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

SUBMISSIONS OF THE ATTORNEY-GENERAL FOR VICTORIA (INTERVENING)

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Filed on behalf of: Attorney-General for the State of Victoria

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I. PUBLISHABLE ON THE INTERNET

1. The Attorney-General for the State of Victoria (**Victoria**) certifies that these submissions are in a form suitable for publication on the internet.

II. BASIS AND NATURE OF INTERVENTION

2. Victoria intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth), largely in support of the plaintiff. Victoria makes submissions addressed to each of the questions in the special case, except those relating to standing (Q5), relief (Q7) and costs (Q8). By way of summary, Victoria submits as follows:

10 2.1. The Commonwealth required legislative authority to enter into the SUQ Funding Agreement on 21 December 2011, to enter into the subsequent variation deeds, and to expend money pursuant to the agreement, having regard to the principles of law established in *Williams v The Commonwealth* (2012) 248 CLR 156 (***Williams***). Leave to re-open *Williams* should be refused. Alternatively, if *Williams* were to be re-opened, a hypothetical law would not support the SUQ Funding Agreement. (See paragraphs 4 to 15 and 50 to 57.)

2.2. Neither *Appropriation Act (No 1) 2011-2012* (Cth), *Appropriation Act (No 1) 2012-2013* (Cth) nor *Appropriation Act (No 1) 2013-2014* (Cth) (together, the **Appropriation Acts**) conferred the requisite authority, having regard to the
20 principles of law established in *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 (***Pape***). (See paragraphs 16 to 26.)

2.3. Nor did s 32B of the *Financial Management and Accountability Act 1997* (Cth) (the **FMA Act**) and Pt 5AA and item 407.013 of Sch 1AA of the *Financial Management and Accountability Regulations 1997* (Cth) (the **FMA Regulations**), read with item 9 of Sch 1 of the *Financial Framework Amendment Act (No 3) 2012* (Cth) (the **Financial Framework Amendment Act**) (together, the **FMA legislation**), confer the requisite authority, because s 32B of the FMA Act and item 407.013 of Sch 1AA of the FMA Regulations are each invalid: neither is a law with respect to any one or more of the heads
30 of Commonwealth legislative power in the *Constitution*. (See paragraphs 27 to 47.)

2.4. Accordingly, the Commonwealth's payments to the third defendant (**SUQ**) in 2012 and 2013 purportedly pursuant to the SUQ Funding Agreement were unlawful. (See paragraphs 48 to 49.)

IV. APPLICABLE LEGISLATIVE PROVISIONS

3. The relevant legislation is set out in the submissions of the Plaintiff and in the Core Special Case Book. Terms defined in the special case have the same meaning below.

V. SUBMISSIONS

Legislative authority is required

The decision in *Williams*

4. In *Williams*, this Court held that s 61 of the *Constitution* did not authorise the Commonwealth, in the absence of statutory authority, to enter into the Darling Heights NSCP Funding Agreement made on 9 November 2007, or to make payments to SUQ pursuant to that agreement. That judgment involved a rejection of the Commonwealth parties' arguments that s 61 conferred a relevantly unlimited power on the Commonwealth to spend moneys lawfully appropriated (the "broad" basis submission) or, alternatively, that it conferred power to the extent that the Commonwealth could be authorised to spend such monies by a hypothetical law under an available head of legislative power (the "narrow" basis submission).[1]

5. The same reasoning and conclusion applies equally in relation to the SUQ Funding Agreement. The Darling Heights NSCP Funding Agreement expired on 31 December 2011[2] and the SUQ Funding Agreement, which commenced operation on 1 January 2012, effectively replaced it.[3] The Darling Heights NSCP Funding Agreement purported to impose obligations on the Commonwealth to make payments of money to

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1 *Williams* at 179-180 [4], 187 [27], 191-193 [35]-[38], 216-217 [83] (French CJ); 232-239 [134]-[159] (Gummow and Bell JJ); 346-353 [497]-[524], 355-358 [535]-[544] (Crennan J). Hayne J (at 267-271 [241]-[253]) and Kiefel JJ (at 368-374 [576]-[595]) likewise rejected the Commonwealth parties' broad basis submission. Hayne J (at 244-245 [183], 276-281 [271]-[286]) and Kiefel J (at 365-368 [567]-[575]) also rejected one of the premises for the Commonwealth parties' narrow basis submission, being the proposition that the Commonwealth could have been authorised to spend such monies by a hypothetical law under s 51(xx) or 51(xxiiiA).

2 SCB (Core) 116 [39]; SCB (Vol 1) 458-462.

3 SCB (Core) 127 [75] and 227.

SUQ in consideration for SUQ providing chaplaincy services[4] at the School for the purpose of the then NSCP.[5] Likewise, the SUQ Funding Agreement imposes obligations on the Commonwealth to make payments to SUQ in consideration for SUQ providing chaplaincy services,[6] albeit at a broader class of schools and for the purposes of the re-named NSCSWP.[7] There is no material difference between the two agreements as relevant to the constitutional question determined in *Williams*.

6. It follows that, subject to the possibility of *Williams* being re-opened and over-ruled, the Commonwealth required legislative authority to enter into the SUQ Funding Agreement, and to make payments to SUQ pursuant to it.

10 *Williams* should not be re-opened

7. The Court ought to refuse the request of the Commonwealth parties for leave to re-open the decision in *Williams*.[8] There is "no very definite rule" as to the circumstances in which the Court will allow the correctness of a previous decision on a constitutional question to be re-agitated, although a number of factors have been recognised as potentially relevant.[9] However, the grant of leave should be exercised with restraint, and the evaluation of any potentially relevant factors should be

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4 The chaplaincy services were described in SUQ's application for funding: SCB (Vol 1) 402, 450-457. As French CJ noted in *Williams* at 183 [17], a key element of those services included the provision of "general religious and personal advice to those seeking it, [and] comfort and support to students and staff, such as during times of grief". See also *Williams* at 218-220 [92]-[95] (Gummow and Bell JJ), 337-339 [458]-[471] (Crennan J).

5 SCB (Core) 113 [25], 115 [38]; SCB (Vol 1) 217-248, 398-457.

6 The relevant services were described in item C of Sch 1 to the SUQ Agreement as "school chaplaincy and/or student wellbeing services at Your School(s), to assist Your School(s) and community(s) in supporting the general spiritual, social and emotional wellbeing of students": SCB (Core) 245.

7 SCB (Core) 116 [40], 117 [43], 118 [52], 120 [61], 127 [75], 224-286; SCB (Vol 2) 503-565.

8 Amended defence of the first and second defendants, paragraph 31(c).

9 *Attorney-General (NSW) v The Perpetual Trustee Co Ltd* (1952) 85 CLR 237 (***A-G v Permanent Trustee***) at 243-244 (Dixon J); *Queensland v The Commonwealth* (1977) 139 CLR 585 (***Second Territory Senators Case***) at 599 (Gibbs J), 602-603 (Stephen J), 620-630 (Aickin J); *Commonwealth v Hospital Contribution Fund* (1982) 150 CLR 49 (***Commonwealth v HCF***) at 55-56 (Gibbs CJ); *John v Federal Commission of Taxation* (1989) 166 CLR 417 (***John v FCT***) at 438-439 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ); *Wurridjal v The Commonwealth* (2009) 237 CLR 309 (***Wurridjal***) at 352-353 [68]-[70] (French CJ); *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 304 ALR 135 (***Plaintiff M76***) at 175 [191]-[192] (Kiefel and Keane JJ).

"informed by a strongly conservative cautionary principle".[10] To re-open a case too readily is apt to diminish the authority and finality of the judgments of the Court.[11]

8. In this case, there are very powerful factors weighing against re-opening *Williams*. It is a recent decision of the Court, in which the Court engaged in a "very full examination" of the relevant issues.[12] While the issues considered in *Williams* were obviously of fundamental importance, it cannot be said that the Court was unaware of their implications.[13] No error in the decision has been made manifest by later cases.[14] The issue which concentrated the attention of the Court (and, in substance, the same parties to this proceeding) only a short time ago should not be permitted to be re-agitated in this proceeding.

A hypothetical law would not support the SUQ Funding Agreement

9. Even if *Williams* were to be re-opened, and even if the Commonwealth parties were to be successful in re-agitating some form of their "narrow" basis submission, s 61 of the *Constitution* would not authorise the Commonwealth's entry into the SUQ Funding Agreement, or the making of payments to SUQ pursuant to that agreement. That is because a hypothetical law authorising such activity would find no support in either s 51(xx) (the corporations power) or s 51(xxiiiA) (the benefits to students power).

10. The corporations power would not support such a hypothetical law for the reasons explained by Hayne J and Kiefel J in *Williams*.[15] That is because, even if SUQ were a "trading corporation" (see paragraphs 50 to 57 below), its status as such would be entirely adventitious to the operation of the hypothetical law. To put the point another way, the operation of the hypothetical law would not in any way "hinge" on SUQ's alleged status as a trading corporation. Nothing in the Guidelines or the SUQ Funding

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10 *Esso Australia Resources Ltd v FCT* (1999) 201 CLR 49 at 71 [55] (Gleeson CJ, Gaudron and Gummow JJ); *Wurridjal* at 352 [70] (French CJ); *Plaintiff M47/2012 v Director-General of Security* (2012) 86 ALJR 1372 (***Plaintiff M47***) at 1477 [527] (Bell J); *Plaintiff M76* at [192] (Kiefel and Keane JJ).

11 *Baker v Campbell* (1983) 153 CLR 52 at 102-103 (Brennan J); *Lee v New South Wales Crime Commission* (2013) 87 ALJR 1082 at 1106-1107 [62]-[66] (Hayne J).

12 *A-G v Perpetual Trustee* at 244 (Dixon J); *Plaintiff M47* at 1447 [350] (Heydon J), [527] (Bell J).

13 Cf *Second Territory Senators Case* at 630 (Aickin J); *Wurridjal* at 351-352 [68] (French CJ).

14 Cf *Second Territory Senators Case* at 624-625, 630 (Aickin J); *Wurridjal* at 351-352 [68] (French CJ).

15 At 276-277 [271]-[272] (Hayne J), 368 [575] (Kiefel J). See also *Victoria v The Commonwealth* (1975) 134 CLR 338 (***AAP Case***) at 363 (Barwick CJ), 377-378 (Gibbs J); *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468 (***Concrete Pipes***) at 489-490 (Barwick CJ); *The Commonwealth v Tasmania (Tasmanian Dam Case)* (1983) 158 CLR 1 at 201 (Wilson J), 271-272 (Deane J), 315 (Dawson J).

Agreement suggests otherwise. To the contrary, the Guidelines contemplate the provision of funding to any "legal entity (an organisation incorporated under Commonwealth or state legislation)", including school governing bodies and parents and citizens' associations.[16]

11. As for the benefits to students power, its scope is relevantly confined in various ways. The expression "provision of ... benefits to students" in s 51(xxiiiA) encompasses the provision of material aid to identified or identifiable students, being material aid that relates to (because it "relieves" the students from needs arising from) particular situations or pursuits of students.[17] But the expression does not encompass the provision of any service that is perceived as capable of being "of advantage to" some students, including a service that is perceived as capable of offering certain intangible advantages to some students (e.g., promoting their "general spiritual, social and emotional wellbeing").[18] Moreover, while the expression would encompass the provision of benefits to identified or identifiable students via an intermediary,[19] it does not encompass the provision of "funding to schools" to assist schools to provide services associated with education.[20] Finally, the expression does not encompass the provision of benefits to a class of persons wider than students (such as a class that included school staff and/or members of the "school community").[21]

12. As Hayne J observed in *Williams*, if the benefits to students power were not confined as identified above, it would be a "large" power approaching a "general power to make laws with respect to education", and "a power of a kind radically different from the other elements of legislative power given by s 51(xxiiiA) and a very long way from the mischief to which s 51(xxiiiA) was directed", being the provision of "various forms of social security benefit".[22] The meaning of the constitutional expression "provision of ... benefits to students" must yield to its textual context, and is also

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16 SCB (Core) 147-148.

17 *Williams* at 279-280 [282] (Hayne J), 366-367 [570]-[572] (Kiefel J). See also *British Medical Association v The Commonwealth* (1949) 79 CLR 201 (***BMA Case***) at 260 (Dixon J); *Alexandra Private Geriatric Hospital Pty Ltd v The Commonwealth* (1987) 162 CLR 271 (***Alexandra Hospital***) at 279-280 (the Court).

18 *Williams* at 279 [280]-[281], 280 [283]-[285] (Hayne J), 367 [572]-[573] (Kiefel J).

19 *Williams* at 278 [278] (Hayne J), 367 [573] (Kiefel J). See also *BMA Case* at 279 (McTiernan J); *Alexandra Hospital* at 280-281 (the Court).

20 *Williams* at 367 [573] (Kiefel J). See also at 280 [285] (Hayne J).

21 *Williams* at 367 [573] (Kiefel J).

22 At 279 [281].

illuminated by its historical context.[23] There is no unqualified principle of constitutional interpretation that the Court must always lean to a broader interpretation of Commonwealth power; "generality must make way to context".[24]

13. Moreover, if the benefits to students power were not confined to the provision of material aid, then it would be necessary for this Court to determine, as a question of constitutional fact, whether the provision of a particular service that was perceived capable of offering certain intangible advantages to students amounted to the provision of a "benefit" to students within the meaning of s 51(xxiiiA). Yet this may be insusceptible of proof. In particular, the special case falls short of establishing the required benefit in the present case.[25]

14. Properly construed, the benefits to students power would not support a hypothetical law authorising the Commonwealth's entry into the SUQ Funding Agreement, for similar reasons to those explained by Hayne J and Kiefel J in *Williams*. *First*, the Commonwealth's obligations under the SUQ Funding Agreement are not confined to the provision of benefits to identified or identifiable students; rather, the purpose of the funding is to "assist" the Darling Heights School and its "community" (via SUQ as a "funding recipient") to support students.[26] *Secondly*, while the SUQ Funding Agreement relates to supporting students, it is not confined to the provision of material aid to students; rather it relates to the provision of services to support "the general spiritual, social and emotional wellbeing of students".[27] *Thirdly*, the SUQ Funding Agreement is not confined to the provision of aid that relates to particular situations or pursuits of students; rather, the support to "wellbeing" may extend to support in respect of matters which may affect students and non-students alike (such as illness or bereavement) and which therefore have no particular connection to the status of being

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23 *Wong v The Commonwealth* (2009) 236 CLR 573 at 582-583 [18]-[23] (French CJ and Gummow J), 622-624 [172]-[177] (Hayne, Crennan and Kiefel JJ).

24 *New South Wales v The Commonwealth* (2006) 229 CLR 1 (***Work Choices Case***) at 317 [767] (Callinan J), referring to the oft-cited passage in *Jumbunna Coal Mine, NL v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 367-368 (O'Connor J). Cf *Williams* at 328 [427] (Heydon J).

25 For example, "A significant proportion of chaplains and student welfare officers who provide services under the NSCSWP deliver social and emotional learning based student wellbeing programs, among other things" (SCB (Core) 125 [70]); "School chaplains and student welfare workers who provide services under the NSCSWP ... "may play a positive role in bullying prevention and management" ([72]) and "may contribute to a positive school climate" (SCB (Core) 126 [73]).

26 SCB (Core) 245. See also SCB (Core) 146, 150 (the NSCSWP Guidelines Revision 6).

27 SCB (Core) 245. See also SCB (Core) 146, 150 (the NSCSWP Guidelines Revision 6); SCB (Core) 120-123 [61]-[62] (services actually delivered at the School under the SUQ Funding Agreement).

a student.[28] *Finally*, the SUQ Funding Agreement is not confined to the provision of chaplaincy services to students, but extends to the provision of such services to families and staff members.[29]

15. The answer to Question 4 of the special case should be "no".

The Appropriation Acts did not confer the requisite authority

16. Following *Pape*, it is settled that neither s 81 of the *Constitution*, which provides for the establishment of the Consolidated Revenue Fund, nor s 83 of the *Constitution*, which provides for parliamentary appropriation of that fund, "confer a substantive spending power" and that "the power to expend appropriated moneys must be found elsewhere in the Constitution or the laws of the Commonwealth".[30] That conclusion stemmed immediately from the recognition of what the plurality in *Pape* described as "the nature of the process of parliamentary appropriation", "[t]he grant of an appropriation [being] not by its own force the exercise of an executive or legislative power to achieve an objective which requires expenditure".[31]

17. It follows that the Appropriation Acts could only confer the requisite authority on the Commonwealth to enter into the SUQ Funding Agreement, and to make payments to SUQ pursuant to that agreement, if the Appropriation Acts were properly characterised as laws not only for the appropriation of moneys for the purposes of s 83 of the *Constitution* but <u>also</u> as laws with respect to one or more enumerated heads of legislative power. For the reasons explained below, the Appropriation Acts should not be construed as purporting to authorise the Commonwealth to spend money. Alternatively, if the Appropriation Acts are properly construed as purporting to provide such authorisation, then they are not supported by an available head of legislative power and are invalid to that extent.

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28 Ibid.

29 SCB (Core) 146, 150.

30 *ICM Agriculture Pty Ltd v The Commonwealth* (2009) 240 CLR 140 (***ICM***) at 169 [41] (French CJ, Gummow and Crennan JJ), referring to *Pape*. See also *Williams* at 224 [114], 229 [128], 230-231 [131] (Gummow and Bell JJ), 241-242 [175], 246-248 [189]-[191] (Hayne J).

31 *Pape* at 72-73 [174]-[178] (Gummow, Crennan and Bell JJ). See also *Williams* at 248 [191] (Hayne J).

The construction issue

18. As Gleeson CJ and Kirby J noted in *Combet v The Commonwealth*, the proper construction of an appropriation Act is to be informed by a context which includes both parliamentary practice and ss 53 and 54 of the *Constitution*.[32]

19. Each of the Appropriation Acts is an Act described in its long title as an Act to appropriate money out of the Consolidated Revenue Fund for the "ordinary annual services of the Government, and for related purposes", and is designated by an odd number in its short title.[33] That reflects a parliamentary practice referred to by Crennan J in *Williams*,[34] and described more fully in *Combet v The Commonwealth*,[35] to distinguish proposed laws which "appropriate revenue or moneys for the ordinary annual services of the Government", in relation to which ss 53 and 54 of the *Constitution* make special provision.

20. Section 54 of the *Constitution* has particular significance in this case.[36] It provides that a proposed law "which appropriates revenue or moneys for the ordinary annual services of the Government shall deal only with such appropriation" (emphasis added). Having regard to the principles established in *Pape*,[37] it is clear that a proposed law that purported to both appropriate moneys under s 81 of the *Constitution* and to authorise the expenditure of those moneys under some head of legislative power in s 51 of the *Constitution* would contravene the injunction in s 54. Such a proposed law would also weaken the role of the Senate in the parliamentary control of expenditure, because the Senate would be precluded by s 53 from amending it. The constitutional imperative that the Senate's role in the authorisation to spend appropriated funds be equal to that of the House of Representatives was a central

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32 (2005) 224 CLR 494 at 521-522 [4] (Gleeson CJ), 580 [169], 595-596 [228] (Kirby J). See also at 575 [155] (Gummow, Hayne, Callinan and Heydon JJ). Cf *Brown v West* (1990) 169 CLR 195 at 211 (the Court); *AAP Case* at 423 (Murphy J).

33 SCB (Core) 343, 447, 559.

34 At 340 [472]-[473].

35 (2005) 224 CLR 494 at 573-574 (Gummow, Hayne, Callinan and Heydon JJ).

36 The traditional view is that failure to comply with s 54 "is not contemporaneously justiciable and does not give rise to invalidity": *Northern Suburbs General Cemetery Reserve Trust v The Commonwealth* (1993) 176 CLR 555 at 578 (Mason CJ, Deane, Toohey and Gaudron JJ), 585 (Brennan J). However, this does not preclude reference to s 54 as an aid to construction.

37 *Pape* at 44-45 [80] (French CJ, citing *Commonwealth v Colonial Ammunition Co Ltd* (1924) 34 CLR 198 at 224-225 (Isaacs and Rich JJ)), 80 [202] (Gummow, Crennan and Bell JJ). See also *Williams* at 354 [531] (Crennan J).

element in the reasoning of the majority in rejecting the Commonwealth parties' broad basis submission in *Williams*.[38]

21. Section 8 of each of the Appropriation Acts[39] provides that a certain amount of money may be "applied for expenditure" for the purpose of contributing to achieving "Outcome 2",[40] and that expenditure for the purpose of carrying out the NSCSWP[41] is taken to be expenditure for the purpose of contributing to achieving that outcome.

22. However, even if, as Hayne J contemplated in *Williams*,[42] that language is capable of being construed as purporting to both appropriate funds from the Consolidated Revenue Fund and authorise the expenditure of those funds for the purposes of the NSCSWP, that construction should not be preferred. It is clearly open to read the Appropriations Acts as purporting only to appropriate funds for purposes which included carrying out the NSCSWP.

The characterisation issue

23. Alternatively, if the Appropriation Acts are construed as purporting to both appropriate funds and authorise the expenditure of those funds for the purposes of the NSCSWP then, to the extent that they purport to authorise expenditure, they are not properly characterised as laws with respect to any one or more enumerated heads of legislative power and are invalid.

24. The Appropriation Acts do not describe the nature or scope of the NSCSWP in sufficient detail to enable the Court to find the constitutional facts necessary to

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38 At 205-206 [60]-[61] (French CJ), 232-233 [136], 235 [145] (Gummow and Bell JJ), 260 [220] (Hayne J), 355 [532] (Crennan J).

39 SCB (Core) 346, 450, 562.

40 SCB (Core) 356, 460, 573. Outcome 2 is more fully described as "Improved learning, and literacy, numeracy and educational attainment for school students, through funding for quality teaching and learning environments, workplace learning and career advice".

41 SCB (Core) 384, 530-531, 636-637.

42 At 264-265 [233]. See also at 354 [531], where Crennan J contemplated the "possibility" of a "special appropriation Act" both appropriating funds and authorising the expenditure of those funds, referring to *Pape* and *HIH Claims Support Ltd v Insurance Australia Ltd* (2011) 244 CLR 72. However, in neither *Pape* nor *HIH* did the relevant "special" appropriation Act both appropriate funds from the Consolidated Revenue Fund and confer an authority to spend the appropriated funds. In *Pape*, s 16(1) of the *Taxation Administration Act 1953* (Cth) provided a standing appropriation from the Consolidated Revenue Fund of amounts which the Commissioner was required or permitted to pay to a person by or under a provision of a taxation law, but the authority to spend was conferred on the Commissioner by s 5 of the *Tax Bonus for Working Australians Act (No 2) 2009* (Cth). In *HIH*, s 4 of the *Appropriation (HIH Assistance) Act 2011* (Cth) appropriated $640 million from the Consolidated Revenue Fund for certain purposes, but did not confer an authority to spend that money.

determine that they are laws with respect to any enumerated head of legislative power.[43] For example, the Portfolio Statement for *Appropriation Act (No 1) 2013-2014* provides only a high-level description of the NSCSWP as a program that "assists school communities to support the wellbeing of their students including strengthening values, providing pastoral care and enhancing engagement with the broader community".[44] Notably, the Appropriation Acts do not purport to apply, adopt or incorporate any more detailed statement of the operation or purposes of the NSCSWP in any version of the NSCSWP Guidelines.

25. Secondly, even if the Court considered that the Appropriation Acts identified the purposes of the expenditure in sufficient detail to enable a characterisation process to be performed, there is no head of power which supports the expenditure. In particular, neither the corporations power nor the benefits to students power supports a law authorising the expenditure for the purposes of the NSCSWP so described, for substantially the same reasons as set out in paragraphs 9 to 14 above.

26. The answer to Question 1 of the special case should be "no".

The FMA legislation did not confer the requisite authority

27. Section 32B(1)(b)(iii) of the FMA Act relevantly provides that if, apart from s 32B(1), the Commonwealth does not have power to make a particular arrangement under which public money is payable by the Commonwealth, and the arrangement is for the "purposes of a program specified in the regulations", then the Commonwealth has power to make the arrangement, subject to compliance with other laws. Regulation 16 of the FMA Regulations provides that Pt 4 of Sch 1AA specifies programs for the purposes of s 32B(1)(b). Item 407.013 of Pt 4 of Sch 1AA states:

> National School Chaplaincy and Student Welfare Program (NSCSWP)
>
> *Objective: To assist school communities to support the wellbeing of their students, including by strengthening values, providing pastoral care and enhancing engagement with the broader community.*

Item 9 of Sch 1 to the Financial Framework Amendment Act is a transitional provision that, relevantly, deems arrangements made before 28 June 2012 (being the date that

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43 See *Williams* at 261 [222] (Hayne J); *Pape* at 78 [197] (Gummow, Crennan and Bell JJ), citing the *AAP Case* at 411 (Jacobs J).

44 SCB (Core) 636.

s 32B of the FMA Act commenced operation) to have effect as if they had been made under s 32B(1).

28. Victoria's primary submission is that s 32B of the FMA Act is invalid by reason that it is not a law "with respect to" any one or more of the enumerated heads of legislative power in s 51 of the *Constitution*. If that is correct, it follows that both reg 16 and Pt 4 of Sch 1AA to the FMA Regulations, and item 9 of Sch 1 to the Financial Framework Amendment Act, are also wholly invalid. Victoria's alternative submission is that, even if s 32B of the FMA Act is valid, then item 407.013 of Pt 4 of Sch 1AA is itself invalid.

10 Section 32B of the FMA Act is invalid

29. It is well settled that there is no implied limit deriving from the structure of the *Constitution* that precludes the Commonwealth Parliament from delegating a power to make laws with respect to a particular matter. Nevertheless any Commonwealth law, in order to be valid, must meet the description of a law "with respect to" one or more enumerated heads of legislative power. Those words "ought never be neglected".[45] They require a sufficient connection between the law (including the rights, powers, liabilities, duties and privileges that the law creates) and a subject or purpose described in a head of legislative power.[46]

30. Where a Commonwealth law delegates the power to make laws with respect to a
20 particular matter, the "law" itself ought to be understood as a "declaration as to power", being the conferral of power on the delegate to make laws with respect to that matter.[47] Therefore, for the law to be valid, there must be a sufficient connection between the power conferred and a subject or purpose described in a relevant head of legislative power. To adopt the words of the plurality in *Plaintiff S157/2002 v The*

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45 *Grannall v Marrickville Margarine Pty Ltd* (1955) 93 CLR 55 at 77 (Dixon CJ, McTiernan, Webb and Kitto JJ).

46 *Fairfax v Federal Commissioner of Taxation* (1965) 114 CLR 1 at 7 (Kitto J); *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 352-353 [7] (Brennan CJ and McHugh J), 372 [58] (Gummow and Hayne JJ); *ICM* at 198-199 [138] (Hayne, Kiefel and Bell JJ).

47 Cf *Commonwealth v Grunseit* (1943) 67 CLR 58 at 82 (Latham CJ). In so far as Evatt J in *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73 at 119-120 suggested that the Commonwealth Parliament may not make a "law with respect to the legislative power to deal with" a head of power, that suggestion should be rejected. Every law conferring rule-making power is both a law with respect to legislative power and a law with respect to the subject-matter of the power: see Zines, *The High Court and the Constitution* (5th ed, 2008) at 202.

Commonwealth, "what may be 'delegated' is the power to make laws with respect to a particular head in s 51 of the *Constitution*".[48]

31. It is within this framework that the observations of Dixon J and Evatt J in *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (***Dignan***) are to be understood.[49] In particular, while affirming the power of the Commonwealth Parliament to make a law authorising the making of delegated legislation, Dixon J noted the following qualification:[50]

> This does not mean that a law confiding authority to the Executive will be valid, however extensive or vague the subject matter may be, if it does not fall outside the boundaries of Federal power. There may be *such a width or such an uncertainty* of the subject matter to be handed over that the enactment attempting it is not a law with respect to any particular head or heads of legislative power.

32. Turning to s 32B of the FMA Act, it is immediately apparent that there is no textual limit to the scope of the power which (when read with s 65) it confers on the Governor-General to specify arrangements, grants or programs. Nor can any such limit be discerned from the character of the scheme or subject-matter dealt with in the FMA Act itself.[51] In its terms, s 32B authorises the Governor-General to specify by regulation *any* arrangement etc., which regulation will thereby enliven the power of the Commonwealth to make the specified arrangement regardless of the existence or otherwise of any connection between the arrangement and a head of legislative power. Section 32B is therefore prima facie invalid. The stark absence of any constitutional foothold for the delegation purportedly conferred by s 32B distinguishes it from various other delegations that have been found not to contravene the limit articulated in *Dignan*.[52]

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48 (2003) 211 CLR 476 at 512-513 [102] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ). See also *Plaintiff M79 v Minister for Immigration and Citizenship* (2013) 87 ALJR 682 at 700 [88] (Hayne J).

49 (1931) 46 CLR 73 at 101 (Dixon J), 119-122 (Evatt J).

50 At 101 (emphasis added).

51 Cf *Dignan* at 121 (Evatt J); *Concrete Pipes* at 519-520 (Walsh J); *Victoria v The Commonwealth* (1996) 187 CLR 416 (***Industrial Relations Act Case***) at 502 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ); *Work Choices Case* at 181 [418] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

52 Cf *Crowe v The Commonwealth* (1935) 54 CLR 69 at 83 (Rich J), 94 (Evatt and McTiernan JJ); *Wishart v Fraser* (1941) 64 CLR 470 at 484-485 (Dixon J), 488 (McTiernan J); *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 257 (Fullagar J); *Tasmanian Dam Case* at 264 (Deane J); *Work Choices Case* at 176 [400], 181-182 [418] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

33. If s 32B of the FMA Act can be saved from invalidity, it can only be by a process of "reading down" its scope such that, properly construed, it only authorises the Governor-General to specify by regulation arrangements, authorisation of the making of which would "fall ... within the ambit of the legislative power of the Commonwealth".[53] Such a construction might seek to call in aid the direction by Parliament to courts in s 15A of the *Acts Interpretation Act 1901* (Cth) to construe the Acts "so as not to exceed the legislative power of the Commonwealth".

34. But it is not open to the Court to construe s 32B of the FMA Act in this way. When s 15A is invoked for the purpose of reading down general words, it will operate only where the law indicates a standard that may be applied for that purpose.[54] But here, as noted above, no such standard is indicated. Rather, Parliament has effectively delegated to the courts the task of defining the limits to the scope of s 32B by reference to no standard other than the potential scope of Commonwealth legislative power itself. To "read down" s 32B by reference only to the potential scope of Commonwealth legislative power, a court would be required to perform a feat which is in essence legislative not judicial. "It would be left to the Court to discover and prescribe an appropriate limitation as various cases presented themselves".[55] And in so doing, the Court would be performing "the essentially legislative task of determining 'the content of a law as a ... declaration as to power'".[56]

35. Finally, SUQ's claim that s 32B is a law with respect to s 51(xxxix) of the *Constitution* (the incidental power) in aid of the executive power must be rejected.[57]

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53 Cf amended defence of the first and second defendants, paragraph 57(b); s 15A of the *Acts Interpretation Act 1901* (Cth).

54 *Pidoto v Victoria* (1943) 68 CLR 87 (***Pidoto***) at 109, 111 (Latham CJ); *Industrial Relations Act Case* at 502 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ); *R v Hughes* (2000) 202 CLR 535 at 556-557 [43] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

55 *Pidoto* at 109 (Latham CJ), citing *R v Burgess; Ex parte Henry* (1936) 55 CLR 608 at 676 (Evatt and McTiernan JJ).

56 *Thomas v Mowbray* (2007) 233 CLR 307 at 345 [71] (Gummow and Crennan JJ), citing *Commonwealth v Grunseit* (1943) 67 CLR 58 at 82 (Latham CJ), *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 512-513 [101]-[102] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ). See also *Bank of NSW v The Commonwealth* (*Bank Nationalisation Case*) (1948) 76 CLR 1 at 164 (Latham CJ), 252 (Rich and Williams JJ), 371-372 (Dixon J); *Concrete Pipes* at 494 (Barwick CJ), 503-504 (Menzies J), 520 (Walsh J); *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 at 349 (Dawson J); *Western Australia v The Commonwealth* (*Native Title Act Case*) (1995) 183 CLR 373 at 485-486 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ); *Momcilovic v The Queen* (2011) 245 CLR 1 at 158 [398] (Heydon J).

57 Amended defence of the third defendant, paragraph 29. That paragraph also identifies s 53 of the *Constitution* as the source of a power to make a "general expenditure law", together with the incidental

That claim depends on a conception of the scope of the executive power to spend public money that was reflected in the Commonwealth parties' "broad" basis submissions in *Williams*. But, as noted above, six Justices squarely rejected those submissions in that case.[58] Hayne J explained that "the relevant 'power vested by this *Constitution* ... in the Government of the Commonwealth' in relation to the spending of money, which is the power with which s 51(xxxix) intersects, must be understood as limited by reference to the extent of the legislative power of the Parliament".[59]

36. The answer to Question 2 of the special case should be "yes", and it is therefore unnecessary to answer to Question 3.

37. If, however, the above arguments are not accepted, then the Court should not find that s 32B is invalid by reason that it infringes some implied limit on the Commonwealth Parliament's legislative powers said to arise from the status of the Senate.[60] The plaintiff appears to argue that, because s 32B purports to authorise the Commonwealth to make arrangements etc. to spend public money in wide and general terms, its passage through Parliament involved or resulted in "the consignment of the Senate to ... a position of inequality relative to the House of Representatives" such as to infringe some implied limit arising from the text and structure of the *Constitution*.[61] Yet the premise for the argument cannot be sustained. Section 32B was passed by both Houses of Parliament. Furthermore, any Bill to amend or repeal s 32B could be originated in the Senate. The constraints on the Senate imposed by s 53 of the *Constitution* did not apply to the enactment of s 32B, and would not apply to any proposed law to amend or repeal s 32B, because s 32B is not a law "appropriating revenue or moneys". Accordingly, the Senate was not in a "position of inequality" in relation to the passage of the Financial Framework Amendment (No 3) Bill 2012 (Cth), and it is not in a "position of inequality" as a consequence of its enactment.

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power and the executive power. It is difficult to see how s 53 can provide any such support. Section 53 delimits the scope of the powers of the House of Representatives and the Senate, respectively, with respect to "proposed laws" appropriating revenue or moneys. It confers no power on Parliament to make laws with respect to any particular subject-matter.

58 *Williams* at 266-271 [238]-[253] (Hayne J). See also at 206-207 [63], 216-217 [83] (French CJ); 228-239 [126]-[159] (Gummow and Bell JJ), 341 [480], 346-355 [496]-[534] (Crennan J), 368-374 [576]-[595] (Kiefel J).

59 At 271 [252].

60 Cf amended statement of claim, paragraph [58].

61 Plaintiff's submissions, paragraph [78].

38. The vice with s 32B is not that it impermissibly weakens the Senate, but that the scope of the delegation of legislative power to the Executive is so general and abstract that it cannot be characterised as a law "with respect to" any one or more of the enumerated heads of legislative power, and therefore fails the test articulated in *Dignan*.

Item 407.013 of Pt 4 of Sch 1AA of the FMA Regulations is invalid in any event

39. Section 32B(1)(b)(iii) of the FMA Act, if valid, invites a comparison to be made between the purposes of any given arrangement or grant, and the "purposes of a program specified in the regulations". If a particular arrangement is for the purposes of such a program, then the provision will operate to authorise the Commonwealth to make the arrangement. Therefore, in assessing the validity of item 407.013 of Sch 1AA to the FMA Regulations, a question of statutory construction must first be answered: what are the "purposes of [the] program" purportedly specified by item 407.013?

40. Victoria contends that, as a matter of statutory construction, item 407.013 purports to specify both the relevant program and its purposes, for the purposes of s 32B(1)(b)(iii). Thus, if a particular arrangement is properly characterised as falling within the scope of the stated "objective" of the NSCSWP in item 407.013, then s 32B(1)(b)(iii) purports to authorise the Commonwealth to make the arrangement. Acceptance of this construction would have two important consequences. First, the validity of the item would fall to be determined by a process of characterisation that focuses exclusively on the statutory text: is a law authorising the Commonwealth to enter into an arrangement under which public money is payable for the "objective" stated in that item supported by one or more heads of legislative power? Secondly, and as a corollary of the first proposition, whatever might be the *actual* purposes of the Executive in pursuing the program designated as the NSCSWP (as may perhaps be evidenced in part by the "guidelines" published by the Executive from time to time) are of no significance to the operation (and therefore the validity) of item 407.013.

41. There are a number of considerations that support this construction. In order for regulations under s 32B(1)(b)(iii) to "specify" a matter, the regulations must identify

the matter with unambiguous clarity.[62] If the "purposes of [the] program" are not identified with such clarity by item 407.013, then the scope of the power conferred on the Executive by s 32B(1) would be uncertain.[63] Item 407.013 does not purport to apply, adopt or incorporate any statement of the purposes of the NSCSWP in any extrinsic document (such as NSCSWP Guidelines Revision 2).[64] Thus, the only location where the (actual or deemed) purposes of the NSCSWP are identified is the statutory text comprising the stated "objective" of the NSCSWP. Moreover, if item 407.013 were to be construed as specifying only the "program", but not its "purposes", then the statutory text stating the "objective" of the NSCSWP would appear to be otiose.[65]

42. So construed, the question of characterisation arises: is item 407.013 a law with respect to one or more enumerated heads of legislative power?[66] The answer to that question is "no", for the reasons outlined below.

43. The heads of power relied on by the defendants as providing support for item 407.013 are the corporations power, the benefits to students power, and s 51(xxxix) (the incidental power) in aid of the executive power.[67] But none of those heads of power is available.

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62 *Gantry Acquisition Corp v Parker & Parsley Petroleum Australia Pty Ltd* (1994) 51 FCR 554 at 569-570 (Burchett J), and the cases there cited. See also *Tickner v Chapman* (1995) 57 FCR 451 at 457-458 (Black CJ), 480-481 (Burchett J), 491-492 (Kiefel J); *Concord Council v Optus Networks Pty Ltd* (1996) 131 FLR 294 at 317-318 (Dunford J); *NAAO v Secretary, Department of Immigration and Multicultural Affairs* (2002) 117 FCR 401 at 409-411 (the Court); *Evans v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 135 FCR 306 at 314-315 [23] (Gray J), 323-324 [57]-[58] (Kenny J), 329 [86] (Downes J).

63 *King Gee Clothing Company Pty Ltd v The Commonwealth* (1945) 71 CLR 184 at 194-197 (Dixon J); *Cann's Pty Ltd v The Commonwealth* (1946) 71 CLR 210 at 219-220 (Latham CJ), 226 (Starke J), 228-229 (Dixon J), 234-235 (Williams J).

64 Cf *Legislative Instruments Act 2003* (Cth), s 14(1)(b). NSCSWP Guidelines Revision 2 (SCB (Vol 2) 631-698) were published in May 2012, and therefore "existed" on 28 June 2012, when reg 16 and item 407.013 of Sch 1AA to the FMA Regulations commenced.

65 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 382 [71] (McHugh, Gummow, Kirby and Hayne JJ), citing with approval *Commonwealth v Baume* (1905) 2 CLR 405 at 414 (Griffith CJ).

66 Ordinarily, when considering the validity of regulations, the Court would ask: "[i]f Parliament had enacted them directly, would they have been valid?" That is because the regulation-making power in the empowering Act must itself be regarded as limited by the *Constitution*: *APLA Ltd v Legal Services Commissioner of New South Wales* (2005) 224 CLR 322 at 373 [104] (Gummow J), quoting *O'Sullivan v Noarlunga Meat Ltd* (1954) 92 CLR 565 at 594 (Fullagar J). However, in this case, Parliament has itself inserted item 407.013 in the FMA Regulations: see Financial Framework Amendment Act, Sch 2 item 2.

67 Amended defence of the first and second defendants, paragraph 92.

44. The corporations power is plainly not available, because item 407.013 has no connection whatsoever with constitutional corporations.

45. The benefits to students power is also not available, because the scope of the purpose identified in item 407.013 exceeds the scope of that head of power (see paragraph 11 above) in various respects. *First*, item 407.013 is not confined to the provision of benefits to identified or identifiable students; rather, it encompasses any action that might assist "school communities" to support students. *Secondly*, while item 407.013 relates to supporting students, it is not confined to the provision of material aid to students; rather it encompasses any support to the "wellbeing" of the students of a school (including the provision of services such as "pastoral care" that may confer some intangible benefits to some students). *Thirdly*, item 407.013 is not confined to the provision of aid that relates to particular situations or pursuits of students; rather, the support to "wellbeing" may extend to support in respect of matters which may affect students and non-students alike (such as illness or bereavement) and which therefore have no particular connection to the status of being a student.

46. The incidental power in aid of the executive power provides no additional support, for the reasons explained in paragraph 35 above.

47. Accordingly, if it is necessary to answer to Question 3 of the special case, the answer should be "no".

Entry into, and payments for the purposes of, the SUQ Funding Agreement

48. It follows from the submissions above that the Commonwealth's purported entry into the SUQ Funding Agreement, and its payments to SUQ in 2012 and 2013 purportedly pursuant to the agreement as varied over time, lacked the requisite authority and were therefore unlawful.

49. The answer to Question 6 of the special case should be "yes".

Whether SUQ is a trading corporation

50. If the submissions above are accepted, then it is not necessary for the Court to consider whether SUQ is a "trading corporation" within the meaning of s 51(xx) of the Constitution. However, in case the Court considers it necessary to do so, Victoria makes the following submissions.

51. The decisions of the Court in *R v Federal Court of Australia; Ex parte Western Australian National Football League* (***Adamson's Case***)[68] and *State Superannuation Board (Vic) v Trade Practices Commission* (***State Superannuation Board Case***)[69] are generally considered to stand for the following propositions:[70]

51.1. A corporation is a trading corporation if trading is such a "substantial" or "sufficiently significant" part of its activities so as to merit that description.[71]

51.2. In considering the activities of a corporation, the court must look beyond the corporation's "predominant and characteristic activity".[72]

52. The existing "activities test" possesses a protean quality, and is somewhat circular.[73] The absence of any clear standard for assessing the "significance" of a corporation's trading activities has produced mixed results and generated considerable uncertainty.[74] However, generally speaking, courts have applied the test quite liberally. Thus, corporations have been characterised as "trading corporations" even where trade accounts for only a small fraction of their revenue: for example, a public hospital (16%),[75] a university (17%),[76] a non-profit organisation (4%)[77] and a statutory fire authority (2.7%).[78]

53. Victoria submits that the test should be refined as follows. The underlying question is: what is the corporation's true character? Generally speaking, the most reliable

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68 (1979) 143 CLR 190.

69 (1982) 150 CLR 282.

70 See, for example, *Quickenden v O'Connor* (2001) 109 FCR 243 at 258-260 [41]-[47] (Black CJ and French J). Cf *State Superannuation Board Case* at 294-295 (Gibbs CJ and Wilson J); *Fencott v Muller* (1983) 152 CLR 570 at 588 (Gibbs CJ); *Australian Workers' Union of Employees (Queensland) v Etheridge Shire Council* (2008) 171 FCR 102 at 116-117 [72] (Spender J).

71 *Adamson's Case* at 208 (Barwick CJ), 233 (Mason J, with whom Jacobs J agreed), 239 (Murphy J); cf the dissenting opinions of Gibbs J (at 213), and Stephen J (with whom Aickin J agreed) (at 220-221).

72 *State Superannuation Board Case* (1982) 150 CLR 282 at 304 (Mason, Murphy and Deane JJ).

73 See *Australian Workers' Union of Employees (Queensland) v Etheridge Shire Council* (2008) 171 FCR 102 at 118 [81] (Spender J).

74 See Gouliaditis, "The meaning of 'trading or financial corporations': Future directions" (2008) 19 *Public Law Review* 110 at 113-119.

75 *E v Australian Red Cross Society* (1991) 27 FCR 310 at 344-345 (Wilcox J).

76 *Quickenden v O'Connor* (2001) 109 FCR 243 at 261 (Black CJ and French J).

77 *E v Australian Red Cross Society* (1991) 27 FCR 310 at 343-344 (Wilcox J).

78 *United Firefighters Union of Australia v Country Fire Authority* [2014] FCA 17, see especially at [83], [100] (Murphy J).

evidence of a corporation's true character will be its present activities.[79] However, a corporation with present activities that include trading will not satisfy the constitutional description of a "trading corporation" unless the trading is its predominant or characteristic activity. Where a corporation's trading activities are incidental to a non-trading activity, trading will not be its predominant or characteristic activity. In particular, where the predominant or characteristic activity of a corporation is some charitable or religious activity (as revealed by its activities in the context of its governing statute or objects), the corporation is not a trading corporation even though it may engage in trade.

10 54. The proposed test is consonant with the focus of the existing case law on a corporation's activities. However, the proposed test revives a higher threshold ("predominant or characteristic") for assessing the significance of trading activities. That test was originally articulated by Barwick CJ in the *St George County Council Case*,[80] and was embraced by Gibbs J in *Adamson's Case*[81] and Wilson J in the *State Superannuation Board Case*.[82] It was applied by Spender J in *Australian Workers' Union of Employees (Queensland) v Etheridge Shire Council*.[83]

55. As Gibbs J explained in the *St George County Council Case*,[84] the only possible reason for the use of the adjectives "foreign", "trading" and "financial" to describe corporations within the power conferred by s 51(xx) is to exclude other types of
20 corporation from the scope of the power. Thus, the ultimate inquiry must be directed to ascertaining whether the "true character" of a corporation is that of a "trading" corporation, to be distinguished from corporations whose true character is otherwise.[85]

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79 In *Fencott v Muller* (1983) 152 CLR 570 at 589-590, Gibbs J described the objects clause of a corporation's memorandum of association an "inadequate and [possibly] misleading guide"; see also *R v Trade Practices Tribunal; Ex parte St George County Council* (1974) 130 CLR 533 (***St George County Council Case***) at 542 (Barwick CJ). One example of an exceptional case may be that of a "shelf company" that is yet to engage in any activities: see, e.g., *Fencott v Muller* (1983) 152 CLR 570.

80 *St George County Council Case* at 543.

81 At 213.

82 At 294.

83 (2008) 171 FCR 102 at 118-119 [78]-[86].

84 At 562.

85 Cf *St George County Council Case* at 562-565 (Gibbs J); *Fencott v Muller* (1983) 152 CLR 570 at 588 (Gibbs CJ), 623 (Dawson J); *Tasmanian Dam Case* at 117 (Gibbs CJ).

And as Gibbs CJ and Wilson J explained in the *State Superannuation Board Case* in relation to the cognate expression "financial corporation":[86]

> [T]he financial activities of a corporation may be substantial in a quantitative sense and yet be no more than incidental and therefore insignificant in relation to the other activities of the corporation. In such a case the financial activities may be both substantial and yet ancillary and therefore insufficient to fix their character to the corporation. … It is not a question solely of substantiality in either a quantitative or relative sense but whether the activity is the predominant or characteristic activity.

10 56. The proposed test also finds support in the judgment of Mason J in *Adamson's Case*,[87] where his Honour observed that the trading activity of a corporation may be "so slight and so incidental to some other principal activity, viz. religion or education in the case of a church or school, that it could not be described as a trading corporation".

57. Whether the trading activities of a particular corporation are sufficient to merit the corporation being characterised as a trading corporation is still a "question of fact and degree", but such assessment must be performed by reference to a clear standard. No elliptical inquiry need be undertaken as to whether a particular proportion of a corporation's activity is, in some abstract sense, "substantial" or "significant".

VI. ESTIMATE OF TIME FOR ORAL ARGUMENT

20 58. Victoria estimates that presentation of its oral argument will take 30 minutes.

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86 At 296. See *Adamson's Case* at 220-221 (Stephen J).

87 At 234.