activities 'should be assailed or curtailed by possible legal doubts as to the validity of public funds' (pp.71-3; also *Report of Royal Commission* 1920, p.26).
Studies of Australia’s emergent nationhood in the inter-war years that emphasise the growth of economic nationalism — ‘Australia Unlimited’, ‘Men, Money and markets’, ‘The Empire’s Farm’ — readily acknowledge the CSIR’s role in promoting national development through national efficiency. Others, which focus on the cultural history of nationhood, suggest that the social equivalent of CSIR was the Commonwealth Department of Health (CDH). Established by executive order in 1921, the CDH gained its constitutional authority in part from the quarantine power (s.51, ix) and by spending under the appropriation power. Its formation amid the social dislocation after World War One — ‘the Sanitarians’ great opportunity’, to quote from its first director J.H.L. Cumpston — was to provide another ‘great coordinating authority’ with a clearly defined national purpose (Roe 1976, p.191). Thus its roles in public health advocacy and encouragement of medical research during the 1920s and then the late 1930s, which were or could be not undertaken by the states’ public health programs, were driven by a national concern to advance Australians, especially the young, to a state of physical and mental well-being (Gillespie 1991, pp.29-56). In passing, the CDH convinced the Commonwealth government in 1929 to move the Australian Institute of Tropical Medicine (established 1909) from Townsville to Sydney University and, as part of this move, fund and manage a new School of Public Health and Tropical Medicine for teaching and research purposes in the Faculty of Medicine (Sydney University Archives Senate Minutes 1925-1927, pp.341-4, 361; Young 1984, pp.400-03). As the original agreement between the Commonwealth government and Sydney University indicates, this was a ‘Commonwealth’ school, established in Sydney for the purpose of convenience and designed to serve Australia and its Pacific dependencies. The advisory council was to have a majority of Commonwealth representatives and its principal advisor was to be to the Commonwealth Minister for Health. Its teaching staff were to be appointed by the university council, its research staff by the CDH, and its students were to be regulated by the Faculty of Medicine. Later the CDH was instrumental in persuading the Lyons government to establish the National Health and Medical Research Council, and through it disburse Commonwealth funds for the Lady Gowrie Child Care (preschool) centres and the National Fitness programs, including the teaching of physical education in universities and teachers’ colleges, and physical fitness in schools (NAA A 1925, 1105/40, Cabinet papers on National Health 1935-38).

Higher education, seemingly unorganised and without a common purpose in terms of Commonwealth spending in the inter-war years, falls between the two stools of national intervention in scientific research and social medicine. This will be seen in four illustrations of Commonwealth initiatives in higher education between 1918 and 1938.

Oriental studies

In 1918 the Commonwealth government agreed to fund the salary components of a chair of oriental studies at Sydney University. The university’s official history emphasises that this decision arose largely out of a local interest in Asian languages, particularly Japanese, as a means of enhancing trade and commercial relations with Asia. But a more accurate reading of the decision indicates that the Hughes government, and specifically the Minister for Defence, Senator Pearce, as early as 1916, was anxious to obtain the teaching of Japanese studies because he feared the military/naval ascendancy of Australia’s wartime ally in the Pacific, after the end of the war. (This fear also led to the establishment of the Pacific Branch in the PM’s Department.) The government sought advice on an appropriately qualified person from the British Foreign Office. The British government’s two original nominations were regarded as unsatisfactory, and Pearce settled on the final nomination, James Murdoch, who was teaching Japanese at the Royal Military College (RMC), Duntroon. A joint appointment was made, so that Murdoch could continue teaching part time at Duntroon. Murdoch and a language assistant, Okado, were funded at Sydney by the Department of Defence (66000 p.a. plus 4300 p.a. from the University and the NSW government). They taught undergraduate classes in Japanese language and, as well, Murdoch offered the subject ‘An Introduction to Far Eastern History’. This was the first instruction in Asian studies at an Australian university. Part of the Commonwealth’s arrangement with the university was that Murdoch was permitted special leave to make annual visits to Japan to observe and report on defence and related matters to the Department of Military Intelligence. After three years at the university Murdoch died and Okado resigned. Japanese remained on the university curriculum until 1938 but it never was as popular or effective as in the short period 1918-1921 (NLA MS 3092; NAA A 3688 488/R1/55; also Turrey 1991, pp.419-20).

Anthropology

The funding of a Chair in Anthropology at Sydney University in 1923 also owes something to Senator Pearce’s continuing interest in Pacific affairs, this time to Australia’s international obligations in the territories of Papua and New Guinea. But the driving force behind the Commonwealth’s support of teaching and research in anthropology came from pressure by the Australian National Research Council (ANRC, established 1919), a council of 100 ‘scientists’, and the universities for the study of Pacific Islander peoples, later extended to Australian Aboriginal peoples. The ANRC approached Dr Page and Senator Pearce with a request that the government help fund a chair in anthropology at Sydney University. The university had been responsive to the idea, as it would not only provide scientific training in the research field, but also provide training in administration of native peoples to RMC cadets and cadet officers in Papua and New Guinea. The last function also appealed to Pearce as the Minister for Home Affairs and Territories, who approached the university. A university senate committee agreed with Pearce, claiming that a chair in the field ‘was highly desirable as a public utility and for the advancement of science’, but in the financial climate of New South Wales in 1923 such a chair ‘needed to be wholly funded by the Federal Government’. The Commonwealth government finally reached an agreement with Victoria and NSW that its universities provide £1000 p.a. towards the chair and it would pay £1500 p.a. Later a Rockefeller Foundation grant for research into human biology, administered by the ANRC, was disbursed to the Anthropology Department to fund its research investigations. Alfred Radcliffe Brown was appointed to the first chair of anthropology in 1925.
already had a large wind tunnel in Melbourne was commissioned to develop an aeronautical research laboratory. Both Victoria and NSW and their respective universities attempted to persuade the Commonwealth to establish from federal funds a chair of aeronautical engineering. Ultimately, in 1938, and as recommended by its own adviser, the government decided to locate the chair at Sydney University with the state government agreeing to fund an aeronautical laboratory at the university (NAA A 432/89, 1938/583, Aeronautical Engineering; SUA special file 724A, G 3/13). In the course of the negotiations with the Commonwealth government there was some indication as to why Sydney University had been the main recipient of Commonwealth initiatives in the inter-war years. At a basic level, the NSW state government appeared more committed to providing annual and special grants to the university than was the Victorian government. This also can be seen in significant differences in state government funding of the two universities. At another level, because of the dispersal of CSIR facilities, mainly to Melbourne, and the general research infrastructure of the two universities, one engineering academic observer noted in 1938 that Melbourne University and the Working Men’s College were seen as the ‘training ground’ for practical engineers, Sydney being ‘the place of fundamental research work’ (MUA UM 312 1938 10, memo from J. Burstell). This could well have been true for the different direction of university research work in the two universities.

Melbourne University received the consolation prize, a Commonwealth-funded Associate Professorship in Meteorology in the Faculty of Science to augment its teaching in the area, and the work of the Melbourne-based Commonwealth Meteorological Bureau. The actual appointment to the special lectureship in meteorology was Fritz Loewe, who was a German scientist, sponsored by the Carnegie Refugee Scholars Scheme (Turner 1991, p.567; Poynter & Rasmussen 1996, p.61).

**CONCLUSION**

The examination of these four Commonwealth initiatives in higher education provides a new set of illustrations, outside of applied science and public health, on the operation of the nationhood power during an earlier period of nation building. These examples, alongside the other ‘education’ initiatives listed in Table 2, reveal the following characteristics of Commonwealth spending, which sustain the modern understanding of the use of the executive power: First, the appropriations to higher education were national in character in that, while they usually provided funds to one university, they promoted activities that were not only in the national interest but, more importantly, had a national purpose, in that they deliberately advanced specific (and previously neglected) aspects of the nation’s intellectual capital. Second, they were spending initiatives that only the Commonwealth could undertake at that time because the states’ and universities’ financial resources were substantially depleted in the early 1920s and then after 1928. As a result, it appears obvious that these new directions in higher education (teaching and research) would not have occurred in this period without the Commonwealth government’s intervention. Finally, these Commonwealth initiatives did not seek to regulate university activities (though the Commonwealth Department of Health went close to it in Sydney University’s new School
of Public Health and Tropical Medicine), but rather provided financial assistance to advance teaching and research in new areas of Australian higher education. As the High Court has warned, the exercise of the nationhood power by the Commonwealth is limited, because the government cannot assume any direct control over these special national endeavours (Blackshield & Williams 1998, p.846).

Viewed from these three perspectives, the implied nationhood power serves as a valuable inquiry device in obtaining not only a new and higher order of explanation of the Commonwealth's first excursions into higher education but also a significant addition to our understanding of the constitutional development of Australian education. This may help to promote a new debate on the role of education in nation building, especially in the first half century of Australian Federation.

Table 2: Constitutional powers and funding education

SECTION 51
Enumerated Legislative Powers of the Commonwealth Parliament
Defence s.51(vi)
Military Science Studies (Sydney and Melbourne Universities), 1906-15
School Cadets, etc, 1910
Reparation Acts, 1918-
Commonwealth Vocational Training, 1919-1926
Soldiers' Children Education Assistance Scheme, 1920-
Broadcasting s.51 (v)
ABC School Broadcasts, 1936-
Social Services Amendment 1946 s.51 (xxiia)
Inc. Benefits to Students (the 'Education Power')

SECTION 52
Exclusive Powers
(i) Seat of Government Power
(ii) Public Service Power
(i) Military Training Colleges and other establishments
National Library, etc.
Institute of Anatomy
(ii) University College Canberra

SECTION 81
Financial Appropriations Power (Direct Grants)
Select universities
Special activities, 1919-1939
Scientific research
Science and Industry Acts, 1920-1939
CSIR 1926-1949 including Research Studentships
CSIR Research Grants to Universities, 1936

NOTES
1. The author acknowledges the support of an ARC Large Grant (1998-2000): 'The Commonwealth and Education 1910-1970'.
2. Excludes appropriation made by the Hughes government in 1922 to Fairbridge Farm School (established Western Australia 1912); see Sherington & Jeffrey (1998, pp.104-6) on grant for five years to maintain cost of the farm under assistance to immigration.

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DEET (1988) Commonwealth Employment and Education Departments: An Historical Overview, Canberra: AGPS.
Young, J.A. et al (1984) Centenary Book of the University of Sydney’s Faculty of Medicine, Sydney: Sydney University Press.