One of federalism’s great virtues is that it provides a means to smaller government. Demarcated power limits the spending excesses of individual governments and provides a check to overarching state authority. The politics of Australian federalism have gradually become more benign in recent years. State governments (and oppositions) have been content to adopt a small target strategy and shirk any inclination (and responsibility) to challenge the dominance of the Commonwealth’s legislative reach or tax base. In fairness, the High Court hasn’t exactly encouraged political disobedience by the states against federal intervention in traditional state responsibilities, given the decisions in the Engineers’ Case and the Tasmanian Dam Case, amongst others. Unfortunately, this pattern of behaviour has continued, with the national partnership agreement to fund the national curriculum and subsequent political deals for states to implement it. Federalist advocates have lamented this encroachment of the federal government into traditional areas of state responsibility for decades.

Criticism of the concept of a national curriculum is a natural extension of such sentiment. These pages, as well as the IPA monograph, *The National Curriculum: A Critique*, edited by Chris Berg, have rightly been sceptical of the conceptual merits of, and content contained in the national curriculum. With parts of the history syllabus suggesting that human rights were somehow conceived in post-war Europe with the Universal Declaration of Human Rights, rather than through the development of liberal democracy centuries earlier, you’d be forgiven for thinking that the word ‘revisionist’ was missing from its title. One angle that opponents of the curriculum appear not to have yet fully considered is the constitutional basis on which it is funded, and administered by the Commonwealth.

Education and federalism: the last line of defence

The only way the national curriculum can be scuppered now is through the High Court, writes Byron Hodkinson.

Byron Hodkinson is a tax consultant from Melbourne. This article is based on his 2010 Bachelor of Laws honours thesis.

Funding arrangements

The national curriculum is administered by the Australian Curriculum, Assessment and Reporting Authority (ACARA), a statutory body established by the parliament in 2008 and funded under a National Partnership Agreement (NPA) between the Commonwealth and the states.

Put bluntly, NPAs might best be characterised as ‘sit down money.’ It incentivises the lazy approach adopted by states in recent years by providing Commonwealth funding for state responsibilities on terms that the states are happy with. Yet they generally do not constitute good policy. The Remote Indigenous Housing Program and the Building the Education Revolution program are two examples of national partnership agreements that have delivered poor outcomes for recipients of state services at little to no political cost for state governments.

NPAs are political motherhood statements that the High Court has held to be completely unenforceable. They receive no endorsement from the Commonwealth Parliament—instead, the parliament, through legislation, has effectively outsourced part of its responsibility of overseeing Commonwealth expenditure to the executive. Not only are the agreements not legally enforceable; they are undemocratic.

The Commonwealth’s contribution in 2010-11 alone amounted to $5.3 million. This was provided directly to ACARA instead of the usual practice of states receiving tied grants from the Commonwealth under section 96 of the constitution. This difference is critical. The ability of the Commonwealth to appropriate monies for specific purposes to the states on any terms it thinks fit has been accepted for decades—for instance, the Commonwealth Government withheld previously allocated money from Victoria in the mid-2000s for the EastLink motorway in Melbourne on the basis that it would no longer be toll-free.
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The Pape Litigation

In 2009 Bryan Pape, a law lecturer and barrister, challenged an aspect of the then-Rudd Labor government’s second fiscal stimulus package; specifically, the Tax Bonus Act, which provided for cash payments to low and middle income earners, with a stated rationale of boosting domestic spending and economic growth in the midst of an economic downturn.

Pape’s case will be long remembered for the dramatic fashion in which he challenged the validity of Commonwealth expenditure outside the prescribed powers of the parliament. His argument would need to be justified with reference to the ‘established practice’ of the national government over many years. The Act establishing ACARA came into being in 2008, so the Commonwealth’s prescriptive school curriculum doesn’t come close to being considered the standard form of the national government.

On this criterion, any hypothetical constitutional challenge would result in the Commonwealth having great difficulty justifying the legislation and accompanying expenditure on the national curriculum against the tests set out by Chief Justice French in Pape.

However, his judgment appeared to be inconsistent because while Chief Justice French remarked that the executive power may be invoked with reference to the temporal nature of certain expenditure, he also insisted that his formulation was consistent with what Justice Brennan said in the case of Davis v Commonwealth, which was that the limits to executive power need be considered with reference to the federal structure of the Constitution.

How Chief Justice French would have done so, given his and the joint judgments of Justices Gummow, Crennan and Bell constituted the majority. Justices Hayne, Heydon and Kiefel dissented. The preponderent value of upholding legislation in this manner is the known unknown emanating from the Pape decision. As Pape himself has warned since the decision, the High Court has given the executive a magic genie, but no criteria as to how it is to be used, let alone stopped.

However, federalists ought to be cautiously optimistic that both majority judgments suggest much upheaval for the Tax Bonus Act—particularly of that Chief Justice French—warned against opening the door to an executive power on steroids, as a means to justify unchecked and unnecessary expenditure. In this regard, there is enough to suggest that the case casts significant doubt on the validity of the funding arrangements of the national curriculum.

Two strands of reasoning from the written judgments stand out as warning beacons as to the validity of the Commonwealth directly funding an area of state responsibility in this manner. The first relates to the ‘established practice’ of the Commonwealth Government and the second is what might be called the ‘otherwise unattainable problem.’ To some degree these issues are intertwined but will be dealt with separately.

The ‘established practice’ of the Commonwealth

In his judgment, Chief Justice French said that in assessing the validity of Commonwealth expenditure outside the prescribed powers of the parliament would need to be justified with reference to the ‘established practice’ of the national government over many years. The Act establishing ACARA came into being in 2008, so the Commonwealth’s prescriptive school curriculum doesn’t come close to being considered the standard form of the national government.

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The ‘otherwise unattainable’ problem

Advocates for a ‘big Canberra’ ought to have great difficulty justifying the spending on the national curriculum on the basis that it ‘peculiarly within the capacity and resources of the Commonwealth Government.’ There is nothing to stop the states from agreeing on a unified curriculum upon their own initiative rather than a top-down scheme prescribed by bureaucrats in Canberra.

Furthermore, the cost of the national curriculum’s implementation is not on a scale anywhere near that of the cost of the implementation of the Tax Bonus Act. The resources required to alter domestic demand in the economy are, quite obviously, exponentially greater.

The fact that Australia got by for more than 100 years with state-based curricula also doesn’t accord well with the reasoning of Justices Hayne and Kiefel, who said that the validity of expenditure outside the legislative purposes of the Commonwealth must be found on the basis that it is peculiarly adapted to the government of the nation and which cannot otherwise be carried on for the benefit of the nation.

While Gummow, Crennan and Bell found the Tax Bonus Act valid, they did so on the basis that once it was established that there was a national economic emergency that only the Commonwealth had the fiscal capacity to respond to, there was no need to comment further. Former Labor Attorney-General Duncan Kerr argued that their judgment suggests two possible scenarios: that the executive power to be disallowed either when it prevents the states from effectively governing; or alternatively, where it provides no competition with the executive power to be disallowed.

The outcome in the forthcoming challenge of Williams v Commonwealth will provide clearer guidance as to just how significant Pape’s case is. Ronald Williams is seeking to have the funding agreement supporting the national chanciency in schools program declared invalid on the basis that the executive had no constitutional mandate to enter into it. Questions to be determined by the High Court in that case are likely to mirror those that would be considered in any hypothetical challenge to the national curriculum.

Political Challenges

Making an academic case against the legality of the national curriculum is one thing. Actually litigating against it and succeeding in the High Court is markedly more difficult. The first impediment relates to the eligibility of certain persons to challenge the expenditure. Bryan Pape only had standing to contest the matter because he was eligible for a payment of $250 under the Tax Bonus Act. Obviously, such circumstances are unusual.

Generally speaking, individual taxpayers don’t have the standing to chal- lenge the validity of Commonwealth ex-

penditure. What if there may be a closer nexus between the national curriculum and a school teacher or the parent of a child than another citizen, it remains unclear whether this would translate into the requisite interest required for the matter to be heard by the High Court.

However, if any of the state Attorneys-General felt so inclined, they could bring a relator action against the Commonwealth on behalf of a taxpayer of their state. As Peter van Onselen recently commented in The Weekend Australian, Colin Barnett has become adept at procuring retail political appeal from parochial spats with Canberra. Unfortunately, such conviction hasn’t extended to protecting the integrity of the Western Australian education system, as WA has joined every other state and territory in selling out to Canberra. Belatedly, some states are now critical of the national curriculum, but oddly only over the less-controversial area of language education.

Conversely, a Member or Senator of the Commonwealth Parliament has special standing to seek expenditure (or legislation for that matter) be struck out by the High Court. The chances of this happening are understandably thin. Very few (if any) parliamentarians, despite their federalist sympathies they may have, would be willing to file a writ against the Commonwealth unless it dovetails into their party’s narrative—and it has been some years since opposing parties have been able to contest the national curriculum on behalf of a taxpayer.

If the federal opposition determines that the national curriculum is of a poor standard—or more to the point, engages in too much of the sort of revisionist history outlined earlier or is unacceptable politically—the only trigger left available to crash the party of the federal government, education unions and state governments may be to vote that the High Court finds the fiscal arrangements of the national curriculum unconstitutional.

The court has given the executive a magic genie, but no criteria as to how it is to be used, let alone stopped.