IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY **No. S154 of 2013**

BETWEEN:

RONALD WILLIAMS
Plaintiff

AND

10 **COMMONWEALTH OF AUSTRALIA**
First Defendant

MINISTER FOR EDUCATION
Second Defendant

SCRIPTURE UNION QUEENSLAND
Third Defendant

20 **SUPPLEMENTARY WRITTEN SUBMISSIONS OF THE ATTORNEY GENERAL FOR WESTERN AUSTRALIA (INTERVENING)**

PART I: SUITABILITY FOR PUBLICATION

1. This submission is in a form suitable for publication on the Internet.

PART II: SUBMISSIONS

Re-open Williams No. 1

2. Clearly enough the Court has power to depart from its previous decisions, but such a course has been rare and is "not lightly undertaken"[1] and in doing so the Court adopts, "a strongly conservative cautionary principle, adopted in the interests of

[1] *John v Commissioner of Taxation* (1988) 166 CLR 417 at 438 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ); *Queensland v The Commonwealth* (1977) 139 CLR 585 at 599 (Gibbs J), 620 (Aickin J); *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* [2013] HCA 53; (2013) 88 ALJR 324 at 356 [192] (Kiefel and Keanne JJ); *Lee v New South Wales Crime Commission* [2013] HCA 39; (2013) 87 ALJR 1082 at 1106 [63] (Hayne J); *Commonwealth v Hospital Contribution Fund* (1982) 150 CLR 49 at 64 (Mason J), 72 (Wilson J).

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continuity and consistency in the law, that such a course should not lightly be taken."[2]

3. The Court should not re-open *Williams No. 1* [3] for the following reasons.

4. *First*, *Williams No. 1* is a recent decision of the Court, which, as noted by Stephen J in *Queensland v The Commonwealth*,[4] is a factor which tends against reconsideration. Although two members of the Court who sat in *Williams No. 1* have been replaced, "turnover" does not justify a review of an earlier decision.[5] Indeed, it would be quite wrong to countenance reconsideration for this reason alone. If it were sufficient then re-opening cases would simply be a matter of waiting or chance.

5. *Secondly*, the decision of the plurality in *Williams No. 1* is not contrary to any earlier authority or any "definite stream of authority".[6] Whilst the reasoning of the plurality may differ in some respects, as noted by Brennan J in *John v Commissioner of Taxation*,[7] the fact that a majority decision is reached on differing grounds and over a cogent dissenting judgment does not diminish its authority or cogency.

6. That *Williams No. 1* does not address, to the satisfaction of the Commonwealth, the questions identified at [108] of the Commonwealth's submissions[8] matters not. Not disposing of an (unhelpful) argument put by a party is not a ground of appeal, let alone a basis to reopen.

7. *Thirdly*, *Williams No. 1* followed three days of oral submissions and the Commonwealth was given the liberty of filing supplementary written submissions. The decision followed a "very full examination of the issues",[9] indeed, in contemporary terms, almost uniquely full.

8. *Fourthly*, "inconvenience" is not a sufficient reason to overrule *Williams No. 1*,[10] even if the Commonwealth (or anyone else) could be said to have suffered it. Inconvenience in this sense is an odd contention. Within 6 days of the judgment in *Williams No. 1* the Commonwealth had enacted legislation which it claimed at the time, and claims in this matter, deals with any problem emerging from the decision. There is nothing to suggest inconvenience during these 6 days, and if the contention is simply that *Williams No. 1* gives rise to inconvenience to the Commonwealth, this is true of every matter in which the Court declares that the Commonwealth has exceeded its legislative or executive power. As the decision in *Ha v New South Wales*[11] illustrates, judicial statements of what the law is, different to that which might have been perceived, and which give rise to "most serious implications", are not avoided simply because of these implications.

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[2] *Wurridjal v The Commonwealth* [2009] HCA 2; (2009) 237 CLR 309 at 352 [70] (French CJ).
[3] *Williams v Commonwealth* [2012] HCA 23; (2012) 248 CLR 156.
[4] *Queensland v The Commonwealth* (1977) 139 CLR 585 at 603 (Stephen J). See also *Attorney-General (NSW) v The Perpetual Trustee Co Ltd* (1952) 85 CLR 237 at 244 (Dixon J).
[5] *Queensland v The Commonwealth* (1977) 139 CLR 585 at 600 (Gibbs J); *Lee v New South Wales Crime Commission* [2013] HCA 39; (2013) 87 ALJR 1082 at 1107 [70] (Hayne J).
[6] *Queensland v The Commonwealth* (1977) 139 CLR 585 at 630 (Aickin J).
[7] *John v Commissioner of Taxation* (1988) 166 CLR 417 at 451 (Brennan J).
[8] See also Commonwealth Submissions [110].
[9] *Attorney-General (NSW) v The Perpetual Trustee Co Ltd* (1952) 85 CLR 237 at 244 (Dixon J).
[10] Commonwealth Submissions [109].
[11] *Ha v New South Wales* (1997) 189 CLR 465, see in particular at 503 (Brennan CJ, McHugh, Gummow and Kirby JJ).

9. In any event, there no appreciable implications for the Commonwealth arising from *Williams No. 1*. Section 96 of the *Constitution*, and even more clearly, s. 94, provide the means to alleviate any supposed negative implication.

State Executive Power

10. The question of the scope of State Executive power was not a matter which was relevant or necessary for the Court to consider in *Williams No. 1*, and it was not considered. It is not relevant when considering reopening *Williams No. 1*.[12]

11. Likewise, it is not relevant or necessary for the Court to consider the scope of State Executive power in the present matter.[13]

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DATED the 17th day of April 2014

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[12] Commonwealth Submissions [108.3] & [110].
[13] Commonwealth Submissions [161]-[162].