

Chapter 9

Using Regulation to Effect Constitutional Change in Higher Education

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I Introduction

In 1966, Geoffrey Sawer described Australia as a ‘frozen continent’¹ with a Constitution that was seemingly fixed in time. The story is well known; of the 44 amendments put to the Australian electorate, only eight have been accepted and, of these, the majority have only concerned administrative matters.² Moreover, the nation’s predilection for rejecting change appears to have intensified over recent decades.³ The result is that Australia ranks as one of the most constitutionally rigid democracies in the world.⁴

Yet beneath the frozen surface, much has changed, so much so that the framers would find the current arrangements unrecognisable. Their vision of dominant states and a supporting federal government has been supplanted by a strong, centralising Commonwealth surrounded by increasingly servile states. How did this transformation come about? Scholars have pointed to several important factors. First, the Constitution’s inbuilt concurrency, which when combined with Commonwealth paramountcy, has enabled the Commonwealth

1 Geoffrey Sawer, ‘Constitutional Issues in Australian Federalism’ (1977) 7 *Publius* 21, 21.

2 George Williams, ‘Rewriting the Federation Through Referendum’, Chapter 16 in this volume.

3 *Ibid.*

4 Astrid Lorenz, ‘How to Measure Constitutional Rigidity: Two Concepts and Four Alternatives’ (2005) 17 *Journal of Theoretical Politics* 339. In some ways, the resistance of change is understandable. Federations, with their written constitutions and more complex procedures for change, almost inevitably exhibit fewer formal amendments: Cheryl Saunders, ‘Constitutional Arrangements of Federal Systems’ (1995) 25 *Publius* 61. Furthermore, in the Australian case at least, some commentators argue that the framers made the process of change intentionally difficult because of their commitment to protecting the newly established states’ autonomy and spheres of responsibility. Such commentators reject any suggestion that the founders foisted an unworkable mechanism on the nation: Gregory Craven, *Conversations with the Constitution: Not Just a Piece of Paper* (University of New South Wales Press, 2004).

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