IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY **No. S307 of 2010**

BETWEEN

RONALD WILLIAMS

Plaintiff

AND

COMMONWEALTH OF AUSTRALIA

First Defendant

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MINISTER FOR SCHOOL EDUCATION, EARLY CHILDHOOD AND YOUTH

Second Defendant

MINISTER FOR FINANCE AND DEREGULATION

Third Defendant

SCRIPTURE UNION QUEENSLAND

Fourth Defendant

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SUBMISSIONS OF THE ATTORNEY GENERAL FOR NEW SOUTH WALES, INTERVENING

1. Part 1: Publication of submissions

1.1 These submissions are in a form suitable for publication on the Internet.

2. Part 2: Basis of intervention and parties supported

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2.1 These proceedings have been commenced in this Court's original jurisdiction under s.75(iii) and (v) of the Constitution and s.30 of the Judiciary Act 1903 (Cth). The Plaintiff and Defendants have agreed to state certain questions of law to this Court by way of special case pursuant to rule 27.08 of the High Court Rules. The Attorney General for NSW intervenes pursuant to s.78A of the Judiciary Act and seeks only to be heard in relation to questions 2(a) and 4(a) of the Special Case [SCB, Vol 1, 35-36].

2.2 The Attorney General for NSW supports the Plaintiff's contentions that a funding agreement dated 9 November 2007 ("Agreement") between the First Defendant
20 ("Commonwealth") and Fourth Defendant ("SUQ") is beyond the executive power conferred on the Commonwealth by s.61 of the Constitution, as is the making of payments by the Commonwealth to SUQ pursuant to that Agreement. In reply, the First to Third Defendants admit that there was no legislative authorisation to enter into the Agreement, and all Defendants say that the Commonwealth had power both to enter into the Agreement and to draw funds and make payments pursuant to that Agreement by reason of s.61 of the Constitution, or s.61 of the Constitution when read with s.51(xxxiiiA), or further and alternatively, s.51(xx).

2.3 The Attorney General for NSW submits:

(a) there are four aspects of the executive power under s.61 of the Constitution – statutory power, prerogative power, capacities and what may be called a "nationhood" power;

(b) all aspects of the executive power are limited to the subject matters of Commonwealth legislative power, be they express or implied;

(c) the Agreement and the making of payments under the Agreement are not within that aspect of executive power based upon a notion of "nationhood";

(d) entry into contracts and the making of payments are matters that fall within the capacities of the Commonwealth Executive. However, to establish the capacity of the Commonwealth Executive to enter into the Agreement and to make payments required under it, it must be shown that the subject matter of the Agreement and the matter to which the payments are directed are matters that fall within Commonwealth legislative power;

(e) the corporations power under s.51(xx) of the Constitution cannot support the Agreement or payments made under it;

(f) so far as the corporations power is concerned, the "activities" test is not the sole criterion for determining the existence of a trading corporation. Even if it is found that SUQ is a trading corporation, that does not mean that the Agreement is authorised by s.51(xx).

3. Part III: Why leave to intervene should be granted

3.1 Not applicable.

4. Part IV: Applicable constitutional provisions, statutes and regulations

4.1 The applicable constitutional and statutory provisions are identified in the Plaintiff's Submissions at [85]-[86].

5. Part V: Argument of the Attorney General for NSW

Aspects of the executive power

10 5.1 Section 61 of the Constitution is the primary source of the Commonwealth executive power. The outer limits of the executive power conferred by s.61 remain to be determined: Pape v Federal Commissioner of Taxation (2009) 238 CLR 1 at 87 [227] per Gummow, Crennan and Bell JJ. However, following from Pape it is now clear that there are four aspects to the executive power under s.61:

(a) power conferred by statutes of the Parliament;

(b) prerogative power of the Crown, being those privileges and immunities that are unique to the Crown which are recognised at common law and which derive
20 from the historic powers of the Sovereign (eg: Farey v Burvett (1916) 21 CLR 433 at 452 per Isaacs J; Barton v The Commonwealth (1974) 131 CLR 477 ("Barton") at 498 per Mason J; Victoria v The Commonwealth (AAP Case) (1975) 134 CLR 338 at 404-405 per Jacobs J);

(c) the Commonwealth's non-prerogative capacities and freedoms, being those capacities and freedoms that it possesses as a legal person which are not otherwise prohibited by law (Davis v The Commonwealth (1988) 166 CLR 79 ("Davis") at 108 per Brennan J and see generally Harris, "The 'Third Source" of Authority for Government Action Revisited" (2007) 123 Law Quarterly Review
30 225), such as the capacity to enter contracts (New South Wales v Bardolph

(1934) 52 CLR 455 at 474-475 per Evatt J, at 496 per Rich J, at 502 per Starke J and at 509 per Dixon J) and the power to spend money validly appropriated; and

(d) a limited power sourced in the Commonwealth's status as a national government and which may in shorthand be described as a "nationhood" power (cf Pape at 168 [488] per Heydon J).

See Pape at 60 [126]-[127] per French CJ, at 83 [214] per Gummow, Crennan and Bell JJ. See also Davis at 107-108, 111 per Brennan J.

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5.2 The "nationhood" aspect of executive power has variously been described as:

(a) the power "to engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation": AAP Case at 397 per Mason J; Davis at 111 per Brennan J; Pape at 87 [228] per Gummow, Crennan and Bell JJ, at 116 [329] per Hayne and Kiefel JJ; and

(b) a power "derived from the character and status of the Commonwealth as a
20 national polity or as deduced from the existence and character of the Commonwealth as a national government": Pape at 121 [345] per Hayne and Keifel JJ.

5.3 Both formulations have a degree of generality regarding the notion of nationhood which give rise to uncertainty regarding the content of this power. This in turn gives rise to ambiguity regarding its limits (see A Twomey, "Pushing the Boundaries of Executive Power – Pape, The Prerogative and Nationhood Powers" (2010) 34 Melbourne University Law Review 313 at 317; G Winterton, "The Limits and Use of Executive Power by Government" (2003) 31 Public Law Review 421 at 426-427).

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5.4 The problem with this aspect of the executive power is its potential to undermine the federal distribution of powers since it operates to confer executive power to areas outside the scope of express Commonwealth legislative power (AAP Case at 364 per Barwick CJ, at 378 per Gibbs J; see also Twomey at 327, 330).

5.5 The capacity of this aspect of executive power to undermine the federal balance justifies keeping this power closely confined. No doubt for this reason, it has been recognised that this aspect of executive power does not have a wide operation. As Mason J stated in the AAP Case at 398:

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> It would be inconsistent with the broad division of responsibilities between the Commonwealth and the States achieved by the distribution of legislative powers to concede to this aspect of the executive power a wide operation effecting a radical transformation in what has hitherto been thought to be the Commonwealth's area of responsibility under the Constitution, thereby enabling the Commonwealth to carry out within Australia programmes standing outside the acknowledged heads of legislative power merely because these programmes can be conveniently formulated and administered by the national government.

20 5.6 In that same case, Barwick CJ said (at 364) that:

> Though some power of a special and limited kind may be attracted to the Commonwealth by the very setting up and existence of the Commonwealth as a polity, no power to deal with matters because they may conveniently and best be dealt with on national basis [exists]. (emphasis added)

5.7 In The Commonwealth v Tasmania ("Tasmanian Dams Case") (1983) 158 CLR 1, Deane J said (at 252) this power will be "confined within areas in which there is no real competition with the States." To similar effect, in Davis (at 93-94) the plurality said:

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> ... the existence of Commonwealth executive power in areas beyond the express grants of legislative power will ordinarily be clearest where Commonwealth executive or legislative action involves no real competition with State executive or legislative competence.

5.8 In Davis, Brennan J said (at 111) that this aspect of the power:

> ... invites consideration of the sufficiency of the powers of the States to engage effectively in the enterprise or activity in question and of the need for national action (whether unilateral or in co-operation with the States) to secure the contemplated benefit.

5.9 See also Pape at 180-181 [519]-[520] per Heydon J.

The limits on executive power

5.10 Each of the four aspects of the executive power identified above is subject to limits, albeit that the nature of some of those limits differs depending upon the source and historical origin of the relevant aspect of power. However, all four aspects of executive power are subject to the limit that the power extends only to subject matters in respect of which the Commonwealth has legislative power.

5.11 Where executive power is conferred by statute, the limit on that power is supplied by the statute, which in turn is limited by the Parliament's legislative power under the Constitution. As such, this aspect of executive power follows legislative power: AAP Case at 362 per Barwick CJ, at 379 per Gibbs J, at 396-397 per Mason J.

5.12 The prerogative power is of course subject to the Constitution. It is further limited in the sense that it abates to the extent that the power is made subject to statute: see Attorney-General v De Keyser's Royal Hotel Ltd [1920] AC 508 at 526, 528 per Lord Dunedin, at 539-540 per Lord Atkinson, at 561 per Lord Sumner, at 570, 575 per Lord

Parmoor; Johnson v Kent (1975) 132 CLR 164 at 169-170 per Barwick CJ; Brown v West (1990) 169 CLR 195 at 205; Ruddock v Vadarlis (2001) 110 FCR 491 at 539 [181] per French J. See also H E Renfree, The Executive Power of the Commonwealth of Australia (1984) at p.395 at fn 26 and G Winterton, "The Limits and Use of Executive Power by Government" (2003) 32(3) Federal Law Review 421 at pp.438-443. As against this, as Barwick CJ noted in Barton at 488 "the rule that the prerogative of the Crown is not displaced except by a clear and unambiguous provision is extremely strong" (see also at 501 per Mason J and Ruddock v Vadarlis at 540 [184] per French J). The courts cannot establish any new prerogatives: British Broadcasting Corporation v Johns [1965] Ch 32 at 79 per Diplock LJ.

5.13 As the First to Third Defendants have conceded in their written submissions at para.41, the prerogative power also follows the Commonwealth's legislative power. To the extent that the Parliament does not have power to legislate with respect to a particular subject matter, that subject matter is withdrawn from the ambit of the prerogative power available under s.61 of the Constitution.

5.14 Relevant to this case are the limits attaching to those aspects of the Commonwealth executive power in s.61 of the Constitution which derive from Commonwealth capacities and notions of nationhood. Both those aspects of power are also limited by the scope of the Commonwealth's legislative power – or in the case of the "nationhood" power, parallel the scope of the legislative power. It is convenient to make this point by first considering the "nationhood" aspect of the executive power.

5.15 Following from Pape, it appears to be accepted that the "nationhood" aspect of the executive power gives rise to a co-extensive legislative power to legislate by reason of the incidental power in s.51(xxxix) of the Constitution. In this sense, the legislative power follows the executive power and not the other way around.

5.16 Once it is accepted that the first three aspects of executive power under s.61 of the Constitution considered above are limited by reference to (or bear a direct

correspondence to) the subject matters in respect of which the Commonwealth has legislative power, it would be an odd result indeed if that fourth aspect of executive power – capacities – was not equally constrained.

5.17 In its capacities, as in other aspects of its executive power under s.61, the Commonwealth is subject to the Constitution. As Mason J explained in AAP Case (at 396) the executive power:

> ... is not unlimited [in scope] and ... its content does not reach beyond the area of responsibilities allocated to the Commonwealth by the Constitution, responsibilities which are ascertainable from the distribution of powers, more particularly the distribution of legislative powers, effected by the Constitution itself and the character and status of the Commonwealth as a national government. The provisions of s.61 taken in conjunction with the federal character of the Constitution and the distribution of powers between the Commonwealth and the States make any other conclusion unacceptable.

5.18 Mason J treated the "nationhood" power as qualification to this proposition (at 397), although if it is accepted that the "nationhood" executive power is co-extensive with the "nationhood" legislative power, no such qualification is necessary.

5.19 Also in the AAP Case, Barwick CJ said that "[t]he Commonwealth is a polity of limited powers" (at 361) and later stated that, subject to certain irrelevant exceptions, "the executive may only do that which has been or could be the subject of valid legislation" (at 362). Gibbs J expressed the same view (at 379): "... the Executive cannot act in respect of a matter which falls entirely outside the legislative competence of the Commonwealth. ... The Constitution effects a distribution between the Commonwealth and the States of all power, not merely of legislative power."

5.20 See also Pape at 115-116 [327] per Hayne and Kiefel JJ. In Pape at 118 [335], Hayne and Kiefel JJ said, "[t]he executive power of the Commonwealth is the executive

power of a polity of limited powers." There is no reason why this limitation should not apply to all aspects of Commonwealth executive power. See also Mason J in Barton at 498 who referred to s.61 of the Constitution enabling the Crown to undertake "all executive action which is appropriate to the position of the Commonwealth under the Constitution and to the spheres of responsibility vested in it by the Constitution."

5.21 To say that the Commonwealth Executive's capacities are limited by the scope of Commonwealth's legislative power means, for example, the Commonwealth Executive cannot enter into any contract that it thinks fit (as was advocated by E Campbell, "Commonwealth Contracts" (1970) 44 Australian Law Journal 14 at pp.17-18 and 23), but only into such contracts as relate to a subject matter falling within Commonwealth legislative power (a position put by N Seddon, Government Contracts – Federal State and Local, 4th ed (2009) at pp.68-74). The same applies in relation to the Executive exercising its capacity to spend money (assuming that a valid appropriation has been made). In this regard, the First to Third Defendants contend that in the absence of the Agreement, the executive power of the Commonwealth would nevertheless extend to make the payments which were due under that agreement (submissions at [19]). This raises the question of whether the Commonwealth Executive has the power to make such payments, which those Defendants suggest is a capacity of the Executive. In this regard, it follows from Pape that ss.81 and 83 of the Constitution do not confer a spending power upon the Commonwealth Parliament (at 23 [8], 36 [53] and 55 [111] per French CJ, at 73 [178] per Gummow, Crennan and Bell JJ, at 211-212 [602]-[604] per Heydon J). See also ICM Agriculture Pty Ltd v The Commonwealth (2009) 240 CLR 140 at 169 [41] per French CJ, Gummow and Crennan JJ.

5.22 If it were otherwise, the Commonwealth would, for example, be authorised to contract with and fund an individual or corporation to establish a university in one or more of the States, despite there being no legislative power under the Constitution to engage in such an exercise.

5.23 In this case, the Commonwealth cannot call in aid the "nationhood" aspect of the executive power under s.61 in order to validate its entry into the Agreement or the payment of funds under that Agreement. The funding of chaplains in schools is not "peculiarly adapted to the government of a nation" and a matter "which cannot otherwise be carried on for the benefit of the nation" (AAP Case at 397 per Mason J). Indeed, the Queensland government maintains its own funding program for chaplains in school (Special Case at paras.19-24 [SCB, Vol.1, 13]). This fact points to a situation where:

10 (a) the Commonwealth action involves "real competition with State executive or legislative competence" (Davis at 94 per Mason CJ, Deane and Gaudron JJ); and

(b) the State has sufficient power itself to provide the program (Davis at 111 per Brennan J).

These are both considerations which tell against the "nationhood" power applying to the facts of this case.

20 5.24 It follows from what has been set out above that the Commonwealth Executive does not have the capacity to enter into whatever contracts it sees fit, nor the capacity to spend whatever money it sees fit (subject to an otherwise valid appropriation). As such, the entry into the Agreement and payment of sums of money under that Agreement will only be within power if it is possible to identify a head of legislative power which would justify these activities. The only sources of legislative power relied upon by the Defendants in this regard are ss.51 (xxxiiiA) of the Constitution (as to which the NSW Attorney General makes no submissions) or further or alternatively, ss.51(xx) of the Constitution.

The corporations power (s.51(xx))

5.25 The Defendants cannot establish that the Agreement or payments made under that Agreement would, if empowered by legislation, be within s.51(xx) of the Constitution.

The "activities" test is not the sole determinate of a corporation's character

5.26 The Attorney General for NSW supports the submission of Western Australia that this Court should not accept that the ends to which trade is directed are always wholly irrelevant to the characterisation of a corporation for the purposes of s.51(xx) of the Constitution (para.17). The Attorney General for NSW adopts Western Australia's reasons in support of this position (paras.18-44) and its conclusion (at para.45) and adds the following.

5.27 The majority in New South Wales v The Commonwealth (Work Choices Case) (2006) 229 CLR 1 declined to consider what kinds of corporation fall within the constitutional expression "trading or financial corporations formed within the limits of the Commonwealth" (at 75 [58]). A review of the authorities shows that the matter has not been definitively settled.

5.28 In R v Federal Court of Australia; Ex parte WA National Football League (Adamson's Case) (1979) 143 CLR 190, the majority held that a corporation's character was to be discerned from the activities it was undertaking (at 208 per Barwick CJ, at 233, 234 per Mason J, at 237 per Jacobs J, at 239 per Murphy J). However, in that case, Mason J (with whom Jacobs J agreed) accepted with respect to West Perth football club that it was relevant to consider its constitution and found the prohibition on revenue or profit being transferred to members "is a circumstance to be taken into account in deciding whether it [was] a trading corporation" (at 236). As such, Mason J did not apply an "activities" test to the exclusion of all other considerations (which calls into question the statement of Black CJ and French J in Quickenden v O'Connor (2001) 109 FCR

243 at 259[44] that substantial trading activity is a "sufficient condition for characterisation of a corporation as a trading corporation").

5.29 Further, in Fencott v Muller (1983) 152 CLR 570, a case concerning a corporation which had not yet engaged in any trading or financial activity, Mason, Murphy, Brennan and Deane JJ said (at 601-602) that the majority in Adamson's Case:

> did not suggest that trading activities are the sole criterion of character. Absent those activities, the character of a corporation must be found in other indicia. While its constitution will never be completely irrelevant, it is in a case such as the present where a corporation has not yet begun, or has barely begun, to carry on business that its constitution, including its objects, assume particular significance as a guide.

5.30 This statement suggests that in all cases the corporation's purposes will have at least some relevance. It is difficult to comprehend how a corporation's objects could have no relevance to ascertaining its character, although it is accepted that a corporation's purpose, when its activities are known, cannot be the sole determinant of its character.

5.31 More recently, in Aboriginal Legal Service of Western Australia (Inc) v Lawrence (No 2) (2008) 37 WAR 450 at [68] (point 7), Steytler P held that the authorities established that both the activities and purposes of a corporation could be considered in determining its character as a trading corporation. This was accepted by the Full Court of the Federal Court in Bankstown Handicapped Children's Centre Association Inc v Hillman (2010) 182 FCR 483 at 509 [48] to be an accurate statement of the law.

Entry into the contract is not authorised by s.51(xx)

5.32 Even if it is found that SUQ is a corporation within s.51(xx), this in and of itself is not sufficient to bring the entry into the Agreement within the executive power under s.61. It is the subject matter of the contract, rather than the identity of the contracting party

which is the focus in determining whether s.51(xx) of the Constitution is satisfied in the circumstances of the case. To hold otherwise, would be to allow the Commonwealth Executive to contract its way into power simply by entering a contract with a constitutional corporation. Whether or not the Agreement was within power would depend upon mere coincidence that the counter-party was a constitutional corporation.

5.33 In the Work Choices Case, the majority construed the power conferred by s.51(xx) of the Constitution broadly in adopting (at 114-115 [178]) the following reasons of Gaudron J in Re Pacific Coal Pty Ltd; Ex parte Construction, Forestry, Mining and Energy Union (2000) 203 CLR 346 at 375 [83]:

> I have no doubt that the power conferred by s 51(xx) of the Constitution extends to the regulation of the activities, functions, relationships and the business of a corporation described in that sub-section, the creation of rights, and privileges belonging to such a corporation, the imposition of obligations on it and, in respect of those matters, to the regulation of the conduct of those through whom it acts, its employees and shareholders and, also, the regulation of those whose conduct is or is capable of affecting its activities, functions, relationships or business.

5.34 It will be observed that Gaudron J was speaking largely here of the regulation of a class of corporation (in some circumstances through legislation operating on persons having a particular relationship with a corporation in that class). This hardly describes the entry into a contract by the Commonwealth with an individual trading corporation which confers rights and obligations on that corporation only and not by way of regulatory legislation but as a mere consequence of a commercial transaction.

5.35 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; Ex parte Wagner (1995) 183 CLR 323 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."

5.36 In this case, the Agreement is not directed to regulating the rights or liabilities of SUQ by reason of the fact that it is a trading corporation. It is a mere random chance that the Agreement is with (what may for the moment be assumed to be) a trading corporation. Thus, the Agreement is not an agreement with respect to a trading corporation. In the circumstances of this case, it just happens to be an agreement with a financial corporation. This type of connection is "so insubstantial, tenuous or distant" that it cannot be described as a law with respect to s.51(xx) (Melbourne Corporation v Commonwealth (1974) 74 CLR 31 at 79 per Dixon J).

Conclusion

5.37 In the result, the executive power under s.61 of the Constitution does not permit entry into the Agreement or the payment of sums of money due under the Agreement.

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