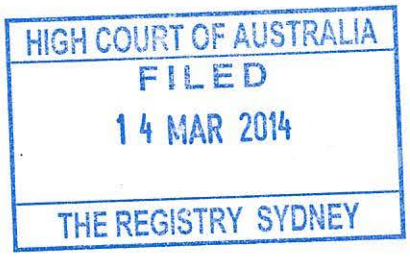
IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S154 of 2013

BETWEEN:

Ronald Williams
Plaintiff



AND

Commonwealth of Australia
First Defendant

Minister for Education
Second Defendant

Scripture Union Queensland
Third Defendant

ANNOTATED SUBMISSIONS OF THE ATTORNEY GENERAL FOR NEW SOUTH WALES, INTERVENING

Part I: Publication of submissions

1. These submissions are in a form suitable for publication on the internet.

Part II: Basis of intervention

2. The Attorney General for New South Wales ("NSW Attorney") intervenes under s 78A of the Judiciary Act 1903 (Cth) for the purpose of making submissions on the following issues (with reference to the plaintiff's summary at Plaintiff's Submissions ("PS") [2] of the issues raised by the questions in the Special Case):

   (i) Did the Appropriation Act (No 1) 2011-2012 (Cth) provide statutory authority for the Commonwealth's entry into the SUQ Funding Agreement (Issue (b))?

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The NSW Attorney submits that it did not. Argument to the contrary is inconsistent with the decision of this Court in Pape v Federal Commissioner of Taxation (2009) 238 CLR 1 ("Pape").

(ii) Are s 32B of the Financial Management and Accountability Act 1997 (Cth) ("FMA Act"), Pt 5AA and Sch 1AA of the Financial Management and Accountability Regulations 1997 ("FMA Regulations"), and item 9 of Sch 1 to the Financial Framework Legislation Amendment Act (No 3) 2012 (Cth) ("Financial Framework Amendment Act"), wholly invalid (Issue (c))?

The NSW Attorney submits that they are. The terms of the Commonwealth's legislative solution to the Court's decision in Williams v The Commonwealth (2012) 248 CLR 156 ("Williams (No 1)") cannot be read down. Further, and in any event, the operation of s 32B and the accompanying regulations gives rise to similar difficulties as were identified in Williams (No 1) in terms of interference with the constitutional structure in respect of federalism and responsible government.

(iii) If the provisions just identified are not wholly invalid, is the SUQ Funding Agreement, as authorised by those provisions, supported by s 51(xx), s 51(xxiiiA) or s 51(xxxix) (the latter operating in conjunction with s 61) (Issue (d))?

In the event that Issue (d) arises, the NSW Attorney submits that they are not so authorised.

(iv) Should the first and second defendants (collectively, "the Commonwealth") be granted leave to re-open this Court's decision in Williams (No 1) (Issue (e)(ii))?

The NSW Attorney submits that the Court should not accede to the request of the Commonwealth, and that in any event the case was correctly decided.

Part IV: Constitutional and legislative provisions

3. The applicable constitutional and statutory provisions are identified in PS [169]-[171].

Part V: Argument

The Appropriation Act (No 1) 2011-2012 did not provide authority for the Commonwealth's entry into the SUQ Funding Agreement

4. The Commonwealth seeks to support its expenditure under the SUQ Funding Agreement by reference to the terms of s 8 of the Appropriation Act (No 1) 2011-2012 (on which it suffices to focus), and subsequent like Acts: Amended Defence at [30(b)], [43(b)], [67(b)], [88E(b)], [88H(b)] (SCB Vol 1 at 50, 54, 59, 67). Yet the Commonwealth has not, in its Amended Defence, identified any challenge to this Court's decision in Pape, in contrast to its foreshadowed challenge to Williams (No 1): see Amended Defence at [31(c)] (SCB Vol 1 at 52). The decision in Pape is inconsistent with the Commonwealth's attempted reliance on the Appropriation Acts.

5. The term "appropriation" is used in the context of ss 81 and 83 of the Constitution "to identify the conferral of authority upon the Executive to spend public moneys, rather than the subsequent exercise of that authority and the debiting of the relevant account": Pape at [176] per Gummow, Crennan and Bell JJ; see also [295] per Hayne and Kiefel JJ. An appropriation is not, by its own force, the exercise of an executive or legislative power to achieve an objective which requires expenditure: Pape at [176]. Rather, it is "no more than an earmarking of the money, which remains the property of the Commonwealth": Victoria v The Commonwealth and Heydon ("AAP Case") (1975) 134 CLR 338 at 411 per Mason J, referred to with approval in Pape at [177] per Gummow, Crennan and Bell JJ, [602] per Heydon J.

6. Consistently with the nature of an appropriation, an appropriation Act "only permits of moneys held in the Treasury being paid out, upon the Governor-General's warrant, to departments of the Government": AAP Case at 387 per Stephen J. Such legislation "does not speak in the language of regulation, it neither confers rights or privileges nor imposes duties or obligations": AAP Case at 386-387, referred to with approval in Pape at [178] per Gummow, Crennan and Bell JJ.

7. It was on the basis of an appreciation of the nature of the process of parliamentary appropriation that the plurality in Pape concluded that the sections of the Constitution which provided for it did not serve "as sources of a 'spending power' by the width of which is determined the validity of laws which create rights and impose obligations or

otherwise utilise the supply approved by an appropriation": at [178]. As Hayne and Kiefel JJ remarked, "the power to spend lies elsewhere": at [320]; see also at [80], [111]-[113] per French CJ, at [601]-[604] per Heydon J.

8. In this context – and absent any challenge to Pape – it is difficult to see the basis of the Commonwealth's attempted reliance on the Appropriation Acts. Presumably, however, it involves some argument to the effect that these Acts have a dual function: both appropriating monies for certain purposes, and authorising their expenditure by the Executive for those purposes. Any such argument should be rejected. It is inconsistent with the terms, nature and context of the Acts.

10 9. There are, broadly, two types of appropriation: annual appropriations, and special appropriations (including standing appropriations) – see Quick & Garran, The Annotated Constitution of the Australian Commonwealth (1901) at 814; Brown v West (1990) 169 CLR 195 at 205-206, 207-208. This case concerns annual appropriations. Annual appropriations are themselves divided into two categories: those for the ordinary annual services of the Government, and other appropriations. This division is reflected in ss 53-54 of the Constitution (reflecting in turn, it seems, a practice crystallised by the "Compact of 1857" in South Australia: Harrison Moore, The Constitution of the Commonwealth of Australia (2nd ed, 1910) at 142-143).

20 10. By long practice, in any financial year Appropriation Act (No 1) (and, if employed, Appropriation Act (No 3) and Supply Act (No 1)) deals with the ordinary annual services of the Government, and Appropriation Act (No 2) (and, if employed, Appropriation Act (No 4) and Supply Act (No 2)) deals with other annual appropriations: noted Brown v West at 207. This practice is still maintained.

11. Reflecting this practice, Appropriation Act (No 1) 2011-2012 and Appropriation Act (No 2) 2011-2012 are consecutively numbered Acts (No 69 and No 70 of 2011 respectively), and were assented to and commenced on the same date. According to its Long Title, Appropriation Act (No 1) 2011-2012 is "[a]n Act to appropriate money out of the Consolidated Revenue Fund for the ordinary annual services of the Government,
30 and for related purposes". The Long Title of the Appropriation Act (No 2) is "[a]n Act to appropriate money out of the Consolidated Revenue Fund for certain expenditure,

and for related purposes". This well-established division is also reflected in Table 1.1 of the relevant Portfolio Budget Statement: SCB Vol 1 at 378, fn 1 and 6.

12. Any Commonwealth argument that Appropriation Act (No 1) 2011-2012 has a dual function of both constituting the relevant appropriations for the ordinary annual services of the Government, and authorising the spending of such monies, would involve non-compliance with the requirement in s 54 of the Constitution. As the Plaintiff submits at PS [27], even if such non-compliance is not justiciable, the unlikelihood of such stark non-compliance being intended – together with the longstanding practice just outlined – are relevant contextual matters in construing the terms of Appropriation Act (No 1) 2011-2012.

13. Further, Appropriation Act (No 1) 2011-2012 does not evince an intention on the part of the Parliament to perform any function other than that ordinarily performed by such an Appropriation Act. Construed consistently with that purpose, s 8(1) of the Act does no more than permit expenditure of the amount specified in an administered item for an outcome for an agency. The statement that the amounts specified "may be applied for expenditure for the purpose of contributing to achieving that outcome" simply lifts one of the necessary pre-conditions for the expenditure. It is the appropriation itself, that is, the permission to open the "public purse" (cf use of that phrase in Brown v West at 205). An appropriation, and a granting of permission to spend, are legally distinct steps. By its text and context s 8(1) is directed to the former not the latter: see also analogously Pape at [603] per Heydon J.

14. Similarly, s 8(2) performs the function of a deeming provision: if the Portfolio Statements indicate that activities of a particular kind were intended to be treated as activities in respect of that outcome, expenditure for the purpose of carrying out activities of that kind is taken to be expenditure for the purpose of contributing to achieving that outcome. Again, the terms of s 8(2) do not authorise spending for the activities to which the Portfolio Statements refer.

15. The generality of the terms of s 8, even when read with the accompanying schedules, supports the observations of the plurality in Pape at [197] as to the insufficiency of the textual basis for the determination of issues of constitutional fact and for the treatment

of s 81 as a criterion of legislative validity. The NSW Attorney adopts in this respect the submissions of the plaintiff at PS [34]-[36].

Section 32B of the FMA Act and the associated FMA Regulations are wholly invalid

Section 32B cannot be read down

16. The plaintiff has summarised the applicable principles with respect to reading down the words of a statute which have an overly broad application: PS [46]. The plaintiff focuses upon the third of those principles as the most relevant to s 32B: PS [47]ff. However, the absence of a standard, criterion or test for reading down the section which "can be discovered from the terms of the law itself or from the nature of the subject matter with which the law deals" is also of significance in the context of the challenged provisions: Pidoto v Victoria (1943) 68 CLR 87 at 110-111 per Latham CJ; see also Re Nolan; Ex parte Young (1991) 172 CLR 460 at 486-487 per Brennan and Toohey JJ; Re Dingjan; Ex parte Wagner (1995) 183 CLR 323 at 339-340 per Brennan J, 371-372 per McHugh J.

17. Section 32B(1) of the FMA Act declares that arrangements or grants of financial assistance that:

    a. are either specified in the regulations, included in a specified class of arrangements or grants, or are for the purposes of a specified program, and,

    b. apart from the subsection, the Commonwealth does not have power to make,

are within the power of the Commonwealth to make, vary or administer. Pursuant to item 9 of Sch 1 of the Financial Framework Amendment Act, the state of affairs so declared applies to arrangements made both before and after the enactment of s 32B. The arrangements the subject of s 32B(1) which are then listed in Sch 1AA of the FMA Regulations – of which there are over 400 – are identified by reference to their title and a short description of their purpose. The source of Commonwealth legislative power on which those arrangements might be based is not specified and, as the plaintiff observes by reference to a number of particular items in the Schedule (PS [45]), the existence of the requisite connection between the arrangements and the heads of legislative power is far from apparent.

18. In declaring the validity of the myriad arrangements in Sch 1AA, s 32B(1) does not refer to particular subject matter by reference to which it could be read down: cf Victoria v Commonwealth (Industrial Relations Act Case) (1996) 187 CLR 416 at 502.5, and cases referred to there at fn 282; Re Dingjan at 340; Pochi v Macphee (1982) 151 CLR 101 at 110. On the contrary, the apparent intent is to rely upon every conceivable subject matter with respect to which the Commonwealth has power.

19. Nor do the terms of s 32B otherwise suggest a standard or criterion by reference to which the arrangements which are its subject could be read so as to fall within the limits of Commonwealth power. As McHugh J said of s 127C(1)(b) of the Industrial Relations Act 1988 (Cth) in Re Dingjan, neither the section nor the Act "gives any clue as to what standard or test is to be applied in reading down a provision of s 127C that is beyond the power of the Commonwealth to enact": at 372.

20. It is no answer in this context to say that notwithstanding the breadth of its terms, the declaration of validity in s 32B will only operate to the extent that the arrangements in Sch 1AA are otherwise supportable by one or more heads of legislative power. The absence of any identification of heads of power makes for an exercise of indefinite scope, involving a court in an examination of the components of a particular arrangement (beyond the brief description given in the Schedule) by reference to any number of heads of power with which the arrangement may have no more than a tenuous connection. There is "delineated by the Parliament no factual requirements to connect any given state of affairs with the constitutional head[s] of power": Plaintiff S157/2002 v The Commonwealth (2003) 211 CLR 476 at [102] (and see the further, overlapping, submissions made below with respect to Victorian Stevedoring and General Contracting Co Pty Ltd & Meakes v Dignan (1931) 46 CLR 73, Plaintiff S157/2002 and the Work Choices Case (2006) 229 CLR 1).

21. Were the contrary view accepted, then the Commonwealth could routinely enact regulatory provisions which on their face spoke to the world at large, then simply rely on the courts to supply the legal limits of the provisions by considering on a case by case basis whether their application was within any of the Commonwealth's legislative powers. That would require the courts to complete the legislative task of specifying the reach of the law.

22. The Court's decision in R v Hughes (2000) 202 CLR 535 does not support a contrary result. At issue was whether under s 31 of the Corporations Law (WA) the Commonwealth DPP could prosecute the appellant on an indictment alleging a breach of s 1064(1) of that legislation. As then in force, s 1064 prohibited making available, offering for subscription or purchase, or issuing an invitation to subscribe or buy, "any prescribed interest".

23. After concluding that s 29 of the Corporations (Western Australia) Act 1990 (WA) picked up the Director of Public Prosecutions Act 1983 (Cth) as a law of Western Australia, thus enlivening s 31, the plurality considered whether s 47 of the Corporations Act (Cth) validly conferred on Commonwealth officers duties to perform functions or exercise powers created or conferred by the State Corporations Law. Their Honours considered that, formulated as it was in positive terms, s 47 needed to be supported by an available head of legislative power: at [33]-[34]. In that context, they observed that the State law could create offences in fields where it would have been competent for the Commonwealth Parliament to enter directly by its own offence-creating legislation, citing s 51(xx) as an obvious example (at [40], emphasis added):

> In such a situation, a federal law which specifies that certain Commonwealth officers have powers and functions expressed to be conferred by the State law with respect to the prosecution of State offences is a law with respect to that head of legislative power. This will be true of perhaps the very great majority of offences created by State legislation which adopts the Law.

24. The offences with which the accused was charged under s 1064 of the Corporations Law (WA) related to the making of investments in the United States and thus to trade and commerce with other countries, and to matters territorially outside Australia: at [42]. In circumstances where the definition of "prescribed interest" was so drawn as to permit a Commonwealth prosecution, the plurality stated (at [43], citations omitted) that even though the State provision extended to matters beyond Commonwealth power (such as "purely domestic dealings of the proscribed varieties") s 15A of the Acts Interpretation Act 1901 (Cth) could be applied:

> ...to read down a provision expressed in general terms, including a power to prosecute so as to apply only where the particular prosecution is supported by a head of power. Consistently with the statement of general principle in the joint judgment in the Industrial Relations Act Case, this would be

achieved by construing the phrase in s 47(1) of the Corporations Act 'functions and powers that are expressed to be conferred on them by or under corresponding laws' as limited to those functions and powers in respect of matters within the legislative powers of the Parliament of the Commonwealth.

25. The criterion which the majority considered could be applied to read down s 47 of the Corporations Act with respect to offences under State corporations legislation was whether the offences in question could have been the subject of direct Commonwealth regulation. As the plurality observed, for most of those offences the power in 51(xx) was likely to be available. The provision at issue in Hughes indicated that may not always be the case, although there was, in any event, a clear indication on the terms of the State offence in question that it would otherwise be amenable to Commonwealth regulation.

26. It is too large a step to read the plurality's reasons in Hughes as supporting the validity of s 32B of the FMA Act merely because with respect to some arrangements there may be some head of power to support the legislative declaration of validity. The fact that the plurality in Hughes described its approach to s 15A as consistent with the Industrial Relations Act Case at 501-503 indicates that their Honours did not consider that they were taking so significant a step: at [43]. The cases on which the plurality relied (at [43], fn 80) also do not suggest such a departure.

Section 32B is inconsistent with the constitutional structure

27. In Williams (No 1), Hayne J observed that all members of the Court in Pape "held that considerations of text and structure, akin to those alluded to or elucidated in earlier decisions, limit the executive power of the Commonwealth, at least insofar as it enables the Commonwealth to spend public moneys": at [199]. The judgments of a number of members of the Court in Williams (No 1) emphasised the adverse impacts that conferral of a broad spending power on the Executive would have upon the federal structure.

28. Chief Justice French identified those impacts as including the potential for expenditure by the Executive to diminish the authority of the States in their fields of operation, in so far as such Commonwealth expenditure was within the competence of the States' executive governments. Although not a criterion of invalidity, his Honour considered

this to be "a reason not to accept the broad contention that such activities can be undertaken at the discretion of the Executive, subject only to the requirement of appropriation": at [37]; see also at [89] per Gummow and Bell JJ; [590]-[591] per Kiefel J.

29. A number of members of the Court also referred to the impact of a broad construction of the Commonwealth's spending power in terms of its potential bypassing of s 96 of the Constitution. Justices Gummow and Bell stated in this context (at [147]-[148]):

> Section 96 of the Constitution gives to the Parliament a means for the provision, upon conditions, of financial assistance by grant to Queensland and to any other State. ....
>
> With respect to the significance of s 96 in the federal structure, the following passage from the reasons of Barwick CJ in the AAP Case is in point:
>
> > 'Section 96 ... has enabled the Commonwealth to intrude in point of policy and perhaps of administration into areas outside Commonwealth legislative competence. No doubt, in a real sense, the basis on which grants to the claimant States have been quantified by the Grants Commission has further expanded the effect of the use of s 96. But a grant under s 96 with its attached conditions cannot be forced upon a State: the State must accept it with its conditions. Thus, although in point of economic fact, a State on occasions may have little option, these intrusions by the Commonwealth into areas of State power which action under s 96 enables, wear consensual aspect. Commonwealth expenditure of the Consolidated Revenue Fund to service a purpose which it is not constitutionally lawful for the Commonwealth to pursue, is quite a different matter. If allowed, it not only alters what may be called the financial federalism of the Constitution but it permits the Commonwealth effectively to interfere, without the consent of the State, in matters covered by the residue of governmental power assigned by the Constitution to the State.'

30. Justice Hayne pointed to the inconsistency between a broad spending power and the "consensual aspect" of grants to the States under s 96: at [247]-[248]; see also at [501], [503] per Crennan J; at [592] per Kiefel J. More fundamentally, his Honour considered that on the accepted understanding of s 96, as explained in State of Victoria v The Commonwealth (1957) 99 CLR 575, it would, on the Commonwealth's construction, effectively be rendered otiose. That result was "not consistent with reading s 51(xxxix) as supporting any and every law that provides for or otherwise controls the expenditure of money lawfully appropriated from the Consolidated

Revenue Fund regardless of the purposes for which or circumstances in which the expenditure is to be made": at [247].

31. Chief Justice French further observed that power had concentrated over time in the Executive, with a corresponding rise in the power of the House of Representatives as opposed to the Senate, which was the "States' House" (at [58]-[59]). However, his Honour noted that this development had "not resulted in any constitutional inflation of the scope of executive power, which must still be understood by reference to the 'truly federal government' of which Inglis Clark wrote in 1901 and which, along with responsible government, is central to the Constitution": at [61].

32. There is nothing novel or radical in taking account of such federal considerations in this way. It simply involves taking account of the federal structure established by the Constitution and reading s 61 of the Constitution in its constitutional context. The Commonwealth is not a unitary government of unlimited powers. Moreover, also underlying this Court's decision in Williams (No 1) was recognition of the balance established between the Parliament and the Executive, and between the two Houses of Parliament, reflecting long-established principles of representative and responsible government. Those principles are given particular effect in Australia by the constitutional provisions in ss 53-56, 61-64 and 81-83, whilst accommodating those principles to Australia's bicameral federal system. The two themes of that system of government and of the constitutional federal structure intersect when it comes to the particular role granted to the Senate. Again, there is nothing radical in taking account of these matters.

33. In this context, a majority of this Court in Williams (No 1) held that in general the Executive power in s 61 did not extend to the activity of spending, except to the extent authorised by legislation: French CJ at [59]-[61]; Gummow and Bell JJ at [138]-[159]; Hayne J at [252]; Crennan J at [534]; Kiefel J at [558]. In that way the primacy of parliamentary control over the raising and spending of money was maintained.

34. Section 32B, and the associated provisions in the FMA Act and FMA Regulations, was the immediate legislative response to that decision. However, it does not accommodate the fundamental constitutional imperatives relating to the federal system

of responsible government established by the Constitution which had been addressed in Williams (No 1).

35. Section 32B does not involve an exercise of the power of parliamentary control over spending, but rather a ceding of that power. It authorises the Executive, simply by amendment of the regulations, to bring particular spending programs into the authorisation scheme. Although Sch 1AA was inserted pursuant to the Financial Framework Amendment Act, any further amendment may be done by the Executive, thus conferring on the Executive a broad spending power without the express sanction of, or oversight by, either the House of Representatives or the Senate. No particular level of specificity is provided. Any details of the arrangements or grants may be entirely opaque. The practical effect of the section is to give up any legislative role, save only for the potential for disallowance (addressed below at [36]-[37]). In so doing, the section seeks to subvert the federal balance to which the Court referred in Williams (No 1) (see further PS [67]-[87]). The measure cannot be supported on the basis that it is itself an exercise of parliamentary control over expenditure. No doubt it reflected the views of the particular government, and of a majority of the two Houses, at a particular time during a particular electoral cycle. But its effect is to deprive the two Houses on an ongoing basis of the entitlement to review expenditure programs.

36. As for the possibility of disallowance of regulations pursuant to s 42 of the Legislative Instruments Act 2003 (Cth), that is not an adequate answer. As explained at PS [92]-[93], the process of laying a legislative instrument before the two Houses, and for the subsequent disallowance of the instrument, is one which takes time. Importantly, the effect of disallowance pursuant to either subsections (1) or (2) of s 42 is that the instrument then – ie prospectively – ceases to have effect: s 45(1). The instrument is not invalid ab initio. Given the delay inherent in the process, it is quite possible that the expenditure will already, validly, have occurred. That expenditure will not be capable of being challenged.

37. Moreover, there is no particular limit on how many new arrangements or grants may be contained in any single legislative instrument amending the FMA Regulations. And s 42 does not permit of partial disallowances. The two Houses would face an all or nothing choice with respect to any amending instrument. There is no relevant

power to request omissions or amendments of the kind referred to in s 53 of the Constitution.

38. These points about s 32B (and the overlapping points about reading down) can be put in another way. Such content as the provision has is determined by reference to regulations made pursuant to its terms. This character suggests that it is not a law with respect to any particular head or heads of legislative power, but is rather a law abdicating power: cf Victorian Stevedoring and General Contracting Co Pty Ltd & Meakes v Dignan (1931) 46 CLR 73 at 101 per Dixon J, at 119-121 per Evatt J. For the reasons just explained, given the constitutional structure it is not open to the Parliament to surrender its powers of control and review over these matters to the Executive.

39. In Plaintiff S157/2002 (2003) 211 CLR 476, the majority referred to Dignan as authority for the proposition that "the structure of the Constitution does not preclude the Parliament from authorising in wide and general terms subordinate legislation under any of the heads of legislative power". However, as Gaudron, McHugh, Gummow, Kirby and Hayne JJ further observed, "what may be 'delegated' is the power to make laws with respect to a particular head in s 51 of the Constitution": at [102]. The formulation of s 32B cannot be so characterised. It delegates to the regulations the function of prescribing arrangements which, by force of the section, will be declared to be within Commonwealth power irrespective of whether or not they may in fact be so supported.

40. Further, by contrast with the regime that was impugned on a similar basis in Work Choices (see at [400], [418]), the section does not involve a delegation of the power to make laws with respect to a particular head or heads of power. Rather, as discussed above in relation to reading down, it appears that the Commonwealth seeks generically to invoke every possible head of power. As was accepted in Work Choices (at [418]), Evatt J's statement that a regulation-making power "ordinarily ... will ... retain the character of a law with respect to the subject matter dealt with in the statute" (Dignan at 121) is "predicated on the existence of 'a scheme contained in the statute itself' which the regulations were to carry out". The challenge in Work Choices was rejected in significant part because the regulation-making power, though wide, could be seen as delimited by giving effect to the "scheme" of the Act: at [415]-[418]. That cannot be

said here, for there is no particular scheme at play in Div 3B of Pt 4 of the FMA Act, other than seeking to support myriad agreements (past, present and future), and myriad spending activities, under myriad powers.

The purported legislative solution is not supported by the constitutional powers invoked

Section 51(xx)

41. In Williams (No 1), Hayne J and Kiefel J were the only members of the Court to consider the Commonwealth's contention that the funding agreement at issue in that case was supported by s 51(xx) of the Constitution. In rejecting that contention, their Honours respectively observed that the Guidelines pursuant to which the agreement was administered did not require a party to a funding agreement to be a trading or financial corporation: at [271] per Hayne J, at [575] per Kiefel J. In circumstances where a constitutional corporation need not be a party to an agreement, Hayne J and Kiefel J concluded that a law authorising such an agreement would not be supported by s 51(xx): at [272], [575]. A law of that nature would not, as Hayne J observed, "be a law authorising or regulating the activities, functions, relationships or business of constitutional corporations generally or any particular constitutional corporation; it would not be a law regulating the conduct of those through whom a constitutional corporation acts nor those whose conduct is capable of affecting its activities, functions, relationships or business": at [272], see also at [575] per Kiefel J.

42. Their Honours were correct so to conclude. Although the power conferred by s 51(xx) of the Constitution has been broadly construed (as to which see Work Choices at [178]), the breadth of the power does not obviate the need to characterise the purported exercise of the power as falling within the power. As McHugh J explained in Re Dingjan (at 368, footnotes omitted):

> It does not follow, however, that s 51(xx) authorises any law that operates on conduct that relates to the activities, functions, relationships or business of trading, financial or foreign corporations. The law must be a law 'with respect to' a corporation of the kind described by s 51(xx). That means that the law must have 'a relevance to or connection with' ... a s 51(xx) corporation. It is not enough, however, that the law 'should refer to the subject matter or apply to the subject matter'.

43. Where the legislation authorises entry into particular agreements in reliance upon s 51(xx), it is the subject matter of the contract, rather than the identity of the contracting party, which must be the focus in determining whether s 51(xx) provides the relevant legislative support. To hold otherwise would be to allow the Executive to contract its way into power simply by entering a contract with a constitutional corporation. When the SUQ Funding Agreement is so examined, it is apparent that it is not directed to regulating the rights or liabilities of SUQ by reason of the fact that it is a trading corporation. Rather, whether or not the Agreement is with (what may for the moment be assumed to be) a constitutional corporation is a matter of chance. This type of connection is "so insubstantial, tenuous or distant" that the legislative authorisation for entry into it cannot be described as a law with respect to s 51(xx) (cf Melbourne Corporation v Commonwealth (1974) 74 CLR 31 at 79 per Dixon J).

Section 51(xxiiiA)

44. The NSW Attorney supports the meaning of "benefit" in s 51(xxiiiA) for which the plaintiff contends (PS [120]-[150]), by which the central notion conveyed is "a payment to or for an individual for provision of relief against the consequences of identified events or circumstances: sickness, unemployment, hospital treatment, pharmaceutical needs or being a student".

45. In stating a preference for that construction in Williams (No 1) (at [282]), Hayne J observed, by reference to the Court's decision in Alexandra Private Geriatric Hospital Pty Ltd v The Commonwealth (1987) 162 CLR 271, that the word "benefits" is not confined to a grant of money and may encompass the provision of a service. However, it did not follow that every provision of a service is a benefit within the meaning of s 51(xxiiiA) (at [277]). His Honour explained by contrasting the position in Alexandra Private Geriatric Hospital and the case then before the Court (at [278]-[279]):

> As the Alexandra Hospital Case illustrates, the concept of 'benefit' includes the payment of money for and on behalf of another to obtain the provision to that other of material aid in satisfaction of human want. In that case, money was paid by the Commonwealth to a nursing home proprietor for services provided to a patient. As the Court pointed out, 'the intended ultimate beneficiary of any benefit paid [was] the patient in the nursing home to the

> proprietor of which the payment will ordinarily be made'. And as the Court also pointed out, the 'benefit' could as much be described as money paid for and on behalf of the patient as it could be described as provision of a service to the patient by the nursing home proprietor.
>
> But in the present case, unlike the Alexandra Private Hospital Case, the chaplaincy services to be provided by SUQ can be described only as the provision of a service to student (and others) attending or associated with the school in question. There is not, in this case, a payment of money by the Commonwealth for or on behalf of any identified or identifiable student for services rendered or to be rendered to that student.

46. In order to support a law of the present nature under s 51(xxiiiA), a "benefit" would have to be construed more broadly as meaning any provision of an advantage. Such a meaning of "benefit" would confer a large legislative power "of a kind radically different from the other elements of legislative power given by s 51(xxiiiA) and a very long way away from the mischief to which the s 51(xxiiiA) was directed": at [281] per Hayne J. Aside from the matters of text to which his Honour refers (at [283]-[284]), the construction gives rise to practical difficulties including as to proof, to which the plaintiff refers: PS [123].

47. Associated with that difficulty, critically, is the inherently subjective nature of an evaluation, on the broader construction, of whether a particular measure constitutes a "benefit" in the sense of an advantage. Parliaments may be presumed to always intend to achieve some public benefit when enacting laws. Not uncommonly laws directed to particular groups are intended or said to benefit that group, or benefit others by protecting them from that group. Assessing whether or not such laws actually achieve such benefits is a matter of politics, not law. A claim that a law relating, for example, to improving student discipline is to the benefit of students subject to that discipline is likely to fall into that category identified by Gibbs J in Buck v Bavone (1976) 135 CLR 110 at 119, of "a matter of opinion or policy or taste ... which cannot be effectively reviewed by the courts". The wisdom or suitability of a particular scheme is not for the Court to pass upon: Alexandra Private Geriatric Hospital at 283. The Court should not readily accept that the constitutional facts on which exercise of the power was conditioned were so subjective and resistant to the possibility of effective judicial review. That consideration weighs heavily against accepting a construction of s 51(xxiiiA) as supporting laws said to be to the general advantage of identified persons affected by

the relevant circumstances. It supports the view that the placitum is directed to the provision by the Commonwealth of financial benefits, or the equivalents thereof, to such persons.

48. In rejecting the argument that a hypothetical law providing for the impugned payments would be supported by s 51(xxiiiA), Hayne J observed that the payments made under the program were made "to provide a service to which students may resort and from which they may derive advantage", but which were not "benefits to students" (at [285], original emphasis). Justice Kiefel reached a similar conclusion, describing the purpose of the Funding Agreement as "a contract to provide funds for the provision of chaplaincy services in a school as part of the education-related program of the school": at [574]. So construed, it did not provide benefits to students and was not a contract for the provision of such benefits: at [594]. In reaching that conclusion, her Honour observed (at [593]) that the power conferred by s 51(xxiiiA) to provide benefits to students "is not one to assist schools to provide services associated with education which may be of some benefit to students". The conclusion of their Honours in Williams (No 1) should be adopted in the present case.

Sections 61 and 51(xxxix)

49. As the plaintiff observes (at PS [151]), a majority of this Court in Williams (No 1) concluded that the chaplaincy program was not a program required as a matter of nationhood, nor did it form part of the ordinary functions of government. Unless the Court grants leave to the Commonwealth to reconsider its decision in that case, the reliance upon s 61 and s 51(xxxix) to support the SUQ Funding Agreement is misplaced.

The Court should not reconsider its decision in Williams (No 1)

50. To the extent necessary to support the power to enter into and spend money under the SUQ Funding Agreement and subsequent Variation Deeds, the Commonwealth seeks leave to re-open Williams (No 1): see eg Amended Defence at [31(c)] (SCB Vol 1 at 52). In Wurridjal v The Commonwealth (2009) 237 CLR 309 at [70], French CJ explained that when considering whether to overrule previous decisions, the Court should be "informed by a strongly conservative cautionary

principle, adopted in the interests of continuity and consistency in the law". Applying such an approach, and considering the factors identified in John v Federal Commissioner of Taxation (1989) 166 CLR 417 at 438-439 per Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ, there is no basis for reconsidering and/or departing from Williams (No 1) in this case.

51. As to the first of the factors identified in John, whilst the validity of what Heydon J described in Williams (No 1) as the "common assumption" (at [342], see also at [3] per French CJ) was determined for the first time in that case, the majority's reasoning as to federal considerations limiting the scope of the executive power was consistent with earlier authority, in particular Pape: see Williams (No 1) at [30] per French CJ, [143] per Gummow and Bell JJ, [192] and [198] per Hayne J, [500] per Crennan J, [585] per Kiefel J. The Commonwealth has not sought to challenge the correctness of Pape. It is also relevant in this context that the "common assumption" rejected in Williams (No 1) did not "go with a definite stream of authority": cf Queensland v The Commonwealth (1988) 139 CLR 585 at 630 per Aickin J.

52. Further, the detailed reasoning in the judgments in Williams (No 1) followed three days of oral argument, with further written submissions filed after the hearing by some interveners, to which the Commonwealth parties responded. As Kiefel and Keane JJ observed in Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship (2013) 304 ALR 135 at [198], quoting K-Generation Pty Ltd v Liquor Licensing Court (2009) 237 CLR 501 at [247] per Kirby J, "care should be taken to avoid (especially within a very short interval) the re-opening and re-examination of issues that have substantially been decided by earlier decisions in closely analogous circumstances".

53. As to the second factor identified in John, there is no serious divergence between the reasoning relevantly adopted by the six Justices who constituted the majority in Williams (No 1) as to the issues they respectively decided.

54. The third John factor – whether or not the earlier decision had achieved no useful result or had led to considerable inconvenience – also weighs against reconsidering Williams (No 1), particularly because, as was suggested in a number of judgments,

conditional grants to the States under s 96 of the Constitution may enable the program in issue here, and other such programs, to be provided without constitutional difficulty: see at [30] per French CJ, [91] per Gummow and Bell JJ, [503] per Crennan J, [593] per Kiefel J.

55. In any event, the decision in Williams (No 1) is correct for the reasons there given.

Part VI: Estimate of time for oral submissions

56. It is estimated that some 30-40 minutes will be required by NSW for the presentation of its argument.

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10

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20

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