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

BETWEEN:

RONALD WILLIAMS
Plaintiff

AND

COMMONWEALTH OF AUSTRALIA
First Defendant

MINISTER FOR EDUCATION
Second Defendant

SCRIPTURE UNION QUEENSLAND
Third Defendant

ANNOTATED WRITTEN SUBMISSIONS OF THE ATTORNEY GENERAL FOR WESTERN AUSTRALIA (INTERVENING)

PART I: SUITABILITY FOR PUBLICATION

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

PART II: BASIS OF INTERVENTION

2. Section 78A of the *Judiciary Act 1903* (Cth) in support of the Plaintiff.

PART III: WHY LEAVE TO INTERVENE SHOULD BE GRANTED

3. Not applicable.

PART IV: RELEVANT CONSTITUTIONAL PROVISIONS AND LEGISLATION

4. See Part VII of the Plaintiff's Submissions.

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PART V: SUBMISSIONS

5. Western Australia intervenes to submit the following. First, that Division 3B of Part 4 of the *Financial Management and Accountability Act 1997* (Cth) is invalid as it is not a law with respect to any head of Commonwealth legislative power. Second, annual Appropriations Acts do not provide statutory authority for the agreements the subject of claims for specific relief in the Writ of Summons.

FINANCIAL MANAGEMENT AND ACCOUNTABILITY ACT 1997 PART 4 DIVISION 3B

Construction of s.32B(1) of the *Financial Management and Accountability Act 1997*

6. Division 3B of Part 4 of the *Financial Management and Accountability Act 1997* (Cth) ('*FMA Act*') was introduced by the *Financial Framework Legislation Amendment Act (No.3) 2012* (Cth) ('*FFLA Act*'). The purpose of the *FFLA Act* was stated in the Second Reading Speech[1]; to provide "necessary legislative authority" to "spending programmes" the validity of which were in doubt following *Williams (No.1)*[2]. The Commonwealth thought the legislation "necessary".

7. Little texture is given to Division 3B of Part 4 by other provisions of the *FMA Act*. The general purposes of the Act can be gleaned from the summary at its commencement. The summary in respect of Part 4 does not adequately describe the purpose of Division 3B of Part 4[3]. None of its provisions can be described as relating to "an accounting framework for public money" or "the adjustment of appropriations" or as providing for "act of grace payments by the Commonwealth" or "waiver of debts owing to the Commonwealth".

8. Section 32B(1) of the *FMA Act*, along with s.9 of the *FFLA Act*, read with reg.16, and Parts 1–4 of Schedule 1AA of the *Financial Management and Accountability Regulations 1997* (Cth) ('*FMA Regulations*'), purport to provide power to make the arrangements and grants specified in (or in a class specified in) Parts 1–4 of Schedule 1AA.

9. It is submitted below that consideration of validity of the impugned provisions does not require prior determination of which of the arrangements and grants in Parts 1–4 of Schedule 1AA of the *FMA Regulations* the Commonwealth has power to make, "apart from" s.32B(1). Indeed, because s.32B(1) purports to empower the making of delegated laws authorising the making of arrangements and grants which, apart from the bare enabling Act, the Commonwealth does not have power to make, it is more obvious that the impugned provisions can not be characterised as laws with respect to any head of Commonwealth legislative power.

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[1] Commonwealth, *Parliamentary Debates*, House of Representatives, 26 June 2012, 8042 (The Hon. Nicola Roxon).

[2] *Williams v Commonwealth* [2012] HCA 23; (2012) 248 CLR 156 ('*Williams (No.1)*').

[3] Part 4 *Accounting, appropriations and payments*: This Part establishes an accounting framework for public money that involves the Consolidated Revenue Fund and Special Accounts. This Part has a number of rules that apply to the adjustment of appropriations in certain circumstances. It also deals with miscellaneous matters such as act of grace payments by the Commonwealth and waiver of debts owing to the Commonwealth.

10. In any event, if the Commonwealth contends that, apart from s.32B(1), it has power to make vary or administer each of the arrangements or grants specified in (or in a class specified in) the *FMA Regulations*, it can readily identify such power and such arrangements and grants.

11. The Commonwealth pleads[4] that the operation of s.32B depends upon the scope of the *FMA Regulations*. It is submitted below that Division 3B of Part 4 of the *FMA Act* is invalid, whatever the scope of the regulations. If, however, as pleaded by the Commonwealth, the validity of the legislation is determined by whether the phenomena catalogued in Parts 1–4 of Schedule 1AA of the *FMA Regulations* fall within the ambit of the legislative power of the Commonwealth, it is necessary to first construe reg.16 and Parts 1–4 of Schedule 1AA of the *FMA Regulations* to then construe and characterise Division 3B of Part 4 of the *FMA Act*[5].

12. Before considering the construction of reg.16 and Parts 1–4 of Schedule 1AA of the *FMA Regulations*, it is desirable to note s.32C of the *FMA Act*.

Section 32C of the *Financial Management and Accountability Act 1997*

13. Section 32C(4) must be understood to permit (say) the making of a grant of financial assistance, in terms of s.32B(1)(a)(iii), without it being subject to terms and conditions[6]. Although this is in one sense incredible, and depends, it must be supposed, on what is meant by "terms and conditions" in s.32C(4), the breadth of the provision confirms the understanding that Division 3B of Part 4 of the *FMA Act* empowers the Commonwealth Executive to make grants and enter into arrangements of limitless scope, and in respect of matters of limitless subject matter.

14. The effect of s.32C is that Division 3B of Part 4 of the *FMA Act* purports to empower the Commonwealth Executive to have made, and to make in the future, grants of financial assistance in respect of any matter on any terms and conditions, and indeed on no terms and conditions.

Construction of reg.16 and Parts 1–4 of Schedule 1AA of the *FMA Regulations*

15. Because of the Commonwealth's plea[7] that the operation of s.32B, and thereby ultimately its characterisation, depends upon the scope of the *FMA Regulations* and the regulations merely catalogue each of the things stated in Parts 3 and 4 of Schedule 1AA of the regulations, the Commonwealth's case requires that each of these things be construed. This is a fair task due to the number and mode of expression of each of these matters. Whatever the duration of the task, characterisation of the impugned provisions of the Act and regulations can only be determined by their words, properly construed. So, to determine whether the Act falls within a head of Commonwealth power, which (as the Commonwealth pleads), in turn, depends upon the scope of the regulations, which directs attention to the

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[4] Amended Defence of the First and Second Defendants [57] (Core SCB: 56).

[5] This is subject to the proposition advanced below at [53] that even if regulations are laws with respect to a subject matter enumerated in ss. 51 or 52, this does not necessarily mean that the statute conferring power is valid.

[6] In terms of s.32B(1)(a)(i), it cannot be imagined that entry into an arrangement can be otherwise than on terms and conditions, within the meaning of s.32C(4).

[7] Amended Defence of the First and Second Defendants [57] (Core SCB: 56).

currently utilised Parts 3 and 4 of Schedule 1AA of the regulations, the words of items such as (say) [318.001] must be construed to give meaning.

16. In the Commonwealth's submission, therefore, the items in Parts 3 and 4 of Schedule 1AA of the *FMA Regulations* must be construed to determine the nature of the rights, duties, powers and privileges which they change, regulate or abolish. In undertaking this process, it is doubtful that the italicised objective in (say) [318.001] assists. So, to determine the nature of the rights, duties, powers and privileges which [318.001] changes, regulates or abolishes, regard is had to the words "assistance to upgrade Simplot's processing plant in Tasmania".

17. Having regard to these words, the Court is to determine the head of Commonwealth power, with respect to which it is.

The significance of the *FMA Regulations* being in a schedule to the *FFLA Act*

18. In considering the validity of Division 3B of Part 4 of the *FMA Act* and reg.16 and Parts 1–4 of Schedule 1AA of the *FMA Regulations*, nothing turns on the happenstance that the regulations were enacted as part of the *FFLA Act*. Although coming into being in this way, s.32B is a bare enabling provision, and the regulations are in the nature of delegated legislation. The regulations can be amended by the Executive, pursuant to s.65 of the *FMA Act*, without resort to Parliament.

19. Indeed, the *FMA Regulations* have been amended on numerous occasions by the Executive since the enactment of the *FFLA Act*. Schedule 1AA has been amended by regulations on 11 occasions, 10 of which involved the insertion of new items to the schedule[8]. Further, a new Schedule 1AB was inserted in 2013 specifying additional items for the purposes of s.32B of the *FMA Act*[9], and new items have since been inserted into Schedule 1AB on two occasions[10].

The task

20. On this understanding of the basis upon which the Commonwealth contends validity, it is necessary to characterise Division 3B of Part 4 of the *FMA Act*.

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[8] *Financial Management and Accountability Amendment Regulation 2012 (No. 4)* (Cth); *Financial Management and Accountability Amendment Regulation 2012 (No. 5)* (Cth); *Financial Management and Accountability Amendment Regulation 2012 (No. 6)* (Cth); *Financial Management and Accountability Amendment Regulation 2012 (No. 7)* (Cth); *Financial Management and Accountability Amendment Regulation 2012 (No. 8)* (Cth); *Financial Management and Accountability Amendment Regulation 2013 (No. 2)* (Cth); *Financial Management and Accountability Amendment Regulation 2013 (No. 3)* (Cth); *Financial Management and Accountability Amendment Regulation 2013 (No. 5)* (Cth); *Financial Management and Accountability Amendment Regulation 2013 (No. 6)* (Cth); *Financial Management and Accountability Amendment Regulation 2013 (No. 7)* (Cth).

[9] *Financial Management and Accountability Amendment (2013 Measures No. 1) Regulation 2013* (Cth).

[10] *Financial Management and Accountability Amendment (2014 Measures No. 1) Regulation 2014* (Cth); *Financial Management and Accountability Amendment (2014 Measures No. 2) Regulation 2014* (Cth).

SEPARATION OF LEGISLATIVE AND EXECUTIVE POWER; DELEGATION; CHARACTERISATION

21. One of the autochthonous features of the Commonwealth *Constitution* is the compromised separation of Commonwealth legislative and executive power, deriving from the embedded notion of "responsible government on the British model"[11].

22. It has been unquestioned since before *Dignan* that the *Constitution* does not *per se* preclude the Commonwealth Parliament from delegating legislative power by empowering the Executive to make delegated legislation[12]; "the *Constitution* does not forbid the statutory authorization of the Executive to make a law"[13].

23. Dixon J's judgment in *Dignan* clarified that the notion of separation of legislative and executive power does not invalidate such delegation, but his Honour, along with Evatt J, made plain that the Parliament could not, *inter alia*, delegate a legislative power that it did not have under the *Constitution* or empower the Executive to make regulations that did not correspond to, or were not with respect to, a head of Commonwealth legislative power[14].

24. Although Professor Winterton suggests that this prescription is only "suggested occasionally and always *obiter*"[15], it has been much suggested and its existence never questioned or doubted[16]. Consistent with traditions of Australian constitutional interpretation, the methodological technique used to contain unlawful delegation of legislative power has been characterisation. Professor Winterton's remark that this

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[11] Sir Harry Gibbs, 'The Separation of Powers – A Comparison' (1987) 17 *Federal Law Review* 151 at 154, see generally at 152–154. See also George Winterton, 'The Relationship Between Commonwealth Legislative and Executive Power' (2004) 25 *Adelaide Law Review* 21 at 36–42. The matter is discussed in *Victorian Stevedoring & General Contracting Company Pty Ltd v Dignan* [1931] HCA 34; (1931) 46 CLR 73 at 100–102 (Dixon J), 114–118 (Evatt J) ('*Dignan*'). See also *R v Federal Court of Bankruptcy; Ex parte Lowenstein* [1938] HCA 10; (1938) 59 CLR 556 at 565 (Latham CJ); *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 275 (Dixon CJ, McTiernan, Fullagar and Kitto JJ); *Attorney-General (Cth) v The Queen* (1957) 95 CLR 529 at 539–540.

[12] See, eg, *Baxter v Ah Way* [1909] HCA 30; (1909) 8 CLR 626 at 646 (Higgins J); *Farey v Burvett* [1916] HCA 36; (1916) 21 CLR 433; *Pankhurst v Kiernan* [1917] HCA 63; (1917) 24 CLR 120; *Ferrano v Pearce* [1918] HCA 47; (1918) 25 CLR 241; *Sickerdick v Ashton* [1918] HCA 54; (1918) 25 CLR 506; *Roche v Kronheimer* [1921] HCA 25; (1921) 29 CLR 329 at 337 (Knox CJ, Gavan Duffy, Rich and Starke JJ); *Huddart Parker Ltd v Commonwealth* [1931] HCA 1; (1931) 44 CLR 492 at 500–501 (Rich J), 506 (Starke J), 511–512 (Dixon J), 518 (Evatt J).

[13] *Dignan* [1931] HCA 34; (1931) 46 CLR 73 at 102.

[14] *Dignan* [1931] HCA 34; (1931) 46 CLR 73 at 101 (Dixon J), 119–120 (Evatt J).

[15] George Winterton, 'Can the Commonwealth Parliament Enact Manner and Form Legislation?' (1980) 11 *Federal Law Review* 167 at 194.

[16] *Wishart v Fraser* [1941] HCA 8; (1941) 64 CLR 470 at 488 (McTiernan J); *Australian Communist Party v Commonwealth* [1951] HCA 5; (1951) 83 CLR 1 at 256–257 (Fullagar J); *Plaintiff S157/2002 v Commonwealth* [2003] HCA 2; (2003) 211 CLR 476 at 512–513 [101]–[102] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ) ('*Plaintiff S157*'); *Plaintiff M79/2012 v Minister for Immigration and Citizenship* [2013] HCA 24; (2013) 87 ALJR 682 at 700 [88] (Hayne J) ('*Plaintiff M79*'). See also *Giris Pty Ltd v Federal Commissioner of Taxation* [1969] HCA 5; (1969) 119 CLR 365 at 373–374 (Barwick CJ), 379 (Kitto J), 381 (Menzies J), 385 (Windeyer J) ('*Giris*'), where their Honours recognised that there is a limit to the extent of permissible delegation. See further, *New South Wales v Commonwealth* [2006] HCA 52; (2006) 229 CLR 1 at 176–181 [400]–[418] ('*Work Choices*'), where the joint judgment of Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ rejected the Plaintiffs' contentions in the circumstances of the case, but did not appear to reject the legal basis of the contentions. Kirby J, in dissent, at 197–198 [460] accepted the contentions as a matter of law and on the facts.

resort to characterisation is "disingenuous"[17] is misplaced. If, as is undoubted, a doctrine of separation of legislative and executive power does not *per se* preclude the Commonwealth Parliament from delegating legislative power to the Executive, and if, which is also undoubted, Parliament cannot delegate to the Executive a power to make delegated legislation that is beyond the legislative power of the Commonwealth – then the limit of Commonwealth power inescapably involves, at least, characterisation of the enabling law of the Parliament and of the delegated laws made by the Executive pursuant to it. This is not an evasion of reality, or an unprincipled deviation from some pure notion of separation of powers. It is an inevitable consequence of these two undoubted propositions.

25. In respect of these issues, characterisation can, though not always does, occur at two stages; in characterising the enabling law, and if necessary to do so, in characterising the delegated legislation. In some instances, no doubt (as the Commonwealth contends in this matter), it is necessary to characterise the delegated legislation so as to characterise the enabling Act. This, however, is not inevitably so.

26. It may be impossible to characterise legislation as being with respect to a head of Commonwealth power, and this may occur whatever the scope or nature of any delegated legislation.

27. This impossibility can derive from vagueness in the enabling legislation or by the breadth of the power which it purports to delegate.

28. As Dixon J observed in *Dignan*[18]:

> "...a statute conferring upon the Executive a power to legislate upon some matter contained within one of the subjects of the legislative power of the Parliament is a law with respect to that subject... 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."

29. Evatt J in *Dignan* added[19]:

> "...it must be possible to predicate of every law passed by the Parliament that it is a law with respect to one or other of the specific subject matters mentioned in secs. 51 and 52 of the *Constitution*."

30. To similar effect is the observation of McTiernan J in *Wishart v Fraser*[20]:

> "The uncertainty or width of the subject matter with respect to which the Executive is given power to make regulations may prevent the law attempting to confer such power being a law with respect to any subject within the legislative powers of Parliament."

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[17] George Winterton, 'Can the Commonwealth Parliament Enact Manner and Form Legislation?' (1980) 11 *Federal Law Review* 167 at 194–195. It must be supposed that Professor Winterton would have preferred greater emphasis on separation of powers type analysis.
[18] *Dignan* [1931] HCA 34; (1931) 46 CLR 73 at 101.
[19] *Dignan* [1931] HCA 34; (1931) 46 CLR 73 at 119.
[20] *Wishart v Fraser* [1941] HCA 8; (1941) 64 CLR 470 at 488.

31. A law which does not, because of vagueness, enable identification of the head or heads of power with respect to which it is, is not a law with respect to any head of power, and is thereby invalid.

32. Indeed, it can be envisaged – and this matter shows – that a thing enacted can be so vague as to be uncertain or lacking effective meaning as to not attract the description of being a "law".[21] As Kitto J observed in in *Fairfax v Federal Commissioner of Taxation*[22]:

> "Under [s 51 of the Constitution] the question is always one of subject matter, to be determined by reference solely to the operation which the enactment has if it be valid, that is to say by reference to the nature of the rights, duties, powers and privileges which it changes, regulates or abolishes; it is a question as to the true nature and character of the legislation: is it in its real substance a law upon, 'with respect to', one or more of the enumerated subjects, or is there no more in it in relation to any of those subjects than an interference so incidental as not in truth to affect its character?" [23]

33. The valid exercise of legislative power requires that the rights, duties, powers and privileges, which legislation changes, regulates or abolishes, be identifiable.

34. Authority in this Court also recognises that a law which simply hands over legislative power or abdicates it is invalid[24]. Such a law is not a law with respect to a head or heads of power, but a law with respect to delegation. This is illustrated by Fullagar J in the *Communist Party Case*[25]:

> "...an Act giving a power "to make regulations with respect to bankruptcy", not given in aid of specific legislation by the Parliament, might well be held not to be a law with respect to bankruptcy."

35. To similar effect is the observation of Evatt J in *Dignan*[26]:

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[21] *Commonwealth v Grunseit* [1943] HCA 47; (943) 67 CLR 58 at 82 (Latham CJ) ('*Grunseit*'), referred to with approval in *Plaintiff S157/2002 v Commonwealth* [2003] HCA 2; (2003) 211 CLR 476 at 512–513 [102] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ), and *Plaintiff M79/2012 v Minister for Immigration and Citizenship* [2013] HCA 24; (2013) 87 ALJR 682 at 700 [88] (Hayne J).

[22] *Fairfax v Federal Commissioner of Taxation* [1965] HCA 64; (1965) 114 CLR 1 at 7, quoted with approval in *Attorney-General (Vic) v Andrews* [2007] HCA 9; (2007) 230 CLR 369 at 407 [80] (Gummow, Hayne, Heydon and Crennan JJ), 428 [152] (Kirby J).

[23] Kitto J's observation bears an obvious resemblance to that of Latham CJ in *South Australia v Commonwealth (First Uniform Tax Case)* [1942] HCA 14; (1942) 65 CLR 373 at 424. See also, *Airlines of New South Wales Pty Ltd v New South Wales (No.2)* [1965] HCA 3; (1965) 113 CLR 54 at 115 (Kitto J); *Attorney-General (Vic) v Commonwealth* [1962] HCA 37; (1962) 107 CLR 529 at 543 (Dixon CJ), 552 (Kitto J); *Actors and Announcers Equity Association of Australia v Fontana Films Pty Ltd* [1982] HCA 23; (1982) 150 CLR 169 at 201–202 (Mason J), 216 (Brennan J). It resembles also Latham CJ's (frequently quoted) reference in *Commonwealth v Grunseit* [1943] HCA 47; (1943) 67 CLR 58 at 82 to "the content of a law as a rule of conduct or a declaration as to power, right or duty." Latham CJ's observation in *Grunseit* was referred to approvingly by Gaudron, McHugh, Gummow, Kirby and Hayne JJ in *Plaintiff S157* [2003] HCA 2; (2003) 211 CLR 476 at 512–513 [102] and by Hayne J in *Plaintiff M79* [2013] HCA 24; (2013) 87 ALJR 682 at 700 [88].

[24] *Dignan* [1931] HCA 34; (1931) 46 CLR 73 at 121 (Evatt J); *Giris* [1969] HCA 5; (1969) 119 CLR 365 at 373–374 (Barwick CJ), 381 (Menzies J); *Capital Duplicators Pty Ltd v Australian Capital Territory* [1992] HCA 51; (1992) 177 CLR 248 at 283 (Brennan, Deane & Toohey JJ); *Work Choices* [2006] HCA 52; (2006) 229 CLR 1 at 197–198 [460] (Kirby J).

[25] *Australian Communist Party v Commonwealth* [1951] HCA 5; (1951) 83 CLR 1 at 257.

[26] *Dignan* [1931] HCA 34; (1931) 46 CLR 73 at 120.

> "The greater the extent of law-making power conferred, the less likely is it that the enactment will be a law with respect to any subject matter assigned to the Commonwealth Parliament."

36. If regard is had to the well settled general principles of the reasoning process involved in characterising a law as being with respect to a head of Commonwealth legislative power[27], it is impossible in this matter to (*inter alia)* determine the character of Division 3B of Part 4 of the *FMA Act* "by reference to the rights, powers, liabilities, duties and privileges which it creates"[28], or, having regard to its "practical as well as the legal operation" determine "if there is a sufficient connection between the law and the head of power"[29].

37. A further process of characterisation may occur even if the enabling law is valid. Delegated legislation made pursuant to a valid law must also fall within a head of Commonwealth legislative power, or be capable of being determined to be so[30]. This involves a process of characterisation of the delegated law, distinct from construing it as falling within the scope of the delegation.

38. Only cursory regard need be had to the terms of Parts 3 and 4 of Schedule 1AA of the *FMA Regulations* to conclude that it cannot be determined that reg.16 and Parts 1–4 of Schedule 1AA fall within a head or heads of Commonwealth legislative power. The terms in the schedule are hopelessly vague and uncertain. It is not possible to determine the operation of reg.16 and Parts 1–4 of Schedule 1AA of the regulations because the nature of the rights, duties, powers and privileges which the impugned provisions change, regulate or abolish cannot be identified. It is evident from the history of this matter, emerging from *Williams (No.1)*, and from the Commonwealth's reliance[31] on annual Appropriations Acts[32] to provide validity, that the descriptors in Parts 3 and 4 of Schedule 1AA have their genesis in appropriations-type catalogues. As explained below, having regard to the history, function and nature of Appropriations Acts, this genesis confirms that the terms of Parts 1–4 of Schedule 1AA, exemplified by [318.001], do not lend themselves to construction or characterisation by the Court.

Particular issues of characterisation of delegated legislation with particular heads of Commonwealth power

39. Dixon J and McTiernan J observed in *Wishart v Fraser*[33], as did Fullagar J in the *Communist Party Case*[34], Dixon J and Evatt J in *Dignan*[35], Dixon J in *Stenhouse v*

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[27] *Grain Pool of Western Australia v The Commonwealth* [2000] HCA 14; 202 CLR 479 at 492 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ) ('*Grain Pool*').
[28] *Grain Pool* [2000] HCA 14; 202 CLR 479 at 492.
[29] *Grain Pool* [2000] HCA 14; 202 CLR 479 at 492.
[30] *Dignan* [1931] HCA 34; (1931) 46 CLR 73 at 121 (Evatt J): "A regulation will not bind as a Commonwealth law unless both it and the statute conferring power to regulate are laws with respect to a subject matter enumerated in sec. 51 or 52." See also Dixon J at 103. Such an approach was also taken in *Huddart Parker Ltd v Commonwealth* [1931] HCA 1; (1931) 44 CLR 492 at 500, 501 (Rich J), 514, 515–516 (Dixon J).
[31] Amended Defence of the First and Second Defendants [30], [38], [43], [48], [53], [67], [72], [77], [82], [87], [88B], [88E] and [88H] (Core SCB: 50, 53–56, 59–62, 64–67).
[32] Being, *Appropriation Act (No 1) 2011-2012* (Cth); *Appropriation Act (No 1) 2012-2013* (Cth) and *Appropriation Act (No 1) 2013-2014* (Cth).
[33] *Wishart v Fraser* [1941] HCA 8; (1941) 64 CLR 470 at 484–485 (Dixon J), 488 (McTiernan J).
[34] *Australian Communist Party v Commonwealth* [1951] HCA 5; (1951) 83 CLR 1 at 257.

Coleman[36], and various members of the court in *Farey v Burvett*[37] and *Pankhurst v Kiernan*[38], that characterisation of delegated legislation relying upon the defence power in s.51(vi) gives rise to particular considerations. As Dixon J observed in *Wishart v Fraser*[39]:

> "The defence of a country is peculiarly the concern of the Executive, and in war the exigencies are so many, so varied and so urgent that width and generality are a characteristic of the powers which it must exercise."

40. That there exists a particular rule in respect of the defence power makes plain that it must be possible for the Court to determine, from the face of the precept legislation and the delegated legislation, whether the defence power is relied upon. If it is, a different process of characterisation is undertaken.

41. It cannot be determined from the terms of Division 3B of Part 4 of the *FMA Act* or from reg.16 or Parts 3 and 4 of Schedule 1AA whether s.51(vi) provides legislative authority here.

42. That it must be possible to determine the head of power relied to support delegated legislation is further illustrated by the race power in s.51(xxvi). As explained in the *Native Title Act case*[40], Parliament cannot delegate to the Executive the determination under s.51(xxvi) as to whether a law is a special law for the people of a race. Parliament must deem it necessary to make such special laws.

43. So, unless an enabling law is itself a special measure, it cannot empower the Executive to make such special laws.

44. Even if *The Native Title Act case* is to be understood as deciding that the Commonwealth Parliament can delegate to the Executive the power to make such special laws of a "regulatory kind to implement an Act of the Parliament", as opposed to a non-regulatory, substantive law[41]; it must be possible to characterise the delegated law as regulatory or substantive in this sense.

45. It cannot be determined from the terms of Division 3B of Part 4 of the *FMA Act* or from reg.16 or Parts 3 and 4 of Schedule 1AA whether anything there contained purports to be a special law within the terms of s.51(xxvi).

So – what then is the character of Division 3B of Part 4 of the *FMA Act*?

46. Section 32B of the *FMA Act* is not a law with respect to anything in ss.51 or 52 of the *Constitution*. It does not need to be positively characterised to determine invalidity; so long as it is not a law with respect to anything in ss.51 or 52 it is

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[35] *Dignan* [1931] HCA 34; (1931) 46 CLR 73 at 99 (Dixon J), 120–121 (Evatt J).
[36] *Stenhouse v Coleman* [1944] HCA 36; (1944) 69 CLR 457 at 470–472.
[37] *Farey v Burvett* [1916] HCA 36; (1916) 21 CLR 433 at 441–442 (Griffiths CJ), 447–449 (Barton J), 451–455 (Isaacs J, Powers J agreeing at 468), 457–458 (Higgins J).
[38] *Pankhurst v Kiernan* [1917] HCA 63; (1917) 24 CLR 120 at 128–129 (Barton J), 131–133 (Isaacs J), 139 (Powers J agreeing with Barton J and Isaacs J).
[39] *Wishart v Fraser* [1941] HCA 8; (1941) 64 CLR 470 at 484–485.
[40] *Western Australia v Commonwealth* [1995] HCA 47; (1995) 183 CLR 373 at 486 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ) ('*Native Title Act case*').
[41] *Native Title Act case* [1995] HCA 47; (1995) 183 CLR 373 at 486 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

invalid. Be that as it may, it might be thought that, because of its infinitude, it might most charitably characterised as a law with respect to making, varying and administering arrangements and making grants without regard to subject matter. This characterisation is enhanced by the lack of coherence between the matters listed or catalogued in Schedule 1AA and now Schedule 1AB of the *FMA Regulations*. Perhaps less charitably s.32B might be characterised as a law with respect to matters with respect to which the Commonwealth does not have power to legislate. Perhaps, more charitably, s.32B(1) is a law with respect to delegation.

47. Whether incapable of characterisation or so characterised, s.32B is invalid.

Reliance upon sections 51(xxiiiA) and 51(xx) of the *Constitution*

48. It appears[42] that the Commonwealth contends that s.32B, reg.16 and Schedule 1AA of the *FMA Regulations*, to the extent that they identify item 407.013 in the regulations (which relate to the SUQ Funding Agreement), are valid, in respect to this particular application, by reason of sections 51(xxiiiA) and 51(xx) of the *Constitution.*

49. For the reasons explained above, it can be determined that Division 3B of Part 4 of the *FMA Act* is invalid without resort to the schedules in the regulation. If this reasoning is upheld it is unnecessary to consider this contention.

Reliance upon sections 61 and 51(xxxix) of the *Constitution* as the source of legislative power

50. It appears[43] that the Commonwealth contends that all of s.32B, reg.16 and Schedule 1AA of the *FMA Regulations* are valid laws of the Commonwealth by reason of ss.61 and 51(xxxix). It is assumed that this contention is that each of the arrangements or grants specified in (or in a class specified in) the *FMA Regulations* are a valid exercise of executive power by the Commonwealth to which the *FMA Act* is incidental.

51. If this is the contention, then at least in respect of item 407.013 of the regulations it is wrong, by reason of *Williams (No.1)*. Section 61 does not provide power to enter into these agreements[44].

52. More generally, the contention inverts reality. All of the items in Schedules 1AA and 1AB of the *FMA Regulations* derive their legal efficacy and force from the regulations. The regulations, in turn, have legal force and effect because they are regulations made pursuant to the Act. If the contention is that the Act is incidental, in the meaning of s.51(xxxix), to the regulations, it is plainly wrong. The cart is pulled by the horse.

53. Further, and even if this is wrong, as Evatt J in *Dignan* stated[45]:

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[42] Amended Defence of the First and Second Defendants [92(b)(i) and (ii)] (Core SCB: 68).
[43] Amended Defence of the First and Second Defendants [92(b)(iii)] (Core SCB: 68).
[44] *Williams (No.1)* [2012] HCA 23; (2012) 248 CLR 156 at 179 [4] (French CJ), 239 [161], [163] (Gummow and Bell JJ), 281 [289] (Hayne J), 337 [457], 359 [548] (Crennan J), 374 [597] (Kiefel J).
[45] *Dignan* [1931] HCA 34; (1931) 46 CLR 73 at 121 (item 7) (Evatt J).

> "The fact that the regulations made by the subordinate authority are themselves laws with respect to a subject matter enumerated in secs. 51 and 52, does not conclude the question whether the statute or enactment of the Commonwealth Parliament conferring power is valid. A regulation will not bind as a Commonwealth law unless both it and the statute conferring power to regulate are laws with respect to a subject matter enumerated in sec. 51 or 52. As a rule, no doubt, the regulation will answer the required description, if the statute conferring power to regulate is valid, and the regulation is not inconsistent with such statute."

54. If the contention is that all of the items in Schedules 1AA and 1 AB of the *FMA Regulations* are valid exercises of executive power under s.61, then no issue of the validity of the Act, as incidental to it, arises. If this is the Commonwealth contention, *Williams (No.1)* will have to be re-opened. If this is put by the Commonwealth here, it is an odd proposition in light of the statement in the Second Reading Speech referred to above, that (*inter alia*) s.32B provides "necessary legislative authority" to support the scheduled spending programs.

55. Further, if this is the Commonwealth contention, it is inconsistent with the reasoning of Hayne and Kiefel JJ in *Williams (No.1)*[46].

The relevance to validity of Parliamentary disallowance of delegated legislation

56. The fact that the regulations may be disallowed by the Commonwealth Parliament in accordance with s.42 of the *Legislative Instruments Act 2003* (Cth) does not bear upon validity. The fact that the Parliament can (if it wished) repeal an invalid law does not mean that the law is not invalid or that the Court can or should not declare it to be so.

Section 15A of the *Acts Interpretation Act 1901*

57. It is unclear the extent to which, if any, the Commonwealth seeks to rely upon s.15A of the *Acts Interpretation Act 1901* (Cth).

58. Section 15A can have no application to the Division 3B of Part 4 of the *FMA Act* other than in respect of the Commonwealth plea[47] that the operation of s.32B depends upon the scope of the *FMA Regulations*. If the Commonwealth then contends that some of the things catalogued in Parts 1–4 of Schedule 1AA of the *FMA Regulations* fall within legislative power of the Commonwealth and others do not, and that the Act and regulations are to be read and construed having regard only to the valid things, this should be rejected. This would be classically an impermissible "act of remedial amputation carried out by the court"[48].

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[46] *Williams (No.1)* [2012] HCA 23; (2012) 248 CLR 156 at 267 [242]–[243], 269–270 [247]–[248] (Hayne J), 370 [581], 373 [592]–[593] (Kiefel J).

[47] Amended Defence of the First and Second Defendants [57] (Core SCB: 56).

[48] *Attorney-General (SA) v Corporation of the City of Adelaide* [2013] HCA 3; (2013) 87 ALJR 289 at 297 [8] (French CJ). See generally, *Bank of New South Wales v The Commonwealth* [1948] HCA 7; (1948) 76 CLR 1 at 371 (Dixon CJ); *Pidoto v Victoria* [1943] HCA 37; (1943) 68 CLR 87 at 110 (Latham CJ), Rich J (115), 118 (Starke J), 125–126 (McTiernan J), 130–131 (Williams J).

APPROPRIATIONS ACTS

59. The Commonwealth pleads[49] that annual Appropriations Acts[50] "provide statutory authority" for the SUQ Funding Agreement, this being the agreement the subject of claims for specific relief in the Writ of Summons. This contention, to be accepted, would require, *inter alia,* this Court to over-rule *Pape* and *Williams (No.1)*.

60. Sections 81 and 83 of the *Constitution* do not confer a substantive spending power on the Commonwealth. The power to expend appropriated moneys must be found elsewhere in the *Constitution* or the laws of the Commonwealth[51].

61. The Appropriations Acts cannot provide statutory authority for the SUQ Funding Agreement. Sections 81 and 83, pursuant to which the Appropriations Acts were enacted, simply empower regulation of the relationship between the Executive and the Parliament by authorising application of the Consolidated Revenue Fund to identified purposes[52]. The legal basis for expenditure in respect of such purposes, and the creation of rights, duties or obligations in respect of such purposes, is not afforded by the appropriation and must be found elsewhere[53]. To this extent, there is no difference in the application of ss.81 and 83 to the power of the Executive to spend and the power of the Executive to enter into an agreement enabling such spending.

62. That Appropriations Acts do not of themselves confer on the Commonwealth legislative authority to spend or contract has been understood and recognised from the time of federation, based on earlier English practice[54]. For this reason, Appropriations Acts have not, and do not, specify objects of appropriation and expenditure with particularity sufficient to determine questions of conformability with the enumerated legislative powers of the Commonwealth. It is a matter for Parliament to be satisfied (or not) with the generality of expression of appropriation purposes in Appropriations Acts[55], and such expression is often times, if not invariably, obtuse. That this is so derives from the acceptance, since federation and before, that Appropriations Acts do not confer legislative power to act. No doubt,

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[49] Amended Defence of the First and Second Defendants [30], [38], [43], [48], [53], [67], [72], [77], [82], [87], [88B], [88E] and [88H] (Core SCB: 50, 53–56, 59–62, 64–67).

[50] Being *Appropriation Act (No 1) 2011-2012* (Cth); *Appropriation Act (No 1) 2012-2013* (Cth) and *Appropriation Act (No 1) 2013-2014* (Cth).

[51] *Pape v Federal Commissioner of Taxation* [2009] HCA 23; (2009) 238 CLR 1 at 23 [8], 55 [111] (French CJ), 73 [178] (Gummow, Crennan and Bell JJ), 113 [320] (Hayne and Kiefel JJ), 210 [600] (Heydon J) ('*Pape*'); *ICM Agriculture v The Commonwealth* [2009] HCA 51; (2009) 240 CLR 140 at 169 [41] (French CJ, Gummow and Crennan JJ); *Williams (No.1)* [2012] HCA 23; (2012) 248 CLR 156 at 179 [2], 193 [39] (French CJ), 224 [114] (Gummow and Bell JJ), 248 [191] (Hayne J), 341 [478] (Crennan J).

[52] *Pape* [2009] HCA 23; (2009) 238 CLR 1 at 36 [53], 43 [77] (French CJ), 103–104 [291]–[292], 113 [320] (Hayne and Kiefel JJ). See also *Combet v Commonwealth* [2005] HCA 61; (2005) 224 CLR 494 at 535–537 [44]–[48] (McHugh J), 569–570 [139]–[143] (Gummow, Hayne, Callinan and Heydon JJ), 595–596 [227]–[228] (Kirby J). See also *Williams (No.1)* [2012] HCA 23; (2012) 248 CLR 156 at 260 [220]–[221] (Hayne J).

[53] *Pape* [2009] HCA 23; (2009) 238 CLR 1 at 105 [295]–[296] (Hayne and Kiefel JJ).

[54] *New South Wales v Commonwealth* [1908] HCA 68; (1908) 7 CLR 179 at 190 (Griffiths CJ). Professor Campbell relied on this dicta to state, "[a]n appropriation Act does not authorise the Crown to enter into binding contracts, nor does it create binding contractual obligations": Enid Campbell, 'Parliamentary Appropriations' (1971) 4 *Adelaide Law Review* 145 at 161.

[55] *Combet v The Commonwealth* [2005] HCA 61; (2005) 224 CLR 494 at 522–523 [5]–[6] (Gleeson CJ), 569 [140], 577 [160] (Gummow, Hayne, Callinan and Heydon JJ).

had it ever been thought that they did, then it would have been, and would now be, necessary for objects of appropriation to be expressed with particularity sufficient to enable the Court to determine whether an Appropriations Act falls under one or other head of Commonwealth legislative power in the *Constitution*[56]. As Gummow, Crennan and Bell JJ observed in in *Pape*[57]:

> "...the description given to items of appropriation provides an insufficient textual basis for the determination of issues of constitutional fact and for the treatment of section 81 as a criterion of legislative validity."

63. All of this is illustrated by the Appropriations Acts sought to be relied upon here. The appropriation relating to the plaintiff is described as follows:

> "Outcome 2 -
>
> Improved learning, and literacy, numeracy and education attainment for school students, through funding for quality teaching and learning environments, workplace learning and career advice." [58]

64. Such drafting does not enable the Court to assess whether the Appropriation Acts authorise the entry by the Executive into the SUQ Funding Agreement.

65. If the Commonwealth contends that the Appropriation Acts both appropriate money for the ordinary annual services of government, and provide the source of power, here, for the Executive to enter into the SUQ Funding Agreement, then such a contention would give rise to a contravention of the requirement in s.54 of the *Constitution.*

66. This is not to say that the Appropriation Acts are invalid in so far as they appropriate revenue for the ordinary annual services of government. It is simply to say that a construction of the Appropriation Acts in a manner consistent with s.54 is required. This requirement is not inconsistent with those authorities providing that s.54 imposes obligations on the Houses of Parliament, and that a failure to comply with such obligations "is not contemporaneously justiciable and does not give rise to invalidity of the resulting Act"[59].

67. If the Commonwealth contention were correct, then one consequence would be to weaken and undermine the Senate. Because the Senate cannot, by reason of s.53, amend proposed appropriations laws, if the Appropriations Acts here relied upon are truly "laws appropriating revenue or moneys for the ordinary annual services of government", then the Senate cannot amend them, and is prevented from being engaged in the "formulation, amendment or termination of any programme for the

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[56] *Pape* [2009] HCA 23; (2009) 238 CLR 1 at 105 [296] (Hayne and Kiefel JJ); *Williams (No.1)* [2012] HCA 23; (2012) 248 CLR 156 at 261 [222] (Hayne J).

[57] *Pape* [2009] HCA 23; (2009) 238 CLR 1 at 78 [197]. See also 111–112 [317] (Hayne and Kiefel JJ).

[58] See Schedule 1 of the *Appropriation Act (No 1) 2011-2012* (Cth) (Core SCB: 356). See also Schedule 1 of the *Appropriation Act (No 1) 2012-2013* (Cth) (Core SCB: 460) and Schedule 1 of the *Appropriation Act (No 1) 2013-2014* (Cth) (Core SCB: 573).

[59] *Northern Suburbs General Cemetery Reserve Trust v The Commonwealth* [1993] HCA 12; (1993) 176 CLR 555 at 578 (Mason CJ, Deane, Toohey and Gaudron JJ), 585 (Brennan J). See also *Osborne v Commonwealth* (1911) 12 CLR 321 at 336 (Griffith CJ); *Native Title Act case* [1995] HCA 47; (1995) 183 CLR 373 at 482 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

spending of those moneys"[60]. Such diminution of the role of the Senate is contrary to the reasoning in *Williams (No.1)*[61].

68. The Third Defendant's reliance on s.53 (together with s.51(xxxix))[62] is inconsistent with the reasoning and conclusion reached in *Pape*. Section 53 is a mechanical or procedural provision governing the intra-mural activities of the Parliament[63]. It is one of several provisions (in addition to ss.81 and 83) that regulates the relationship between the Executive and Parliament[64]. Given the conclusion in *Pape*, s.53 can no more be the source of power to enter into the *FMA Act* (or any other general contracts act), than could be ss.81 and 83 (together with s.51(xxxix)); and they are not the source.

69. So, whilst a valid appropriation under an Appropriation Act may be a necessary condition of any payment made under the SUQ Funding Agreement[65], it alone cannot be the source of the power to enter into the SUQ Funding Agreement or make payments under the agreement. That source must be found elsewhere.

PART VI: LENGTH OF ORAL ARGUMENT

70. It is estimated that the oral argument for the Attorney General for Western Australia will take 30 minutes. If the Commonwealth or any other party seek to re-open *Pape* or *Williams (No.1)*, the oral argument for the Attorney General for Western Australia will likely take 90 minutes.

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[60] *Williams (No.1)* [2012] HCA 23; (2012) 248 CLR 156 at 235 [145] (Gummow and Bell JJ). See also 232–233 [136].
[61] *Williams (No.1)* [2012] HCA 23; (2012) 248 CLR 156 at 205 [60] (French CJ), 232–233 [136] (Gummow and Bell JJ), 354–355 [532] (Crennan J).
[62] Amended Defendant of the Third Defendant [29] (Core SCB: 78).
[63] *Pape* [2009] HCA 23; (2009) 238 CLR 1 at 70 [165] (Gummow, Crennan and Bell JJ); *Permanent Trustee Australia Ltd v Commissioner of State Revenue (Vic)* [2004] HCA 53; (2004) 220 CLR 388 at 409 [41] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ).
[64] *Pape* [2009] HCA 23; (2009) 238 CLR 1 at 70 [164], 72 [175] (Gummow, Crennan and Bell JJ), 103–105 [291]–[294] (Hayne and Kiefel JJ). See also *Combet v The Commonwealth* [2005] HCA 61; (2005) 224 CLR 494 at 536–537 [45]–[48] (McHugh J), 570 [141]–[143] (Gummow, Hayne, Callinan and Heydon JJ), 595–596 [227]–[228] (Kirby J). See also *Williams (No. 1)* [2012] HCA 23; (2012) 248 CLR 156 at 260 [220]–[221] (Hayne J).
[65] *Pape* [2009] HCA 23; (2009) 238 CLR 1 at 44–45 [80] (French CJ), 105 [296], 111 [316] (Hayne and Kiefel JJ), 210 [601] (Heydon J); *Williams (No.1)* [2012] HCA 23; (2012) 248 CLR 156 at 224–225 [115] (Gummow and Bell JJ).