IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M68 of 2015

BETWEEN:

PLAINTIFF M68/2015
Plaintiff

and

MINISTER FOR IMMIGRATION AND BORDER PROTECTION
First Defendant

and

COMMONWEALTH OF AUSTRALIA
Second Defendant

and

TRANSFIELD SERVICES (AUSTRALIA) PTY LTD (ACN 093 114 553)
Third Defendant

SUBMISSIONS FOR THE ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND (INTERVENING)

PART I: Internet publication

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

PART II: Basis of intervention

2. The Attorney-General for the State of Queensland intervenes in these proceedings pursuant to s 78A of the *Judiciary Act 1903* (Cth), without supporting any party.

Intervener's submissions

Filed on behalf of the Attorney-General for the State of Queensland
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PART III: Reasons why leave to intervene should be granted

3. Not applicable.

PART IV: Statutory provisions

4. The relevant statutory provisions are set out in Annexure A to the plaintiff's written submissions.

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PART V: Submissions

(a) Summary

5. These submissions are limited to a number of points, of relevance to the States, concerning:

   (a) the availability of the external affairs power in s 51(xxix) of the *Constitution* to support the validity of s 198AHA of the *Migration Act 1958* (Cth) and application of
20 s 32B of the *Financial Framework (Supplementary Powers) Act 1997* (Cth); and

   (b) the scope of the Commonwealth's executive power to contract and spend, without legislative authority, for matters within the ordinary or well-recognised functions of government.

6. The Attorney-General's intervention does not extend to supporting the Commonwealth government's actions and policies in this area. Neither does the Attorney-General submit that the impugned laws are necessarily invalid. These written submissions go no further than endeavouring to demonstrate that the legislation and conduct is not able to be
30 supported on the bases dealt with in these submissions.

7. As to the Commonwealth's legislative power with respect to external affairs, the Attorney-General submits that for a Commonwealth law to be valid under the 'treaty implementation' aspect of the power, the international instrument which the law purports to implement must impose an 'obligation'. In this case, the Memorandum of Understanding between Australia and Nauru ('MOU') does not give rise to any obligation in the relevant sense.

8. As to the other aspects of the external affairs power, the Attorney-General submits that:
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   (a) the 'external matters' aspect cannot be enlivened by executive action which is no more than a device to attract domestic legislative power;

   (b) matters of 'international concern' alone do not enliven the power; and

   (c) the power to make laws with respect to relations with other countries (and s 51(xxx)) is purposive in nature and limited by the principle of proportionality.

9. Consequently, within s 51(xxix), only the 'external matters' and 'international relations' aspects of the external affairs power are capable of supporting the validity of s 198AHA of the *Migration Act 1958* (Cth) or the application in this case of s 32B of the *Financial Framework (Supplementary Powers) Act 1997* (Cth).

10. As to the Commonwealth's executive power, the Attorney-General submits that:

    (a) the Commonwealth's executive power to spend appropriated funds in the ordinary administration of the functions of government is sourced in ss 61 and 64 of the *Constitution*; and

    (b) consideration of the scope of that power must take into account the federal structure of the *Constitution*.

(b) Statement of Argument

(i) Section 51(xxix) – external affairs

Implementation of international obligations

11. It is settled that legislation will be supported by the external affairs power if it is reasonably capable of being considered appropriate and adapted to implementing a convention, treaty or agreement.[1] This aspect of the power is only attracted, however, if the international instrument imposes an obligation (or the opposite, secures a 'benefit'[2]).

12. The need for an 'obligation' was most recently affirmed by three members of the Court in *Pape v Commission of Taxation*.[3] There, Hayne and Kiefel JJ found the lack of an obligation a sufficient basis upon which to reject the Commonwealth's submission that the Tax Bonus Act was valid because it implemented an international agreement or understanding.[4] Justice Heydon held that recommendations by international agencies did not support the validity of the Tax Bonus Act, because 'mere recommendations do not create international obligations'.[5]

13. No case has been decided on the basis that a law need not give effect to an international obligation to fall within this limb of the external affairs power.[6] Nor in any case has a

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[1] *Victoria v Commonwealth* (1996) 187 CLR 416, 487 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ) ('*Industrial Relations Act Case*'). See also *R v Burgess; Ex parte Henry* (1936) 55 CLR 608; *Commonwealth v Tasmania* (1983) 158 CLR 1 ('*Tasmanian Dam Case*'); *Richardson v Forestry Commission* (1988) 164 CLR 261; *Queensland v Commonwealth* (1989) 167 CLR 232.

[2] *The Commonwealth v Tasmania* (1983) 158 CLR 1, 103 (Gibbs CJ), 123-124 (Mason J) ('*Tasmanian Dam Case*'); *Airlines of NSW Pty Ltd v New South Wales [No 2]* (1965) 113 CLR 54, 86 (Barwick CJ).

[3] (2009) 238 CLR 1. The other members of the Court in *Pape* did not consider the external affairs power.

[4] *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 126-128 [370]-[374] (Hayne and Kiefel JJ).

[5] *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 164-165 [479] (Heydon J).

[6] Arguably the majority in *New South Wales v Commonwealth* (1975) 135 CLR 337 ('*Seas and Submerged Lands Case*') decided that case on the basis that the legislation gave effect, not only to obligations under the convention, but also to benefits afforded by the convention: 361 (Barwick CJ), 377 (McTiernan J), 473, 475-476 (Mason J), 503-504 (Murphy J). See also *Tasmanian Dam Case* (1983) 158 CLR 1, 131 (Mason J). It is

majority of the High Court endorsed the view that an obligation is not necessary for validity.[7]

14. Professor Leslie Zines has suggested that 'the power to implement treaties ... is not limited to obligations under those treaties'[8] because the Court in *Victoria v The Commonwealth* ('the *Industrial Relations Act Case*')[9] upheld legislation giving effect to recommendations of the International Labour Organization. It is respectfully submitted, however, that (as pointed about by Heydon J in *Pape*[10]) the joint judgment in the *Industrial Relations Act Case* does not support Zines' conclusion. It is true that Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ cited with apparent approval the statement of Evatt and McTiernan JJ in *R v Burgess; Ex parte Henry*[11] that:

> ... the Parliament *may* well be deemed competent to legislative for the carrying out of 'recommendations' as well as the 'draft international conventions' resolved upon by the International Labour Organisation or of other international recommendations or requests upon other subject matters of concern to Australia as a member of the family of nations.
>
> (Emphasis added.)

15. Their Honours did not, however, decide the validity of any of the impugned provisions on the basis that Evatt and McTiernan JJ's suggestion was correct. Instead, their Honours found that the provisions which gave effect to recommendations were valid 'if, *but only if*, the terms of these Recommendations themselves can reasonably be regarded as appropriate and adapted to giving effect to the terms of the Conventions to which they relate' (emphasis added).[12] The question of whether the recommendations could be relied upon 'of themselves' to support an exercise of the external affairs power was, they said, 'not necessary to decide'.[13]

16. The requirement for an obligation is the means by which the Court gives effect to judicial statements that the subject of a treaty does not give rise to 'a separate, plenary head of

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submitted that 'benefits' are simply the counterpart of 'obligations'. It may be accepted that the 'treaty implementation' aspect of external affairs extends to securing benefits.

[7] Three judges in the *Tasmanian Dam Case* (1983) 158 CLR 1 (Mason, Murphy and Deane JJ) rejected the requirement for an obligation. However, Mason J criticised the requirement primarily on the basis that its opposite ('facilitating the enjoyment by Australia of the benefits promised by the treaty') might also be supported by the external affairs power (at 129-130). As suggested above, so much may be accepted. Further, although Murphy J stated that 'it [wa]s not necessary for validity that the federal law implement some treaty obligation' (at 177-178), his Honour went on to find that Australia owed an international obligation and to treat that finding as relevant. Chief Justice Gibbs, Wilson and Brennan JJ each regarded the existence of an obligation as critical (102; 187-189; 220). Justice Dawson accepted that 'a law can be with respect to external affairs although it is not made in the implementation of any international obligation' (at 300-301) but was speaking of other aspects of s 51(xxix).

[8] Leslie Zines, *The High Court and the Constitution* (Federation Press, 5th ed, 2008) 387.

[9] (1996) 187 CLR 416.

[10] *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 164-165 [479].

[11] (1936) 55 CLR 608, 687.

[12] *Industrial Relations Act Case* (1996) 187 CLR 416, 509 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

[13] *Industrial Relations Act Case* (1996) 187 CLR 416, 509 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

legislative power.'[14] If the Commonwealth Parliament cannot legislate generally with regard to the subject-matter of a treaty (and it cannot), it must be because Parliament is restricted to implementing sufficiently precise obligations, and not loose aspirations.[15]

17. The requirement of an obligation at international law can also be seen from the way in which the authorities have applied the test for whether a law conforms to the treaty it is said to implement.[16] That test is now whether the law is 'reasonably capable of being considered appropriate and adapted to implementing the treaty.'[17] Where the legislative provision goes beyond the terms of the treaty, the validity of the law still turns on whether it is 'reasonably capable of being considered appropriate and adapted to implementing' the obligation it goes beyond.[18]

18. An early illustration of this – albeit prior to the articulation of this test – is provided by the case of *R v Poole; Ex parte Henry [No 2]*.[19] That case concerned the question of whether a law preventing low flying over the whole of an aerodrome was valid even though it was made pursuant to a convention which prohibited low flying only in the landing area. The extension was held to be '"sufficiently stamped with the purpose" of carrying out the prohibition contained in the Convention.'[20] Although a law may validly go beyond an international obligation in this sense,[21] it remains the case that it must give effect to an obligation.

The Memorandum of Understanding

19. The MOU between Australia and Nauru does not gives rise to any binding obligations under international law, and therefore does not engage the legislative power in s 51(xxix).

20. At international law, a memorandum of understanding is generally regarded to be[22]

> an international instrument of a less formal kind ... signed by the governments concerned, recording their understandings as to matters of fact or their future conduct, but in such a way as to reflect an intention on their part not to enter into a legally binding agreement upon the matters covered or otherwise to create legal rights and obligations for themselves.

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[14] *Tasmanian Dam Case* (1983) 158 CLR 1, 172 (Murphy J).
[15] *Industrial Relations Act Case* (1996) 187 CLR 416, 486 (Brennan CJ, Toohey, Gaurdon, McHugh and Gummow JJ).
[16] Formulations of the test prior to its current articulation also required the existence of an obligation. See, for example, *R v Burgess; Ex parte Henry* (1936) 55 CLR 608, 674 (Dixon J), 687 (Evatt and McTiernan JJ); *Airlines of NSW Pty Ltd v New South Wales [No 2]* (1965) 113 CLR 54, 86 (Barwick CJ), 126 (Taylor J), 136 (Menzies J), 125 (Windeyer J).
[17] *Industrial Relations Act Case* (1996) 187 CLR 416, 487 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).
[18] See, for example, *Industrial Relations Act Case* (1996) 187 CLR 416, 517 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).
[19] (1939) 61 CLR 634.
[20] *R v Poole; Ex parte Henry [No 2]* (1939) 61 CLR 634, 656 (Evatt J).
[21] It is in this light that the plurality's comment in the *Industrial Relations Act Case* (1996) 187 CLR 416 at 487 should be read: 'But that is not to say that an obligation imposed by treaty provides the outer limits of a law enacted to implement it.'
[22] John Grant and J Barker (eds), *Parry and Grant Encyclopaedic Dictionary of International Law* (Oceana Publications, 2nd ed, 2004) 314.

21. Hence in *Ruhani v Director of Police [No 2]*,[23] Kirby J described a previous MOU between Australia and Nauru as merely recording the 'wish of the two Governments.'[24]

22. Of course, the designation of an instrument as a memorandum of understanding would not deprive the instrument of its character as an enforceable agreement if the true intention of the participating governments was to enter into such an agreement.[25] However, while the choice of nomenclature is not decisive, it is indicative of an intention to avoid creating international obligations. Also relevant is the obligation on the part of Australia and Nauru to register '[e]very treaty and every international agreement entered into' by them pursuant to art 102 of the *Charter of the United Nations*.[26] That neither country has done so with respect to the MOU,[27] is an additional indication that it is not binding.

23. Ultimately, as Brennan J (as his Honour then was) said in the *Tasmanian Dam Case*, '[w]hether [an instrument] gives rise to an international obligation is a matter of interpretation of its terms.'[28] The preamble to the MOU in this case speaks of the 'Participants hav[ing] reached the following common understanding'. The objectives refer to 'joint cooperation' and 'regional cooperation'. The remainder of the MOU – including the deployment of various modal verbs such as 'will' and 'may' – should be read in that context. Lastly, the fact that the only consequence for non-compliance with the terms of the instrument is 'consultation between the Participants' in art 24 points to an intention not to enter into a legally binding agreement. Though in the minority in the result, Wilson J reasoned in the *Tasmanian Dam Case*, with respect correctly, that the absence of 'provision for handling any complaints or resolving any disputes' under the convention was 'yet another consideration suggesting a negative answer to the question' of whether the convention gave rise to an obligation.[29] Reading the MOU as a whole, it is

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[23] (2005) 222 CLR 580.

[24] *Ruhani v Director of Police [No 2]* (2005) 222 CLR 580, 593 [50]. Cf *Ruhani v Director of Police* (2005) 222 CLR 489, 558 [227] (Kirby J).

[25] 'Treaty' is defined despite 'whatever its particular designation' in art 2(1)(a) of the *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980). On the relevance of the *Vienna Convention*, see *Tasmanian Dam Case* (1983) 158 CLR 1, 222 (Brennan J).

[26] *Charter of the United Nations* art 102, 'approved' domestically by s 5 of the *Charter of the United Nations Act 1945* (Cth). Note also that the Act binds the Crown in right of the Commonwealth by virtue of s 4.

[27] The only bilateral treaties and agreements between Australia and Nauru currently registered are: *Agreement between Australia and Nauru concerning additional police and other assistance to Nauru*, opened for signature 10 May 2004, 2439 UNTS 293 (entered into force 29 July 2004); *Rehabilitation and Development Co-operation Agreement*, opened for signature 5 May 1994, 1897 UNTS 265 (entered into force 5 May 1994); *Agreement for the settlement of the case in the International Court of Justice concerning certain phosphate lands in Nauru*, opened for signature 10 August 1993, 1770 UNTS 380 (entered into force 20 August 1993); *Exchange of notes constituting an agreement amending the above-mentioned Agreement, as amended*, opened for signature 2 February 1984, 1426 UNTS 334 (entered into force 3 February 1984); *Agreement relating to appeals to the High Court of Australia from the Supreme Court of Nauru*, opened for signature 9 September 1976, 1216 UNTS 152 (entered into force 21 March 1977); *Exchange of notes constituting an agreement amending the above-mentioned Agreement*, opened for signature 12 August 1976, 1216 UNTS 313 (entered into force with retroactive effect 20 October 1970); *Agreement relating to air services*, opened for signature 17 September 1969, 794 UNTS 264 (entered into force 17 September 1969).

[28] *Tasmanian Dam Case* (1983) 158 CLR 1, 222.

[29] *Tasmanian Dam Case* (1983) 158 CLR 1, 193.

submitted that any obligations or powers that may be derived from the use of the words 'will' or 'may' are 'political or moral, but not legally binding.'[30]

Section 198AHA of the *Migration Act*

24. Section 198AHA of the *Migration Act 1958* (Cth) purports to apply where the Commonwealth enters into an 'arrangement'. 'Arrangement' is defined, in subsection (5), to include 'an arrangement, agreement, understanding, promise or undertaking, whether or not it is legally binding.' In so far as the provision purports to extend to giving effect to an arrangement which is not legally binding, it follows from the above analysis that it cannot be supported by the treaty implementation aspect of the external affairs power.

25. Finally, even if s 198AHA is supported to some extent by the external affairs power on the basis that it gives effect to the MOU, that section would not 'afford the Federal Parliament a plenary power over the subject matter of' the MOU.[31] In this regard, it is submitted that the words 'or the regional processing functions of the country' in s 198AHA(2)(a) and (b) cannot be supported on the basis of giving effect to the MOU. These paragraphs authorise the taking of action or the making of payments 'in relation to the arrangement or the regional processing functions of the country'. The additional words following 'arrangement' either cover the same activities authorised in relation to the arrangement with Nauru (in which case they are otiose), or they cover activities outside the scope of the arrangement (in which case they cannot be supported as an implementation of the MOU).

26. Particularly given that operation of s 198AHA with respect to the 'arrangement' includes power to do 'anything else incidental or conducive to the taking of' action in relation to the arrangement (s 198AHA(2)(c)), it cannot be said that the words 'or the regional processing functions of the country' are reasonably capable of being considered appropriate and adapted to implementing obligations in the arrangement.[32] That is not to say that the additional words cannot be supported by the external affairs power; only that they find no support in the treaty implementation limb of the head of power.

Section 32B of the *Financial Framework Act*

27. Section 32B of the *Financial Framework (Supplementary Powers) Act 1997* (Cth) gives the Commonwealth executive power to make, vary or administer arrangements or grants, however, only if it is within the power of the Commonwealth parliament to authorise their making, variation or administration.[33] Items 417.021, 417.027, 417.029 and 417.042 of reg 16 of the *Financial Framework (Supplementary Powers) Regulations 1997* (Cth) hinge upon s 32B of the Act. The question in the present case then is whether the items in

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[30] *Tasmanian Dam Case* (1983) 158 CLR 1, 92 (Gibbs CJ).

[31] *Thomas v Mowbray* (2007) 233 CLR 307, 407 [284] (Kirby J). See also *Industrial Relations Act Case* (1996) 187 CLR 416, 486-487 (Brennan CJ, Toohey, Gaurdon, McHugh and Gummow JJ); *Tasmanian Dam Case* (1983) 158 CLR 1, 172 (Murphy J).

[32] See footnote 18, above, and the accompanying text.

[33] *Williams v Commonwealth* (2014) 252 CLR 416, 456-457 [35]-[36] (French CJ, Hayne, Kiefel, Bell and Keane JJ), 471 [99] (Crennan J) ('*Williams [No 2]*').

the regulation can be said to be within a head of legislative power. In so far as the external affairs power is relied upon, it is submitted that the considerations set out above in respect of s 198AHA of the *Migration Act* apply with equal force to s 32B of the *Financial Framework (Supplementary Powers) Act* and the regulations made thereunder.

Other aspects of the external affairs power

External matters

28. It may be accepted that the external affairs power extends to 'any law which can properly be characterized as a law with respect to any matter, thing or person occurring or situate outside Australia.'[34] However, as with the executive action of entering into treaties, it is submitted that the external affairs power cannot be enlivened solely by executive action rendering a matter external in order to gain legislative competence. The relevant executive action must not be 'no more than a device to attract domestic legislative power'[35] or a 'colourable attempt to convert a matter of internal concern into an external affair.'[36] That is not to say that the external affairs power will not support any instance in which the externality was caused by the Australian government. However, as with treaties, the power should not extend to cover matters made external in bad faith. It is acknowledged that it 'must be [a] very exceptional circumstance which could found an allegation of lack of bona fides'.[37] It is not submitted that the Commonwealth lacked good faith in the present case.

International concern

29. For the reasons given by Callinan and Heydon JJ in *XYZ v Commonwealth*,[38] this Court ought to reject a mere 'international concern' as an independent basis for enlivening the external affairs power. In that case, their Honours pointed out that this Court has never decided that the international concern doctrine exists.[39] Many of the obiter comments in support of the doctrine were in fact concerned with narrowing the treaty implementation aspect of the external affairs power rather than widening the scope of the power in the absence of a treaty.[40] In any event, 'international concern' is too elusive a concept to yield any criteria capable of guiding interpretation,[41] unless the criteria are so broad as to 'be capable of unduly disrupting the distribution of powers between the States and the Commonwealth.'[42] Recognition of 'international concern' would render redundant the

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[34] *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 602 (Deane J) ('*War Crimes Act Case*'). See also at 529-531 (Mason CJ), 634-636 (Dawson J), 714 (McHugh J).

[35] *Tasmanian Dam Case* (1983) 158 CLR 1, 259 (Deane J), citing *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 231 (Mason J), 260 (Brennan J); *R v Burgess; Ex parte Henry* (1936) 55 CLR 608, 642 (Latham CJ), 669 (Dixon J), 687 (Evatt and McTiernan JJ).

[36] *Tasmanian Dam Case* (1983) 158 CLR 1, 217 (Brennan J), citing *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 229 (Mason J), 241 (Murphy J), 258-260 (Brennan J).

[37] *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 217 (Stephen J). See also at 200 (Gibbs CJ).

[38] (2006) 227 CLR 532. The other members of the bench ultimately decided the case on other grounds: at 543 [18] (Gleeson CJ), 552-553 [50]-[53] (Gummow, Hayne and Crennan JJ), 575 [127], 582 [147] (Kirby J).

[39] *XYZ v Commonwealth* (2006) 227 CLR 532, 607 [217].

[40] *XYZ v Commonwealth* (2006) 227 CLR 532, 608 [217].

[41] *XYZ v Commonwealth* (2006) 227 CLR 532, 608-610 [218]-[220].

[42] *XYZ v Commonwealth* (2006) 227 CLR 532, 610 [221].

careful analysis in the case law of whether Commonwealth legislation is 'reasonably capable of being considered appropriate and adapted' to an international obligation. The doctrine also lies at odds with the reasoning and result in *Australian Communist Party v Commonwealth*,[43] given that '[i]f anything could be described as being a matter of international concern, it was Communism in the 1950s.'[44] For those reasons, the Court should reject the international concern doctrine.

International relations

10 30. It is accepted that the external affairs power includes power to make laws with respect to Australia's relations with other countries.[45] In relation to the islands of the Pacific, the power is repeated in s 51(xxx) of the *Constitution*.[46]

31. The Attorney-General submits that, *at least* in respect of this aspect, the power in s 51(xxix) is purposive, and attracts a requirement of proportionality. Thus, where a law is said to be with respect to Australia's relationship with another nation state, the court must determine whether the 'contested law [is] disproportionate (that is, not 'reasonably appropriate and adapted') to the exercise of the [international relations aspect of the] external affairs power.'[47]

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Conclusion

32. The result of the above analysis in this case is that only the 'external matters' and 'international relations' aspects of the external affairs power are capable of supporting the validity of s 198AHA of the *Migration Act*, or the application of s 32B of the *Financial Framework (Supplementary Powers) Act*.

(ii) Commonwealth executive power

30 33. Following *Williams v Commonwealth* ('*Williams [No 1]*')[48] and *Williams v Commonwealth* ('*Williams [No 2]*'),[49] the Commonwealth's executive power to spend appropriated funds is limited to circumstances in which the expenditure is:

(a) made in the execution and maintenance of the *Constitution*;

(b) made in the execution or maintenance of a statute or expressly authorised by statute;

(c) supported by a common law prerogative power;

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[43] (1951) 83 CLR 1.
[44] *XYZ v Commonwealth* (2006) 227 CLR 532, 610 [222].
[45] *XYZ v Commonwealth* (2006) 227 CLR 532, 543 [18] (Gleeson CJ). See also *Thomas v Mowbray* (2007) 233 CLR 307, 364 [151] (Gummow and Crennan JJ).
[46] The scope of s 51(xxx) falls entirely within the external affairs power: *Seas and Submerged Land Case* (1975) 135 CLR 337. See also Gabriël Moens and John Trone, *The Constitution of the Commonwealth of Australia Annotated* (LexisNexis Butterworths, 8th ed, 2012), 179 and the authorities there cited.
[47] *XYZ v Commonwealth* (2006) 227 CLR 532, 579 [140] (footnote omitted).
[48] *Williams [No 1]* (2012) 248 CLR 156.
[49] *Williams [No 2]* (2014) 252 CLR 416.

(d) made in the ordinary administration of the functions of government; or

(e) (possibly) supported by the nationhood power.[50]

34. However, the scope and interaction of at least some of these categories remains unsettled.

35. These submissions address the scope of the Commonwealth's non-statutory power to expend money 'in the ordinary administration of the functions of government'.

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36. Any attempt to mark out the scope of Commonwealth executive power must begin with s 61 of the Commonwealth *Constitution*[51] and the 'basal consideration' that the *Constitution* effects a distribution of powers and functions between the Commonwealth and the States.[52] Accordingly, the scope of Commonwealth executive power is constrained by 'the basic considerations of federal structure which yielded the decision in *Melbourne Corporation*'.[53]

37. As Hayne J noted in *Williams [No 1]*, 'the *extent* to which the Commonwealth may make contracts and dispose of property ... must be ascertained by interpreting the
20 *Constitution*.'[54] That process suggests that in determining the scope the 'ordinary administration of the functions of government' aspect of the Commonwealth's power under s 61, s 64 is central. It is submitted that it is s 64 which is the 'source' of that aspect of the power. As French CJ said in *Williams [No 1]*, the 'field of non-statutory executive action ... extends to the administration of departments of State under s 64 of the *Constitution*'.[55]

38. Determining whether a particular activity falls within the power identified by reference to s 64 may be difficult.[56] It 'is not a repository for bright line categories'.[57] Some guidance as to scope of this category is available from Barwick CJ's observation in *Victoria v*
30 *Commonwealth* ('*AAP case*')[58] (albeit in the context of appropriations) that the Commonwealth has power to 'create departments of State, for the servicing of which, as distinct from the activities in which the departments seek to engage, money may be withdrawn from the Consolidated Revenue Fund'.[59]

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[50] See Twomey, 'Post-William Expenditure – When can the Commonwealth and States spend public money without parliamentary authorisation?' (2014) 33 *University of Queensland Law Journal* 9, 9-10. Cf *Williams No 1* (2012) 248 CLR 156, 184-185 [22].

[51] *Re Residential Tenancies Tribunal (NSW) and Henderson; Ex parte Defence Housing Authority* (1997) 190 CLR 410, 424 (Brennan CJ); *Williams v Commonwealth [No 1]* (2012) 248 CLR 156 [206] (Hayne J).

[52] *Williams [No 2]* (2014) 252 CLR 416, 469 [83] (French CJ, Hayne, Kiefel, Bell and Keane JJ).
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[53] *Williams [No 1]* (2012) 248 CLR 156, 270 [248] (Hayne J).

[54] *Williams [No 1]* (2012) 248 CLR 156 [206] (emphasis in original). See also *The Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421, 461 ('*Wool Tops Case*') where Starke J commented that 'the validity of any particular act with that field [of s 61] must be determined by reference to the Constitution or the laws of the Commonwealth, or to the prerogative or inherent powers of the King.'

[55] *Williams [No 1]* (2012) 248 CLR 156, 191 [34] (French CJ); *Wool Tops Case* (1922) 31 CLR 421, 432.

[56] *Williams [No 1]* (2012) 248 CLR 156, 214 [79] (French CJ).

[57] *Williams [No 1]* (2012) 248 CLR 156, 214 [79] (French CJ).

[58] (1975) 134 CLR 338.

[59] *AAP Case* (1975) 134 CLR 338, 362 (Barwick CJ).

39. It may be accepted that 'the Court should favour a construction of s 64 which is fairly open and which allows for development in a system of responsible ministerial government'.[60] However, as noted above, like other aspects of Commonwealth executive power, its scope must be constrained by the 'basal consideration' of Australia's federal constitutional arrangements.

40. A number of cases have addressed the question of whether particular Commonwealth contracts are within the scope of the executive power in s 61. For example:

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(a) In the *Wool Tops Case*[61] the High Court held that agreements by which the Commonwealth agreed to give consent to a sale of wool tops by a company in return for a share of the profits of the transaction, or agreed that the business of manufacturing wood tops would be carried on by the company as agent for the Commonwealth, were outside the Commonwealth's executive power.

(b) In *Commonwealth v Australian Commonwealth Shipping Board*[62] this Court held that the Australian Commonwealth Shipping Board constituted by the *Commonwealth Shipping Act 1923* (Cth), had no power to enter into an agreement with the Municipal
20 Council of Sydney to supply, deliver and erect on municipal land in 1926, six steam turbo-alternators for a total price of £666,605 or thereabouts.[63]

(c) However, in *Johnson v Kent*[64] it was held that the Commonwealth had power under s 61 to build a tower to provide telecommunication services and to accommodate a restaurant and viewing facilities for the public on Crown land in Australian Capital Territory so that no special statutory authority (other than an appropriation Act) to authorise the works was required. Critical to the reasons of Barwick CJ (with whom the other members of the Court agreed) was the following observation:[65]

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> Just as the legislative power for the Territory derived from s 122 is non-federal ..., so it seems to me that the executive power in relation to the Territory is not federally restrained.

The Chief Justice acknowledged that his conclusion as to the extent of Commonwealth executive power in that case would not necessarily apply if such powers were exercised within the area of a State.[66]

41. *Bardolph*[67] held that the Executive Government of New South Wales could enter into a binding contract with a private corporation for the provision of government advertising,

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[60] *Williams [No 1]* (2012) 248 CLR 156, 214-15 [79] (French CJ) citing *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391, 460 [211] (Gummow and Hayne JJ).
[61] (1922) 31 CLR 421.
[62] (1926) 39 CLR 1.
[63] *Commonwealth v Australian Commonwealth Shipping Board* (1926) 39 CLR 1, 10, referred to in *Williams [No 1]* (2012) 248 CLR 156, 208 [66] (French CJ).
[64] (1975) 132 CLR 164.
[65] *Johnson v Kent* (1975) 132 CLR 164, 169.
[66] *Johnson v Kent* (1975) 132 CLR 164, 169.

without the need for a special statute to authorise the contract (although a subsequent appropriation Act would be necessary) on the basis that the contract for advertising services was made in the 'ordinary course of administering a recognised part of the government of the State'.[68]

42. In *Bardolph*, among the relevant considerations identified by Evatt J at first instance was that the advertising was 'essential to the proper functioning of the Executive government', demonstrated by the 'long-continued practice of Parliament's voting monies for advertising services'.[69] Justice Dixon said that it was a matter of 'primary importance' that 'the subject matter of the contract, notwithstanding its commercial character, concerned a recognized and regular activity of Government in New South Wales'.[70]

43. It is necessary to bear steadily in mind that *Bardolph* considered the extent of State executive power. That power may be 'analogous to the powers of Commonwealth Ministers, derived from s 64 of the *Constitution*'.[71] However, as French CJ acknowledged in *Williams [No 1]*, *Bardolph* was decided in a 'setting analogous to that of a unitary constitution' and does not involve consideration of ss 61 and 64 of the *Constitution.*[72] Those considerations (which involve recognition of the *Constitution's* federal structure) suggest that limitations additional to those identified in *Bardolph* are applicable to the Commonwealth's executive power in this area.

44. These cases suggest that, in determining whether an activity engaged in by the Commonwealth which is not supported by special statute constitutes 'administration of departments of State'[73] or 'an ordinary and well-recognised activity of the Government'[74] within ss 61 and 64 of the *Constitution*, the following may be relevant:

- Is the activity of long-standing and essential to the proper functioning or servicing of a department of State or is it a new or exceptional policy initiative?
- Would the requirement for special statutory authorisation for the activity have the effect of involving Parliament in the day to day administration of a department or is the activity significant, making Parliamentary oversight appropriate?
- Is the proposed activity to take place on Commonwealth or Territory land or on State land?
- Possibly, whether the activity represents a relatively minor financial obligation or a significant impost on the public purse?

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[67] (1934) 52 CLR 455.
[68] *Bardolph* (1934) 52 CLR 455, 508 (Dixon J).
[69] *Bardolph* (1934) 52 CLR 455, 471 (Evatt J).
[70] *Bardolph* (1934) 52 CLR 455, 507 (Dixon J).
[71] *Williams [No 1]* (2012) 248 CLR 156, 211 [74] (French CJ).
[72] *Williams [No 1]* (2012) 248 CLR 156, 214 [79] (French CJ).
[73] *Williams [No 1]* (2012) 248 CLR 156, 191 [34] (French CJ).
[74] *Williams [No 1]* (2012) 248 CLR 156,234 [142] (Gummow and Bell JJ).

45. It is not suggested that these criteria are exhaustive or individually conclusive.

46. Applying these criteria to the present case, it is clear that the activities engaged in by the Commonwealth executive, including entering into the MOU and various contracts with corporations engaged to perform services in that regard (all of which are funded by the Commonwealth executive):

    - represents a new and exceptional policy initiative on behalf of the Commonwealth involving significant expenditure;
    - warrants Parliamentary oversight, which would by no means involve Parliament in the day to day administration of a department; and
    - occurs both on State and foreign land.

47. That being the case, it is submitted that the activity cannot be said to constitute the 'administration of a department of State' or 'an ordinary and well-recognised activity of the Government' and is therefore not authorised under ss 61 and 64 of the *Constitution*.

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