IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY **NO S 154 OF 2013**

BETWEEN: **RONALD WILLIAMS**
Plaintiff

AND: **COMMONWEALTH OF AUSTRALIA**
First Defendant

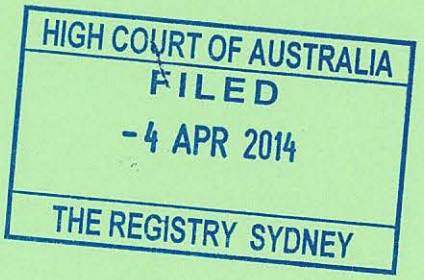
MINISTER FOR EDUCATION
Second Defendant

SCRIPTURE UNION QUEENSLAND
Third Defendant

ANNOTATED SUBMISSIONS OF THE FIRST AND SECOND DEFENDANTS

10

20



Filed on behalf of the First and Second Defendants by:
Australian Government Solicitor
4 National Circuit
Barton, ACT 2600
DX 5678 Canberra

A3198786

Date of this document: 4 April 2014
Contact: Andrew Buckland / Emilie Sutton
File ref: 13139524
Telephone: 02 6253 7024 / 02 6253 7596
Facsimile: 02 6253 7304
E-mail: andrew.buckland@ags.gov.au /
emilie.sutton@ags.gov.au

Contents

PART I PUBLICATION

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

PART II ISSUES

2. The issues have been accurately stated by the Plaintiff, save that:

   2.1. in relation to issue (a), the First and Second Defendants (**the Commonwealth**) do not accept the factual premise expressed in (a)(i) (ie, that an issue in *Williams v Commonwealth*[1] (***Williams***) was the lawfulness of any payment made in the 2011-2012 financial year);[2]

   2.2. in relation to issue (d), the Commonwealth does not contend that any of the impugned provisions are a law relevantly supported by s 51(xx);

   2.3. in relation to issues (f) and (g), in light of the position taken by the interveners, the Commonwealth does not challenge the Plaintiff's standing.

PART III SECTION 78B OF THE *JUDICIARY ACT 1903* (CTH)

3. Notices have been issued pursuant to s 78B of the *Judiciary Act 1903*.

PART IV FACTS

4. The Plaintiff's summary of the facts needs supplementation in areas important to various strands of the argument developed below.

5. Students do not attend schools simply for the purpose of intellectual learning. Schools "play a vital role in promoting the intellectual, physical, social, emotional, moral, spiritual and aesthetic development and wellbeing of young Australians".[3]

6. In September 2011, the Commonwealth announced the National School Chaplaincy and Student Welfare Program (**NSCSWP**), which continues and extends the previous National School Chaplaincy Program (**NSCP**) in recognising that students have needs that extend beyond their intellectual and physical needs.

7. This extension of the NSCP followed very extensive consultation between the Commonwealth and the States as to the desirability of the Commonwealth both continuing and extending that program. No State opposed the extension of the program.[4] Further, the Queensland Government submitted that "[i]n Queensland the

---

1 (2012) 248 CLR 156.

2 See [101] below.

3 SCB CV 144 (2008 Melbourne Declaration Educational Goals for Young Australians, as quoted in the NSCSWP Guidelines).

4 Special case at [41].

State Government supports the valuable contribution that school chaplains make to the spiritual and emotional wellbeing of students in our state school communities".[5]

8. Judgment was delivered in *Williams* on 20 June 2012. The Financial Framework Legislation Amendment Bill (No 3) 2012 (**FFLA Bill**) was introduced into, and passed by, the House of Representatives on 26 June 2012. The FFLA Bill was introduced into, and passed by, the Senate on 27 June 2012. The FFLA Bill received Royal Assent and commenced operation on 28 June 2012 as the *Financial Framework Legislation Amendment Act (No 3) 2012* (**FFLA Act**).

9. The FFLA Act inserted s 32B into the *Financial Management and Accountability Act 1997* (**FMA Act**) and Sch 1AA into the *Financial Management and Accountability Regulations 1997* (**FMA Regulations**). Schedule 1AA included item 407.013, which specifies the "National School Chaplaincy and Student Welfare Program (NSCSWP)" as a program for the purposes of which "arrangements under which public money is, or may become, payable by the Commonwealth" may be made.

10. The specification of the NSCSWP as a "program" was accompanied by a short statement of the objective of that program, being "[t]o 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 407.013 does not purport to authorise any expenditure that is consistent with that objective. It is the program, not the objective, that is "specified" for the purpose of s 32B.

11. The NSCSWP was the only program mentioned by name in the second reading speech for the FFLA Bill.[6] There can therefore be no doubt that item 407.013 was intended to authorise expenditure on the existing program that was known as the NSCSWP. Item 407.013 assumes that the nature of that program can be ascertained. That assumption is well placed, as the essential features of the program are recorded in the NSCSWP Guidelines (**Guidelines**). The Guidelines were first promulgated in September 2011 (well before s 32B and item 407.013 were enacted).[7] The current version is dated December 2013.[8] It is an agreed fact that the Guidelines set out "requirements for the administration and delivery of the NSCSWP".[9]

12. The key features of the NSCSWP are:

    12.1. Participation by school communities is voluntary.[10] Indeed, schools can exit the NSCSWP at any time.[11] No services will be provided in a particular school under

---

5 Special case at [42]; SCB V2 at 502.

6 The Attorney-General stated: "The government is committed to maintaining funding for community programs, including the National School Chaplaincy Program and its successor program. The [NSCP] and its successor program have delivered very valuable services for the benefit of students across Australia. This program needs to be put on a firm legal basis as a matter of urgency, to enable payments to resume for the benefits of schools and students relying on the program": Commonwealth, *Parliamentary Debates*, House of Representatives, 26 June 2012, 8041 (Nicola Roxon MP, Attorney-General). The Attorney-General went on to state: "The schedule contains 427 grants and programs, including the National School Chaplaincy and Student Welfare Program" (Commonwealth Book of Additional Materials (**CBAM**) 28, 29).

7 SCB CV 117 [43].

8 SCB CV 136-200.

9 SCB CV 117 [43].

10 SCB CV 145 (1.4)

11 SCB CV 180 (8.5).

the NSCSWP unless a school community (and particularly the school principal) first identifies a need, and then makes a positive request for the provision of services within that school. The particular services to be provided must be documented in an agreement between the school and the funding recipient.[12]

12.2. If a school community chooses to participate in the NSCSWP, participation by students is voluntary.[13]

12.3. Each school retains a fundamental choice whether services are provided by a school chaplain or a secular student welfare worker.[14]

12.4. The NSCSWP assists school communities to support the spiritual, social and emotional well-being of their students. The support and guidance can involve matters such as ethics, values, relationships and spirituality, and the provision of student welfare and pastoral care.[15]

12.5. State and Territory government and non-government education authorities retain supremacy in the administration of schools[16] and in controlling whether chaplains or student welfare workers can enter schools[17] and what standards they must comply with while there.[18]

PART V LEGISLATIVE PROVISIONS

13. The Plaintiff correctly identifies the relevant legislative provisions.

PART VI ARGUMENT

(1) Summary

14. In summary, the Commonwealth submits:

14.1. Section 32B of the FMA Act is valid:

(a). Properly construed, s 32B authorises the particular arrangements or grants that are specified in the FMA Regulations, and arrangements or grants for the purpose of programs that are specified in the FMA Regulations (as amended from time to time). It is thus engaged only when there is a valid regulation, and so does not purport to authorise arrangements or grants irrespective of whether they fall within a head of Commonwealth legislative power. The validity of particular regulations that engage the operation of s 32B must be determined on a case-by-case basis.

---

12 SCB CV 152 (3.3) and 153 (3.4).

13 SCB CV 160 (5.1).

14 SCB CV 144, 145 (1.4). See also 147 (2.1 and 2.2), 158 (4.7).

15 SCB CV 145 (1.3), 146 (1.5).

16 SCB CV 147 (2.5), expressly recognising the role of State/Territory authorities.

17 SCB CV 182 (8.13).

18 See SCB CV 186 (Code of Conduct, principle 1).

(b). To the extent that the Plaintiff's attack on s 32B depends on implications arising from the role of the Senate, it is a complete answer to that attack that item 407.013 of Sch 1AA to the FMA Regulations was directly inserted into the Regulations by Parliament, acting through both Houses. The fact that, in other cases (not now in issue), the Executive has a wide discretion to specify in the FMA Regulations the programs for the purpose of which arrangements or grants may be made does not mean that s 32B is not a "law" within the meaning of s 51 of the Constitution, or that it is not a law with respect to any head of power.

14.2. Item 407.013 of Sch 1AA to the FMA Regulations is valid, in that it is supported by s 51(xxiiiA) and/or s 51(xxxix) of the Constitution.

14.3. Even if s 32B or item 407.013 are invalid, payments made pursuant to the Funding Agreement dated 21 December 2013 between the Commonwealth and Scripture Union Queensland (**SUQ**) (**Funding Agreement**)[19] were valid. That is so for two reasons:

(a). Payments made pursuant to the Funding Agreement were authorised by the relevant Appropriation Acts.

(b). Those payments were made in exercise of the executive power of the Commonwealth. The executive power to spend and contract does not require authorising legislation before it may be exercised, either at all or in cases which may reasonably be regarded as relating to matters of national benefit or concern. There are limitations on this power, but none are contravened here. (This submission requires the Court to reconsider the correctness of *Williams*, but it is appropriate that the Court do so.)

15. Given the complexity of the issues, and the significant degree of overlap between the arguments advanced by the Plaintiff and the interveners, the Commonwealth's submissions will, in general, address all submissions on a common basis.

(2) Introduction: the necessity to address the correctness of *Williams*

In *Davis v Commonwealth* (***Davis***),[20] Brennan J explained that an act done in execution of an executive power of the Commonwealth is done in execution of one of three categories of powers or capacities: (a) a statutory (non-prerogative power) power or capacity; (b) a prerogative (non-statutory) power or capacity (using the term "prerogative" in the sense of a special power, privilege or immunity of the Crown); or (c) a capacity which is neither a statutory nor a prerogative capacity. Adopting this taxonomy, in *Williams* four Justices[21] held that the third category of executive power does not extend to the Commonwealth making certain types of payments and entering into funding agreements related to those types of payments.

---

19 Special case at [75], SCB CV at 225.

20 (1988) 166 CLR 79 at 108.

21 French CJ, Gummow, Crennan and Bell JJ.

16. Beyond that core proposition, it is not possible to be precise about the ratio of *Williams*, because the majority view was expressed in three separate reasons for judgment containing overlapping but not univocal themes. While it seems that the two principal concerns underpinning the reasons for judgment of the majority can be tied to responsible government and federalism, the three separate reasons do not address those concerns with the same voice or weight.

17. It is, however, possible to say that *Williams* does not hold that:

    17.1. an Appropriation Act which appropriates the Consolidated Revenue Fund (**CRF**) and specifies the purposes of that appropriation can never provide statutory authority for executive spending and contracting (because one member of the majority, Crennan J, held that such an Appropriation Act can provide that authority if the appropriation is "special" and provides "some detail about the policy being authorised");[22]

    17.2. the executive power to spend and contract can never exist without statutory authority (because all four members of the majority held that it sometimes can).[23]

    (For convenience, when referring to this type of executive action, the Commonwealth will use the terms "executive spending and contracting" or "the executive power to spend and contract", although it may be thought that the Court's true focus should be on executive spending.[24])

18. The determination of whether *Williams* is correct, and the precise boundaries of the principles it establishes, are matters to which the Commonwealth will return later in these submissions (see Section 6). However, the Commonwealth's first submission is that it is not necessary for the Court to express any views in relation to these matters in order to resolve this case in the Commonwealth's favour, because the present case is fundamentally different from *Williams*. That follows because:

    18.1. First, and most importantly, the obvious purpose of the Parliament in enacting s 32B of the FMA Act and Sch 1AA to the FMA Regulations was to provide the very parliamentary recognition or permission that the Court had identified as necessary and absent in *Williams*. The Court should decide whether Parliament's response to *Williams* is effective. In enacting s 32B and item 407.013, Parliament specifically turned its attention to the NSCSWP and indicated that the Executive had power to make payments for the purposes of that program and to take related administrative action. That being so, the impugned payments are valid. This Court has often acknowledged that it should not decide constitutional questions when it is not necessary to do so.[25] For that reason, the Court should not embark upon an examination of the correctness of *Williams* solely in order to decide whether payments under the NSCSWP would

---

22 *Williams* at 354 [531] (Crennan J).

23 *Williams* at 191 [33]-[34] (French CJ), 234 [141]-[144] (Gummow and Bell JJ), 348 [503] (Crennan J).

24 That follows because although this case, like *Williams* before it, has a contract at its centre, the role of the contract here is simply to condition the spending of money.

25 See, eg, *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140 at 199 [141] (Hayne, Kiefel and Bell JJ), and the cases there cited.

be valid independently of s 32B (notwithstanding the terms in which that section is expressed).

18.2. Secondly, the reasons for judgment of Hayne J in *Williams* revealed the possibility that the annual Appropriation Acts may provide sufficient parliamentary permission for expenditure on the NSCSWP. If they do, as the Commonwealth now asserts, then the payments that are impugned in this proceeding are valid on that basis, without any need to examine any wider issues.

18.3. Thirdly, some strands of the decision in *Williams* proceeded on the basis that the Commonwealth was unilaterally intruding into an area where the States had traditional responsibility and the proven legal and practical capacity to act.[26] But a close consideration of the origins and structure of the NSCSWP demonstrates that the Commonwealth decided to continue and extend the earlier program only after detailed consultation with the States, and with their approval. Accordingly, the factual basis for the apparent concern in *Williams* that the NSCP was subverting the function of s 96 does not hold for the NSCSWP.

(3) Section 32B of the FMA Act: general arguments

(3)(a) The proper construction of s 32B

19. Section 32B of the FMA Act permits new or different arrangements or grants to be authorised from time to time through the making of regulations. However, in the case of all of the programs originally specified in Pt 4 of Sch 1AA (including the NSCSWP), no such further regulations were required, because the same Act that introduced s 32B also directly amended the FMA Regulations to authorise those programs.[27] It did so by inserting reg 16(1)(d) and Pt 4 of Sch 1AA into the FMA Regulations, which together specify "programs" for the purposes of s 32B(1)(b).

20. Accordingly, insofar as item 407.013 in Sch 1AA to the FMA Regulations is concerned, there is no question of any "by-passing" of the Senate. On the contrary, the Senate expressly approved expenditure on the program specified in item 407.013. As a result, most of the points that the Plaintiff and supporting interveners make in seeking to attack s 32B do not fall for decision in this case and should be dismissed as hypothetical. However, to take them in turn.

21. First, the Plaintiff contends that s 32B of the FMA Act is invalid in its entirety because it purports to confer a power to make, vary or administer arrangements or grants irrespective of whether they fall within the ambit of legislative power of the Commonwealth.[28] That submission is based on a misconstruction of s 32B.

---

26 *Williams* at 182-183 [12] (French CJ), 213 [77] (French CJ), 216-217 [83] (French CJ), 234-236 [144]-[148] (Gummow and Bell JJ).

27 Commonwealth legislation commonly amends regulations: see, eg, *Post and Telegraph Regulations Act 1967*, s 3, First, Second, Third, and Fourth Schedules; *Health Insurance Commission (Reform and Separation of Functions) Act 1997* s 54 and Sch 2.

28 Plaintiff's submissions at [43].

22. Correctly construed, the effect of s 32B is to authorise, on a case-by-case basis, the making, varying or administration of each of the distinct arrangements or grants which from time to time are specified in the FMA Regulations, or are included in a class of arrangements or grants specified in the Regulations, or are for the purposes of a program specified in the Regulations. Each regulation is supported by any and all heads of legislative power that may be available in relation to the particular matter specified in the regulation. The need for a valid regulation to engage the operation of s 32B highlights the fact that s 32B does not purport to authorise expenditure irrespective of any limits on Commonwealth legislative power. The regulation-making power conferred by s 32B, read with s 65 of the FMA Act, only authorises regulations that are within a head of Commonwealth legislative power.[29] The real question is not whether s 32B is valid, but whether it supports the regulation that specifies a particular program, arrangement or grant. That question must be addressed on a case-by-case basis, focusing on whether the Commonwealth has power to make the regulation that engages the relevant operation of s 32B.

23. Next, the Plaintiff threatens that s 32B is drafted in terms that "could well extend to situations of insufficiency of Commonwealth legislative power",[30] and then invites the Court to adopt that meaning and hold the section invalid on that basis. Plainly, however, the Court should prefer an interpretation of s 32B that would preserve the validity of the provision to one that would result in invalidity.[31]

24. Next, the Plaintiff imagines a series of possible constructions of s 32B in an endeavour to establish that it is not possible to read s 32B down so that it operates only with respect to matters within Commonwealth legislative power. The tenor of the argument is that there are simply too many possible ways in which the scope of s 32B could be confined, and that in the absence of guidance in the FMA Act as to the reading that should be preferred, the selection of one mode over another would be "a feat that is ... legislative and not judicial".[32] That argument fails because there is no need to read s 32B down so as to preserve its validity. In its terms the section operates only where a regulation – valid under a head of legislative power and therefore within the regulation-making power – specifies a relevant program.

25. The Plaintiff strains the interpretation of the FMA Act by urging distinctions between reading down the FMA Act to authorise a program; or an arrangement; or a part of an arrangement; or the act of making, varying or administering an arrangement in finding a connection to a head of power.[33] In truth there is a single composite inquiry in each case: is a regulation specifying a program for the purpose of which arrangements or grants may be made sufficiently connected with one or more heads of power?[34] If

---

29 See, eg, *Wotton v Queensland* (2012) 246 CLR 1 at 14 [22]-[23].

30 Plaintiff's submissions at [43].

31 *Acts Interpretation Act 1901* s 15A; *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 14 (Mason CJ), and the cases there cited. The second reading speech to the FFLA Bill also confirms that that meaning was not intended: Commonwealth, *Parliamentary Debates,* House of Representatives, 26 June 2012, 8042 (Nicola Roxon MP, Attorney-General), CBAM 29.

32 Plaintiff's submissions at [46(c)] and [53].

33 Plaintiff's submissions at [47] and [48].

34 See *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 373 [104] (Gummow J), citing *O'Sullivan v Noarlunga Meat Ltd* (1954) 92 CLR 565 at 594.

"yes", the FMA Act and regulation are valid to at least that extent, with its further effect in other cases to await a later matter. The validity of any particular arrangement or grant would then depend on whether it was, in fact, an arrangement or grant for the purposes of the specified program (a matter not in issue here).

(3)(b) The Plaintiff's argument that s 32B is not a "law" – either at all or with respect to relevant heads of legislative power

26. Next, the Plaintiff contends that s 32B is invalid even if it is read in the manner for which the Commonwealth contends above, because it purports to confer upon the Executive power to make, vary or administer such arrangements or grants as the Executive determines should be made by regulation (provided they relate to some subject matter within the reach of Commonwealth legislative power). This submission appears to be put on the basis that there is nothing in the regulation-making power in s 65 of the FMA Act "to constrain the discretion conferred by the combination of ss 32B and 65 upon the Commonwealth Executive to determine, by regulation, the arrangements or grants which it is or will be empowered to make, vary or administer".[35] This, it is said, has the consequence that s 32B cannot be a "law".[36]

27. This argument must be rejected. Much the same argument, which like the Plaintiff's argument in this case was based on Latham CJ's remarks in *Commonwealth v Grunseit*,[37] was rejected in *New South Wales v Commonwealth* (***Work Choices***).[38] There are many cases that establish that there is nothing impermissible about the "delegation of a legislative power by the Parliament to the Executive in such terms that the repository of the power is free to exercise its own discretion and judgment".[39] Regulation-making powers expressed in very wide terms are routinely upheld.[40]

28. While ss 32B and 65 of the FMA Act give the Executive a wide discretion as to the grants or arrangements that might be supported, the regulation-making power takes its place within the context of a set of provisions that have the specific purpose of authorising spending (and related administration). The "ambit of the power must be ascertained by the character of the statute and the nature of the provisions it contains", and in that context the delegation of legislative power can be seen to have occurred for a specific purpose.[41] Further, Parliament retains the power to take back or confine the authority it has granted to the Executive at any time. That is important because, as Mason CJ, Dawson and McHugh JJ said in *Capital Duplicators Pty Ltd v Australian Capital Territory*,[42] in a passage has been approved on many occasions:[43]

---

35 Plaintiff's submissions at [61] and [64].

36 Plaintiff's submissions at [62], [65].

37 (1943) 67 CLR 58 at 82.

38 (2006) 229 CLR 1 at 176 [400] and 181 [416]-[417]. Nor can any useful analogy be drawn with the hypothetical example discussed in *Plaintiff S157 v Commonwealth* (2003) 211 CLR 476 at 512-512 [102].

39 *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248 at 265 (citing earlier authority).

40 See, eg, *R v Halton; Ex parte AUS Student Travel Pty Ltd* (1978) 138 CLR 201 at 209; *Esmond Motors v Commonwealth* (1969) 120 CLR 463 at 476.

41 *Morton v Union Steamship Co of New Zealand Ltd* (1951) 83 CLR 402 at 410, quoted in *Work Choices* (2006) 229 CLR 1 at 180 [415].

42 (1992) 177 CLR 248 at 265; see also 281. See further *Permanent Trustee v Commissioner of State Revenue* (2004) 220 CLR 388 at 420-421 [77]-[78] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ).

> There are very considerable difficulties in the concept of an unconstitutional abdication of power by Parliament. So long as Parliament retains the power to repeal or amend the authority which it confers upon another body to make laws with respect to a head or heads of legislative power entrusted to the Parliament, it is not easy to see how the conferral of that authority amounts to an abdication of power. And, in the present case, Parliament not only retains its power of repeal, but also provides, by means of ss. 29 and 35, for the disallowance of enactments of the Assembly.

29. Viewed from the perspective of characterisation, s 32B is a law with respect to each and every head of legislative power that may be relevant to the expenditure of public money. The identified purpose of s 32B means that it does not have "such a width or such an uncertainty of the subject matter to be handed over" that it cannot be characterised as a law with respect to heads of legislative power.[44] It is analogous to the provisions of the *Director of Public Prosecutions Act 1983* that empower Commonwealth officers to prosecute offences under State law. In *R v Hughes*,[45] this Court did not characterise those provisions as laws with respect to any particular head of power. Instead, it held that they were "supported by as many heads of power as from time to time have been exercised by the Parliament to create offences against Commonwealth laws".[46]

(3)(c) The Plaintiff's argument that s 32B offends an implied constitutional limitation concerning Senate engagement

30. Next, the Plaintiff contends that s 32B is invalid because it is inconsistent with an implied constitutional limitation on the power of the Executive to implement policies and spend money without the engagement of the Senate beyond the appropriation process.

31. This argument does not fall for determination because, as noted above at [19]-[20], the Senate was directly involved in enacting s 32B of the FMA Act and reg 16 and item 407.013 of Sch 1AA. The Plaintiff seeks to answer that point by contending that, if s 32B cannot operate validly with respect to any new and later regulations made under s 65 of the FMA Act, then s 32B was always invalid from the outset, even with respect to those provisions of Sch 1AA to the FMA Regulations that were inserted directly by Parliament.[47]

32. That argument should be rejected, because even if the Plaintiff could establish that the operation of s 32B cannot be extended by regulations because any such extension would not sufficiently engage the Senate (which is denied, for reasons addressed below at [33]-[51]), that argument would not impugn the validity of s 32B as it operates upon Sch 1AA in the form it took as a result of the enactment of the FFLA Act. The provisions of the FFLA Act, including the amendments made to the FMA Regulations, would operate in the same way with respect to all the grants and arrangements that it

---

43 *Gould v Brown* (1998) 193 CLR 346 at 487 [287]; *R v Hughes* (2000) 202 CLR 535 at 574-575 [94]; *Bymes v The Queen* (1999) 199 CLR 1 at 10-11 [4].

44 *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 at 101 (Dixon J).

45 (2000) 202 CLR 535 at 555 [40]; see also 557 [43].

46 There is also no conceptual difference between s 32B and various other important and longstanding statutory provisions such as s 62A of the *Audit Act 1901* discussed below at [50].

47 Plaintiff's submissions at [87].

authorises, even if regulations cannot validly be made extending the operation of s 32B. In those circumstances, it would be a simple and correct matter to read down ss 32B and 65 so that they apply only to the programs originally specified in the FFLA Act.[48] Once it is recognised that such a reading down would be available if required, it follows that there is no occasion to consider whether the operation of s 32B can in fact be extended by regulation, that not having occurred in the context of the NSCSWP.

33. Even if item 407.013 had been prescribed by regulation by the Governor-General under ss 32B and 65 of the FMA Act, those provisions would be consistent with the constitutional role of the Senate in relation to legislation authorising expenditure, and thus would be valid. Three factors, taken together, support that conclusion.

34. First, s 32B does not appropriate the CRF. The appropriations authorising the application of money for all the programs and grants prescribed in Sch 1AA are, just like those supporting the NSCSWP, found in the annual Appropriation Acts.

35. The Plaintiff contends that permitting annual Appropriation Acts to be used to authorise expenditure by the Executive would undermine the "proper" relationship between the Senate and Executive. In so contending, the Plaintiff ignores or overlooks the fact that, as Heydon J noted in *Williams*, "[i]n practice and by right, the Senate takes a very active role in controlling and monitoring executive expenditure".[49]

36. The Senate does so "by right" because of its power under s 53 of the Constitution to request amendments and omissions to an Appropriation Bill for the ordinary annual services of Government, underpinned by its ultimate power to reject such a Bill. As *Odgers' Australian Senate Practice,* points out, although "the provisions of section 53 are usually described as limitations on the power of the Senate in respect of financial legislation, ... they are procedural limitations only, not substantive limitations on power, because the Senate can reject any bill and can decline to pass any bill until it is amended in the way the Senate requires". In this respect, "[t]he only effect of choosing a request instead of an amendment is that the bill makes an extra journey between the Senate and the House".[50]

37. The Senate controls and monitors executive expenditure "in practice" by scrutinising the Portfolio Budget Statements (**PBS**) and the Portfolio Additional Estimates Statements (**PAES**) which, as explained below, give content to the annual Appropriation Acts by setting out the details of proposed expenditure, and by the Senate Committee process which allows the Senate to review estimates of expenditure and scrutinise the performance of the Executive more generally.[51] Senate

---

48 *Acts Interpretation Act 1901* s 15A; *Pidoto v Victoria* (1943) 68 CLR 87 at 110-111; *Victoria v Commonwealth (Industrial Relations Case)* (1996) 187 CLR 416 at 502-503; *R v Hughes* (2000) 202 CLR 535 at 557 [43].

49 *Williams* at 317 [396].

50 *Odgers' Australian Senate Practice*, 13th ed (2012), (***Odgers***) at 345, CBAM 164.

51 See Senate Standing Order 25(2)(a), CBAM 13. The legislation committees also have access to numerous documents other than the Budget Papers and the PBS and PAES. The Senate has made a number of orders of continuing effect that require Ministers to table certain information and documents. For example, each Minister in the Senate, in respect of each department or agency administered by that Minister, or by a Minister in the House of Representatives represented by that Minister, is required to table a list of all grants approved in each portfolio or agency. The list must include the value of the grant, the recipient of the grant and the program for which the grant was

Standing Order 26(1) requires that annual and additional estimates, set out in the PBS or PAES and related budget documentation, be referred to the relevant legislation committee of the Senate for examination and report.[52]

38. In recent times, Senate legislation committees have devoted extraordinary attention– with close to 700 hours of hearings each year – to reviewing estimates of expenditure.[53] The Parliament's 2014 sitting calendar shows that the Senate has allocated 16 days to the review of estimates of expenditure. This review can extend to government expenditure generally, but the primary focus of these committees is on expenditure under the annual Appropriation Acts.[54]

10 39. The amount of effort and time the Senate spends in approving and scrutinising expenditure under the annual Appropriation Acts is particularly significant given that the legislative program of Parliament deals with many matters other than public expenditure and that, even within that field, about 15 per cent of total government expenditure is now subject to annual parliamentary approval in the annual Appropriation Bills.[55]

40. In 1909-1910, the proportion of Commonwealth Government expenditure appropriated through the annual appropriation process was 90%. In 1969-1970 it was 44%, and in 1992-1993 it was 26%.[56] The decreasing proportion of public expenditure subject to periodic approval by the Senate through annual appropriations, and the corresponding
20 increasing reliance on legislative authorisation to spend supported by standing appropriations, is regularly cited as reducing the Senate's ability to exercise effective control over public expenditure.[57] Where a program is supported by separate primary legislation containing a standing appropriation, the Senate does not thereafter have the ability each year to bring the program to an end or control expenditure under it by insisting on changes to the annual Appropriation Bills necessary to fund the program. The annual appropriation process allows this involvement.

41. Secondly, it is important to understand the nature of the power conferred by s 32B and Sch 1AA. The enactment of s 32B and Sch 1AA was intended only to remove any

---

made (24 June 2008, Senate Journal No 19, 590, CBAM 119). The Senate also requires agencies to disclose information about the contracts they have entered into (see the order made by the Senate on 20 June 2001 (Senate Journal No 192, 4538) and subsequently amended on multiple occasions, CBAM 104-114). Moreover, in practice, agency annual reports are scrutinised as part of the additional estimates process. Those reports must be tabled in Parliament and be prepared in accordance with guidelines approved on behalf of the Parliament by the Joint Committee of Public Accounts and Audit (*Public Service Act 1999* ss 63 and 70). An annual report must include any information specifically required by statute (eg, s 57(7) of the FMA Act requires a copy of the audited financial statements and the Auditor-General's reports to be included in each agency's annual report).

52 CBAM 16.

53 Department of the Senate, *Annual Report 2011-12* at 72, CBAM 131. Any Senator may attend a meeting of a legislation committee in relation to estimates, question witnesses and participate in the deliberations of the committee and add a reservation to a report relating to estimates: Senate Standing Order 26(8), CBAM 17. Senators have asked at least 130 questions about the NSCP/NSCSWP during the period 1 July 2011 to the present, CBAM 31-100.

54 *Odgers* at 468, CBAM 170.

55 *Odgers* at 379-380, CBAM 166-167.

56 *Odgers* at 379, CBAM 166.

57 *Odgers* at 378-380, CBAM 165-167.

deficiency in executive power to spend and enter into related funding agreements which had arisen as a result of the decision in *Williams*.[58] Section 32B and the regulations, by allowing the areas in which the Executive may spend to be marked out, does not alter or enhance the nature of the power that may then be exercised by the Executive within those areas.

42. Accordingly:

    42.1. Section 32B does not involve the Parliament delegating "regulative"[59] power to the Executive.[60]

    42.2. Section 32B does not permit a regulation to exclude the application of State laws and, for that reason, a prescribed spending program or grant enjoys no greater level of immunity from State law than would otherwise be the case.

43. The Plaintiff and the supporting interveners do not indicate what level of engagement by the Senate would be necessary to bring a regime permitting spending and contracting within the executive power of the Commonwealth. Presumably, they contemplate that such authorisation must be provided by primary legislation. But that would be impractical in the extreme and subvert the relationship between the Ch I and Ch II arms of government.[61]

44. The terms of Sch 1AA to the FMA Regulations show that there are literally hundreds of spending programs and grants that arguably require legislative permission or recognition in light of the decision in *Williams*. It is highly impracticable, given the other demands on parliamentary time, for each spending program or grant – whether small or large, routine or urgent – to be authorised by primary legislation, particularly given the parliamentary consideration already afforded to the Government's spending proposals in the context of the Budget and additional estimates. Further, as explained above at [40], requiring primary legislation in every case may tend to reduce the ability of the Senate to control public expenditure by increasing the use of standing appropriations.

45. Thirdly, any regulations made under s 65 of the FMA Act for the purposes of Sch 1AA are disallowable by either House of Parliament pursuant to s 42 of the *Legislative*

---

58 Commonwealth, *Parliamentary Debates*, House of Representatives, 26 June 2012, 8041 (Nicola Roxon MP, Attorney-General), CBAM 28.

59 *Attorney-General of the Commonwealth of Australia v The Queen* (1957) 95 CLR 529 at 540.

60 Section 32B does not, for example, allow the Executive by regulation to impose a tax, prescribe an offence, or dispense with the requirements of a Commonwealth law. As such, the power of delegated authority conferred by s 32B has nothing in common with that considered in cases such *Baxter v Ah Way* (1909) 8 CLR 626 or *Giris Pty Ltd v Federal Commissioner of Taxation* (1969) 119 CLR 365. Still less is s 32B analogous to the legislation considered in *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73, where the relevant regulation-making power extended to making legislation that was inconsistent with Commonwealth Acts.

61 As Evatt J said at first instance in *New South Wales v Bardolph* (***Bardolph***) (1934) 52 CLR 455 at 471, to require a clear reference by Parliament to particular payments "would reduce almost to a nullity the responsibility of Ministers for the ordinary course of governmental administration, and would compel Parliament to devote all its time and attention to administrative, as distinct from legislative, duties".

Instruments Act 2003 (**LI Act**).[62] The Plaintiff asks the Court to disregard that fact.[63] Section 42 of the LI Act would undoubtedly have been relevant to any attack on the validity of s 32B had it been re-enacted as part of the FMA Act. It is not deprived of that relevance by the fact that it is located in legislation that applies generally with respect to legislative instruments made under all Commonwealth Acts. Consistently with this, the existence of disallowance powers has been relied upon by this Court in rejecting challenges to other powers to make delegated legislation.[64]

46. The Plaintiff then submits that s 42 of the LI Act should be disregarded because "it is neither an inevitable nor an immutable feature of the context in which s 32B of the FMA Act was enacted".[65] But s 42 could be repealed only with the agreement of the Senate.[66] It is part of the legislative context until the Senate decides otherwise.

47. Finally, the Plaintiff points to the breadth of the purposes of spending prescribed in the annual Appropriation Acts as impermissibly weakening the accountability of the Executive to the Parliament by allowing the Executive to spend on new policies which have not been disclosed to the Parliament.[67] This ignores both: (a) the fiscal realities of a Commonwealth Budget; and (b) the means which exist and are exercised by the Senate to ensure that amounts appropriated are applied for the specific purposes and programs identified by the Executive in the budget papers (eg, the PBS and PAES).

48. With respect to the fiscal realities of a Budget, no amount is brought to account in an annual Appropriation Act unless it is referable to a specific activity or enterprise, and expenditure on that activity or enterprise has survived the Government's expenditure review process. It is not possible for appropriated amounts to be applied for other activities and enterprises without the Government abandoning those activities and enterprises which it has said it wishes to pursue.

49. With respect to the means available to the Senate, it is necessary to note the power that the Senate has through its committee process and standing disclosure

---

62 Section 42 of the LI Act permits the disallowance of "a legislative instrument or a provision of a legislative instrument" (emphasis added). It follows that the submission of New South Wales (at [37]) that "s 42 does not permit of partial disallowances" with the result that the "two Houses would face an all or nothing choice with respect to any amending instrument" must be rejected. It is perfectly possible for either House to disallow an individual item.

63 The Plaintiff seeks to rely upon Latham CJ's observation in the *South Australia v Commonwealth* (1942) 65 CLR 373 (*First Uniform Tax Case*) that an otherwise valid Act does not become invalid by reason of the enactment of other Acts. But Latham CJ did not suggest that the validity of legislation must be assessed independently of the context in which it operates, and plainly that is not so.

64 See, eg, *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248 at 265 (Mason CJ, Dawson and McHugh JJ); *Permanent Trustee v Commissioner of State Revenue* (2004) 220 CLR 388 at 420-421 [77]-[78] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ).

65 Plaintiff's submissions at [90]-[91].

66 The Plaintiff also suggests (at [93]) that a regulation could be made, and spending could occur, before the Senate had an opportunity to disallow a regulation (as, for example, with regulations made during a Senate recess). The decision in *Williams* was not concerned with isolated payments satisfying one-off demands for Commonwealth funding. It was concerned with the ability of the Executive to engage in ongoing spending programs. Given the mechanisms the Parliament has put in place to prevent circumvention of the disallowance regime (including provisions that prohibit the remaking of regulations while they are required to be tabled or subject to disallowance (LI Act ss 46 and 47), or within 6 months of having been disallowed (LI Act s 48)), any such spending program could not proceed in the face of Senate opposition. The NSCSWP is obviously such a program.

67 Plaintiff's submissions at [78].

requirements to monitor the extent to which actual expenditure by the Executive corresponds to the specific programs and enterprises identified in the PBS and PAES (see again [37]-[38]). As Gleeson CJ said in *Combet v Commonwealth*: "the higher the level of abstraction, or the greater the scope for political interpretation, involved in a proposed outcome appropriation, the greater may be the detail required by Parliament before appropriating a sum to such purpose; and the greater may be the scrutiny involved in review of such expenditure after it has occurred".[68] The Senate's continuing acceptance of outcome appropriations is indicative of the detail provided by the Executive to the Senate in relation to proposed expenditure, and of the capacity of the Senate to verify that expenditure was made consistently with that detail.

50. The Senate's control of public expenditure under the regime established by s 32B and Sch 1AA is very much greater than the control it had over expenditure under trust accounts established by the Treasurer or Finance Minister in accordance with s 62A of the *Audit Act 1901*. For 90 years, s 62A allowed the Treasurer, and then the Finance Minister, to establish trust accounts as components of the Trust Fund and to specify the purposes for which amounts could be paid out of those components.[69] Often, the only involvement of the Senate was in enacting the appropriation which permitted a specified amount to be debited from the CRF and credited to the trust account.[70]

51. By contrast, in enacting s 32B and subjecting the regulations that relate to that power to the disallowance regime, Parliament has for the first time disjoined the annual appropriation process from the parliamentary process authorising expenditure for the purposes of those appropriations. That disjuncture results in an extremely significant accretion of power to the Senate vis-a-vis the House of Representatives and the Executive. The notion that, despite all this, s 32B does not sufficiently engage the Senate should be rejected.

(4) Section 32B of the FMA Act: specific arguments

(4)(a) Section 32B is supported by the student benefits power (s 51(xxiiiA))

52. Section 32B, read together with the FMA Regulations (and specifically item 407.013 of Sch 1AA), validly confers on the Commonwealth the power to make, vary or administer an arrangement or grant for the purposes of the NSCSWP (including the Funding Agreement, a term of which requires compliance with the Guidelines), because in that operation s 32B is a law with respect to the provision of benefits to students within the meaning of s 51(xxiiiA) of the Constitution.

---

68 (2005) 224 CLR 494 at 523.

69 A standing appropriation authorising the expenditure for the purposes of a trust account determined by the Treasurer or Finance Minister was provided, to the extent necessary, by s 62A(6): *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555 at 577-578, 593. The ministerial establishment of the trust account and the prescribing of its purposes were not, unlike the regulations now made for the purposes of Sch 1AA, subject to disallowance by the Senate.

70 See *New South Wales v Commonwealth* (***Surplus Revenue Case***) (1908) 7 CLR 179 in relation to *Coast Defence Appropriation Act 1908*; cf *Northern Suburbs General Cemetery Reserve Trust*, where the crediting of the Trust occurred under the *Training Guarantee (Administration) Act 1990*.

(4)(a)(i) General principles

53. Section 51(xxiiiA) of the Constitution provides that the Commonwealth Parliament has power to make laws with respect to "[t]he provision of maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services (but not so as to authorise any form of civil conscription), benefits to students and family allowances."

54. That paragraph was added to the Constitution in 1946.[71] The "main purpose of the alteration of the Constitution now embodied in s.51 par. (xxiiiA.) was to empower the Commonwealth Parliament to legislate to spend its moneys on a wider range of social services than those authorised by s. 51, par. (xxiii.)."[72]

55. While s 51(xxiiiA) is the result of a constitutional amendment rather than part of the original text of the Constitution, it is nevertheless a grant of legislative power. As such, the principles applicable to its construction are well settled.

55.1. First, when interpreting a grant of power, the appropriate approach "is simply to read the paragraph and to apply it without making implications or imposing limitations which are not found in the express words".[73] The Constitution "should be construed with all the generality which the words used admit".[74] That is appropriate as the Constitution is "an instrument of government meant to endure and conferring powers expressed in general propositions wide enough to be capable of flexible application to changing circumstances."[75] This approach is just as applicable to s 51(xxiiiA) as to any other grant of power. As Williams J put it in the *BMA Case*, "[t]he new paragraph is of course plenary in its fullest sense and must, like every other legislative power in the Constitution, be given a wide and liberal interpretation".[76]

55.2. Secondly, if a law fairly answers the description of a law with respect to two subject matters, one of which is within s 51 and the other which is not, the law is valid notwithstanding that there is no independent connection between the two subject matters.[77] Accordingly, if a law is a law with respect to the provision of benefits to students, it is valid whether or not it could also have been characterised in some other way (eg, as a law with respect to education).

---

71 *Constitution Alteration (Social Services) 1946*.

72 *British Medical Association v Commonwealth* (***BMA Case***) (1949) 79 CLR 201 at 286 (Williams J).

73 *R v Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways Pty Ltd* (1964) 113 CLR 207 at 225.

74 *Work Choices* (2006) 229 CLR 1 at 103 [142] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ); *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479 at 492 [16]; *R v Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways Pty Ltd* (1964) 113 CLR 207 at 225-226.

75 *Australian National Airways Pty Ltd v Commonwealth* (1945) 71 CLR 29 at 81 (Dixon J). See the similar approach in *McCulloch v Maryland* 17 US 316 (1819) at 407 (Marshall CJ).

76 *BMA Case* (1949) 79 CLR 201 at 286 (Williams J). See also at 247 (Latham CJ) and 279-280 (McTiernan J).

77 *Work Choices* (2006) 229 CLR 1 at 103-104 [142] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ); *Murphyores Inc Pty Ltd v Commonwealth* (1976) 136 CLR 1 at 11-12 (Stephen J).

55.3. Thirdly, the Court should construe s 51 without seeking to avoid overlap between the various subjects enumerated in its various paragraphs, for those grants are not to be regarded as though their subjects were mutually exclusive.[78]

55.4. Fourthly, where there is a question as to whether a term in a grant of legislative power is used in a wider or narrower sense, the Court should generally favour the broader interpretation.[79] That approach underpins the accepted understanding of many different heads of Commonwealth legislative power.[80]

55.5. Fifthly, "if a sufficient connection with the head of power does exist, the justice and wisdom of the law, and the degree to which the means it adopts are necessary or desirable, are matters of legislative choice".[81] Further, it is not appropriate to test an interpretation of the Constitution against extreme scenarios or by "imagining conditions in which its operation might cease to be just".[82]

56. Having regard to the above principles, there is no warrant for giving a confined or restricted meaning to the word "benefit" or, more particularly, to the phrase "benefits to students" in s 51(xxiiiA). As McHugh J explained in *Re Wakim; Ex parte McNally*:[83]

> many words and phrases of the Constitution are expressed at such a level of generality that the most sensible conclusion to be drawn from their use in a Constitution is that the makers of the Constitution intended that they should apply to whatever facts and circumstances succeeding generations thought they covered. ... [T]he test is simply: what do these words mean to us as late twentieth century Australians? Such an approach accords with the recognition ... that our Constitution was "made, not for a single occasion, but for the continued life and progress of the community".

57. In *Alexandra Private Geriatric Hospital Pty Ltd v Commonwealth* (***Alexandra Hospital Case***),[84] the Court approved the explanation of the meaning of "benefit" offered by McTiernan J in the *BMA Case*:[85]

> The material aid given pursuant to a scheme to provide for human wants is commonly described by the word "benefit". When this word is applied to that subject matter it signifies a pecuniary aid, service, attendance or commodity made available for human beings under legislation designed to promote social welfare or security: the word is also applied to such aids made available through a benefit society to members or their dependants. The word 'benefits' in par. (xxiiiA.) has a corresponding or similar meaning.

---

78 *Actors & Announcers Equity Association of Australia v Fontana Films Pty Ltd* (1982) 150 CLR 169 at 191-194; *Russell v Russell* (1976) 134 CLR 495 at 539.

79 See *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 367-368 (O'Connor J), in a celebrated passage that has been applied many times by this Court.

80 See, eg, the discussion of its application to s 51(xxix) in *XYZ v Commonwealth* (2006) 227 CLR 532 at 550-551 [43]-[45] (Gummow, Hayne and Crennan JJ).

81 *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479 at 492 [16]; *Work Choices* (2006) 229 CLR 1 at 104 [142] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

82 *Grace Brothers Pty Ltd v Commonwealth* (1946) 72 CLR 269 at 292 (Dixon J).

83 (1999) 198 CLR 511 at 552-553 [44] (citations omitted).

84 *Alexandra Hospital Case* (1987) 162 CLR 271 at 280.

85 *BMA Case* (1949) 79 CLR 201 at 279 (emphasis added). See also at 246 (Latham CJ), 260 (Dixon J), 286-287 (Williams J) and 292 (Webb J). See also *Williams* at 277-278 [276] and 280 [283] (Hayne J) and 366-367 [571] (Kiefel J).

58. Thus the meaning of the word benefits "is not confined to a grant of money or some other commodity. It may encompass the provision of a service or services."[86] The conclusion that a "benefit" may take the form of the provision of a service is supported by the internal structure of s 51(xxiiiA), some limbs of which expressly denote payments of various kinds – eg, pensions and allowances – while others, including "benefits to students", are not so limited. The fact that "benefits" can take the form of the provision of a service is the reason why, in the *Alexandra Hospital Case*, the Court thought it mattered not whether the relevant benefit was identified as the payment of money to the nursing home proprietor, or the provision of accommodation to patients which that payment procured.[87]

59. No doubt the reference in s 51(xxiiiA) to the "provision of" benefits is to be understood as the provision of those benefits by the Commonwealth.[88] But that does not mean that benefits must be provided by the Commonwealth directly,[89] as is illustrated by both the *BMA Case*[90] and the *Alexandra Hospital Case*.[91] In the latter case, the Court said:[92]

> If it be accepted ... that the Parliament could legislate for the establishment of Commonwealth hospitals to provide nursing home care directly to patients in need of such care, there can be no objection to it adopting ... "a private enterprise approach to the problem" ... by inviting proprietors of private nursing homes voluntarily to undertake to provide the necessary services in return for a government subsidy.

60. The Plaintiff concedes that a "benefit" may take the form of a service, but he contends that it is only in the limited context of "payments to or for ... patients in relation to services provided to them" that the "provision of "benefits" ... can be taken to include the provision of services".[93] But if, as contemplated by the *Alexandra Hospital Case*, s 51(xxiiiA) would allow the Commonwealth to establish its own hospitals, that submission cannot be correct. The provision of "hospital benefits" in the form of the direct provision of hospital services (or payments to a third party to operate a hospital) would not involve services being "provided to a specific individual as the 'quid pro quo' for the Commonwealth's largess".[94] Funding would be provided to create and operate hospitals, which would then provide a benefit to individuals capable of identification only at the point that they sought to utilise the services available at the hospitals.

61. In light of the above authorities (both concerning the applicable principles of construction, and the scope of s 51(xxiiiA)), it is submitted that it is sufficient for a law to be a law with respect to the provision of benefits to students if:

---

86 *Alexandra Hospital Case* (1987) 162 CLR 271 at 280. See also *BMA Case* (1949) 79 CLR 201 at 230 (Latham CJ), 260 (Dixon J), 279 (McTiernan J), 292 (Webb J); *Williams* at 278 [277] (Hayne J), 329 [429] (Heydon J), 366-367 [571] (Kiefel J).

87 (1987) 162 CLR 271, 281.

88 *Alexandra Hospital Case* (1987) 162 CLR 271 at 279; *BMA Case* (1949) 79 CLR 201 at 243 (Latham CJ), 254 (Rich J), 260 (Dixon J), 279 (McTiernan J), 292 (Webb J).

89 *Williams* at 277 [275] and 278-279 [278] (Hayne J), 328 [426], 329 [429] (Heydon J) and 367 [573] (Kiefel J); *BMA Case* (1949) 79 CLR 201 at 261, 266 (Dixon J). See also at 246 and 247 (Latham CJ).

90 In that case it was not fatal to the validity of the impugned legislation that it provided for Commonwealth funding of the provision of medicines by private chemists.

91 *Alexandra Hospital Case* (1987) 162 CLR 271 at 280; *BMA Case* (1949) 79 CLR 201 at 280.

92 *Alexandra Hospital Case* (1987) 162 CLR 271 at 282.

93 Plaintiff's submissions at [144].

94 Plaintiff's submissions at [145].

61.1. the law provides for payments to be made by the Commonwealth to a third party in consideration for the third party providing a service;

61.2. that service is "made available" to students who wish to take advantage of it from time to time (or, if a service is not provided directly to a student, it is provided to another person in circumstances where the provision of that service can be expected to provide an indirect benefit to students); and

61.3. the service is provided as a "method of responding to a perceived need"[95] of students (or to provide for the "human wants" of students).

62. It is no part of the function of the Court to decide whether the provision of a particular service is in fact beneficial or efficacious.[96] As Latham CJ said in the *BMA Case*, pursuant to s 51(xxiiiA) "provision might have been made for the supply of drugs and medicines by merely giving them away to all applicants without any precautions to secure that they were needed by or would be useful to the applicants".[97] The judgment whether a program to provide services to students is appropriate to meet the needs or "human wants" of students is a judgment for Parliament, the wisdom of any particular law being "entirely for the Legislature and not for the Judiciary".[98]

63. A law authorising expenditure on a particular program has a sufficient connection with s 51(xxiiiA) if its connection with that head of power is not "so insubstantial, tenuous or distant" that it cannot properly be described as a law "with respect to" the provision of benefits to students.[99] That test acknowledges that "the words 'with respect to' in s 51 of the Constitution are words of very wide connection and deliberately so".[100] Legislation supporting a program for the provision of services to meet a perceived need of students plainly has such a connection.

64. There are, of course, limits. Section 51(xxiiiA) does not support a law providing for the compulsory receipt of a benefit or service.[101] Nor would it be sufficient to engage s 51(xxiiiA) that legislation supports a program that merely happens to apply to students (as, for example, where a program is established to provide benefits to a wide class of persons, some of whom happen to be students). That follows from the fact that, unlike the other powers in s 51(xxiiiA), the power with respect to the provision of

---

95 *Williams* at 330 [434] (Heydon J).

96 The parties agree on this point, and the Commonwealth does not take the position attributed to it in [122] of the Plaintiff's submissions.

97 *BMA Case* (1949) 79 CLR 201 at 245.

98 *Burton v Honan* (1952) 86 CLR 169 at 179 (Dixon CJ). As Brennan J observed in a somewhat analogous context in *Gerhardy v Brown* (1985) 159 CLR 70 at 138: "When the character of a measure depends on such a political assessment, a municipal court must accept the assessment made by the political branch of government which takes the measure. It is the function of a political branch to make the assessment. It is not the function of a municipal court to decide ... whether the political assessment is correct". See also at 161-162 (Dawson J); *Western Australia v Commonwealth* (1995) 183 CLR 373 at 460-461.

99 *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31 at 79 (Dixon J); *Re Dingjan* (1995) 183 CLR 323 at 369 (McHugh J); *Leask v Commonwealth* (1996) 187 CLR 579 at 621-622 (Gummow J), 633-634 (Kirby J); *Cunliffe v Commonwealth* (1994) 182 CLR 272 at 314-315 (Brennan J); *Tasmanian Dam Case* (1983) 158 CLR 1 at 152-153 (Mason J); *Bourke v State Bank of NSW* (1990) 170 CLR 276 at 289.

100 *Leask v Commonwealth* (1996) 187 CLR 579 at 633 (Kirby J).

101 *BMA Case* (1949) 79 CLR 201 at 279 (McTiernan J). See also at 276-277 (Dixon J).

benefits to students is defined in part by the character of the recipient of the benefit. But where a program defines the persons who may receive a service by reference to their status as students, and where access to that service is voluntary, a sufficient connection exists. Such a connection also exists where a service may be provided to persons who are not themselves students, but where the service provides an indirect benefit to students.

(4)(a)(ii) Application of general principles to the NSCSWP

65. Section 32B of the FMA Act, when read with item 407.013 in Sch 1AA, is properly characterised as a law with respect to the provision of benefits to students because:

65.1. it provides for the Commonwealth to make payments to a third party in consideration for the third party providing a service within participating schools (the indirect provision of benefits having been upheld in the *BMA Case* and the *Alexandra Hospital Case*);

65.2. the services that are provided pursuant to the NSCSWP are those that each individual school community perceives and identifies as services that are needed to provide for the welfare or wellbeing of their students, and it is those services that are "made available" to students who wish to take advantage of them from time to time. The requirement that a school request the provision of particular services (and choose the form thereof) ensures that there is a nexus between the services that are provided and the needs of the students. (Again, that is consistent with the *BMA Case*, where a scheme for the subsidisation of pharmaceuticals provided benefits only to persons who from time to time needed pharmaceutical products.)

66. The provision of services under the NSCSWP is a method of responding to a perceived need of students that has a direct connection, rather than an "insubstantial, tenuous or distant" connection, with the provision of benefits to students. Consistent with [62] above, while it is not for the Court to decide whether a particular service successfully meets the needs of students, it may receive material to confirm that the relationship between the provision of a particular service and the needs of students is not insubstantial, tenuous or remote. For this purpose, the Commonwealth relies on the agreed fact that there is considerable evidence that programs addressing the wellbeing of students,[102] including programs provided by SUQ at the School,[103] and more generally,[104] provide substantial benefits to students.[105] Studies have evaluated wellbeing programs delivered to hundreds of thousands of students, and found that they:[106]

66.1. significantly enhanced students' social and emotional competence;

---

102 A significant proportion of chaplains and student welfare workers who provide services under the NSCSWP deliver social and emotional learning based student wellbeing programs, among other things: Special case at [70].

103 Special case at [61], [71]. See SCB CV 221 (point 4).

104 Special case at [62].

105 Special case at [66]-[74].

106 Special case at [68]. See also Special case at [69], [71]-[73].

66.2. significantly reduced or prevented behaviour and mental health problems or disorders, for example, truancy, dropping out of secondary school, aggression, criminal behaviour, misuse of drugs and alcohol and symptoms of mental health difficulties such as anxiety and depression;

66.3. significantly enhanced or promoted school-connectedness and positive attitudes and behaviours by students towards themselves, others and their school;

66.4. significantly enhanced academic achievement; and

66.5. benefited students from low socio-economic status and different ethnic backgrounds at least as much as other students (and often more).

67. Thus it is quite wrong to attempt, as the Plaintiff does, to equate the benefit provided by the NSCSWP with intercessory prayers by nuns in closed orders.[107]

68. The Commonwealth of course acknowledges that any consideration of whether s 32B of the FMA Act, when read with item 407.013 in Sch 1AA, is a law with respect to the provision of benefits to students must take account of the Court's decision in *Williams*. In *Williams*, four Justices did not decide whether s 51(xxiiiA) would support entry into a funding agreement, and expenditure under such an agreement, in relation to the NSCP.[108] Justice Heydon held that s 51(xxiiiA) would have supported entry into such a funding agreement, while Hayne J and Kiefel J held that it would not.

69. The Plaintiff adopts the reasoning of Hayne J concerning s 51(xxiiiA).[109] Justice Hayne held that the NSCP did not provide benefits to students because there was not "a payment of money by the Commonwealth for or on behalf of any identified or identifiable student for services rendered or to be rendered to that student".[110] While his Honour accepted that the word "benefit" may "encompass the provision of a service or services", he said that "it by no means follows that every provision of a 'service' is a 'benefit' within the meaning of s 51(xxiiiA)".[111] Justice Hayne held that "[w]hen the word 'benefits' is twice used in s 51(xxiiiA) the central notion that is being conveyed is a payment to or for an individual for provision of relief against the consequences of identified events or circumstances".[112] Payments for chaplains did not involve "benefits to students" because "[t]he payments that are made under the NSCP are not made to or for students. They are made to provide a service to which students *may* resort and from which they *may* derive advantage".[113]

70. Justice Kiefel likewise adopted a reading of the word "benefit" that excluded the NSCP, although there are differences between her Honour's approach and that of Hayne J. For example, Kiefel J held that benefits provided to students in reliance on s 51(xxiiiA)

---

107 cf Plaintiff's submissions at [123], citing *Gilmour v Coats* [1949] AC 426 at 446. An equivalent submission was rejected in *Williams* at 330 [434] (Heydon J).

108 *Williams* at 216-217 [83] (French CJ), 218 [91] (Gummow and Bell JJ, who expressly left this point open) and 356 [537] (Crennan J).

109 Plaintiff's submissions at [121].

110 *Williams* at 279 [279] (emphasis added).

111 *Williams* at 278 [277].

112 *Williams* at 279 [282] (emphasis added). See also at 279 [279].

113 *Williams* at 280 [285] (emphasis in original).

"must be provided to students as a class",[114] whereas Hayne J said that the central notion was "payments to or for an individual".[115] Further, while Kiefel J agreed with Hayne J that "the power to make provision for benefits to students is not a power to provide anything which may be *of benefit* to them", her Honour did not specify the criteria by reference to which services that provide "benefits to students" are to be distinguished from those that do not, save to refer to a concept of "social services":[116]

> In the present context, it [the word "benefits"] refers to social services provided to students. Social services provided to students might take the form of financial assistance, for example payment of fees and living and other allowances, or material assistance, such as the provision of books, computers and other necessary educational equipment, or the provision of services, such as additional tutoring. The term "benefits" in the context of s 51(xxiiiA) does not extend to every service which may be supportive of students at a personal level in the course of their education.

71. With respect, the reasoning adopted by Hayne J and Kiefel J concerning s 51(xxiiiA) should not be followed.

72. So far as existing authority is concerned, the proposition of Hayne J that the payment must be to or for an "identified or identifiable student", and against the "consequences of identified events and circumstances", such that it is not enough that a student may resort to the service from time to time for advantage, does not sit well with the substance of the decision and the reasoning in the *Alexandra Hospital Case*. If one focuses on the service in that case as the benefit, the service was provided to those persons who chose to reside in the nursing home from time to time; and the beneficiaries were identifiable by the decisions they made, and renewed on a daily basis, to form part of the group of persons residing in the home and to accept the services there offered, whether the services were to be enjoyed in a group setting or individually.

73. Likewise in the present case, the services are provided to those students, within the given school community, who choose to avail themselves from time to time of the offer from the chaplain/student welfare worker; and the student beneficiaries are then identifiable by the decisions they make, and renew on a daily or weekly basis, to receive the services, whether in a group setting or individually. While it would just add paperwork, it would be possible, if it were necessary, to identify the individual students benefiting from the service, by appropriate record keeping.

74. The only difference between the *Alexandra Hospital Case* and this one is a difference of payment structure. In the *Alexandra Hospital Case*, the payment formula was a set amount per patient per day;[117] in the present case, it is a lump sum for a minimum agreed number of hours of services provided in the school over a set period.[118] The fact that a different payment structure is employed in the present case, allowing greater flexibility in service delivery to the students, the school and the service provider, should not alter the constitutional analysis. The Commonwealth in each case,

---

114 *Williams* at 367 [573] (emphasis added).

115 *Williams* at 279 [282] (emphasis added).

116 *Williams* at 367 [572].

117 *Alexandra Hospital Case* (1987) 162 CLR 271 at 280.

118 See clause 2 of the Funding Agreement and item C.4 of Schedule 1 to that agreement.

through a payment of money to a service provider, provides a service to persons who have relevant needs (in one case, the needs of a patient in a nursing home, in the other case, the needs of a student in a school) in order to meet those needs. Just as choosing to meet the need directly or through a service provider makes no difference to the constitutional analysis, so choosing between different ways of funding a service provider makes no such difference.

75. Justice Hayne accepted that if the phrase "benefits to students" embraced "any and every form of provision of money or services that is of "advantage" to students", then "a law that provided for the Commonwealth's payment for provision of a chaplain (whether by paying the wages of the chaplain or by paying an intermediary like SUQ to provide a chaplain at one or more schools) would be a law with respect to the provision of benefits to students".[119] But his Honour rejected that construction for three reasons, none of which should be accepted:

75.1. First, because if "benefits" to students encompasses every form of payment that provides advantage, the power to legislate with respect to the provision of benefits to students would be "a large power which approaches a general power to make laws with respect to education".[120]

75.2. Secondly, the circumstances in which s 51(xxiiiA) was introduced into the Constitution showed that it was "evidently intended to provide federal legislative power with respect to the provision of various forms of social security benefit, including benefits which were then and for some time had been provided by the Commonwealth".[121] Justice Kiefel likewise treated this as a key consideration.[122]

75.3. Thirdly, if a broad understanding of "benefit" were adopted, the reference in s 51(xxiiiA) to "medical ... services" would be superfluous because "[e]very law for the provision by the Commonwealth of medical services would be a law with respect to the provision by the Commonwealth of a form of 'sickness and hospital benefits'".[123]

76. The first reason gives insufficient weight to the established principles governing the interpretation of grants of legislative power set out at [55] above. Whether s 32B of the FMA Act, when read with item 407.013 in Sch 1AA to the FMA Regulations, could be characterised as a law with respect to "education" is not the question. Further, this case should be decided on the law before the Court, not on a hypothetical law. The Commonwealth is not, by the law in question, purporting to exercise a general power to regulate education in Australia. It is not purporting to establish its own schools. The question raised by this case is this: recognising that there are schools, under State or private control, and allowing for the primary responsibility and control for the education of the students within those schools to remain where it currently lies, is there nevertheless a need of students that will be met by the provision on behalf of the Commonwealth of a service they may voluntary choose to utilise? A law of this sort is

119 *Williams* at 279 [280].

120 *Williams* at 279 [281].

121 *Williams* at 279 [281].

122 *Williams* at 366 [570] and 367 [573].

123 *Williams* at 280 [284].

a law with respect to the provision of benefits to students, however else it may also be characterised.

77. The second reason for confining the grant of power in s 51(xxiiiA) treats the legislative power conferred by s 51(xxiiiA) as if it is constrained by observations in Parliament,[124] or in the "Yes" case which supported its adoption, to the effect that the new clause was needed to ensure the validity of existing measures in the aftermath of *Attorney-General (Vic) (Ex rel Dale) v Commonwealth*[125] (***Pharmaceutical Benefits Case***).[126] But it cannot properly be presumed that the social welfare measures that existed in Australia in 1946 (let alone those that existed in the United Kingdom between 1896 and 1946[127]) represented Parliament's – or, more importantly, the electors' – settled view for all time as to the benefits that might appropriately be provided by the Commonwealth. Indeed, the second reading speech specifically envisaged that existing measures may be extended.[128] While the introduction of s 51(xxiiiA) was intended to ensure that the Commonwealth could continue to provide at least the social services that already existed in 1946, there is no basis for treating the social services that then existed as if they exhaust the meaning of the words inserted into the Constitution as s 51(xxiiiA).[129]

78. It is the meaning of the words used in s 51(xxiiiA) – and not any expectations that may have existed in 1946 as to the programs those words might support – that is relevant. It is no more permissible to limit the "benefits" that can be provided under s 51(xxiiiA) to those contemplated in 1946 than it would be to limit the concepts of "telephonic services" or "industrial disputes" by reference to services or disputes of the kind that existed in 1901. As McHugh J said in *Eastman v The Queen*:[130]

> Because the intention of the makers of the Constitution is one to be determined objectively, the present generation may see that the provisions of the Constitution have a meaning that escaped the actual understandings or intentions of the founders or other persons in 1900.

79. Further, even to the extent that the benefits that could be provided under s 51(xxiiiA) were to be limited by reference to benefits of the kind provided in 1946, one of the measures s 51(xxiiiA) was intended to support – the *Education Act 1945* – conferred on the Universities Commission the function to "arrange" for the training of discharged members of the forces and to "assist" other persons to "obtain training in Universities

---

124 Commonwealth, *Parliamentary Debates*, House of Representatives, 27 March 1946, 646-648 (H V Evatt MP, Attorney-General and Minister for External Affairs), CBAM 157-159.

125 (1945-1946) 71 CLR 237.

126 Commonwealth Electoral Office, *Referendums to be taken on the Proposed Laws: Constitutional Alteration (Social Services) 1946 ... : The Case For and Against* (1946).

127 These social welfare measures are examined at length in the Plaintiff's submissions at [125]-[132]. In light of the obvious advances in concepts of social security that occurred during the first half of the 20th century, there is no reason why legislative powers with respect to the provision of "benefits" of various kinds in s 51(xxiiiA) should be interpreted by reference, for example, to the legislative definition of "friendly societies" in the United Kingdom in the 1890s or by the coverage of the *National Insurance Act 1911* (UK). Applying the settled principles of constitutional interpretation discussed above at [55], material of this kind does not govern the proper construction of s 51(xxiiiA).

128 Commonwealth, *Parliamentary Debates*, House of Representatives, 27 March 1946, 649 (H V Evatt MP, Attorney-General and Minister for External Affairs), CBAM 160.

129 *Williams* at 326 [420] (Heydon J); *Cole v Whitfield* (1988) 165 CLR 360 at 385.

130 (2000) 203 CLR 1 at 46-47 [147] (citations omitted, emphasis added).

or similar institutions".[131] The Plaintiff's reference to "one of"[132] the functions of the Universities Commission being "to provide financial assistance to students" fails to grapple with the fact that the breadth of the functions of the Universities Commission under ss 14(a) and (b) of the *Education Act 1945* "falsify"[133] his submission that all of the schemes that existed in 1946 were schemes where the Commonwealth or an entity established by it either provided "financial assistance directly to the intended recipient of the benefits" or "substitut[ed] itself for each such intended recipient as the party responsible, either in whole or in part, for paying the cost of certain services provided to that recipient".[134] Section 14(b) of the *Education Act 1945* was one of the provisions that was the subject of the advice from various King's Counsel discussed in the second reading speech given by Dr Evatt in support of the amendment to introduce s 51(xxiiiA), and whose validity was on any view intended to be supported by that amendment.[135]

80. The third reason advanced by Hayne J for confining the grant of power in s 51(xxiiiA) does not sufficiently recognise that there are 11 separate grants of power in s 51(xxiiiA).[136] Even if ascribing a particular meaning to the word "benefits" as used in the context of the sickness and hospital benefits power would render the medical services power "superfluous" (which may be doubted), that "superfluity" would be no reason to read down the scope of the former power. Just as the scope of s 51(xxix) is not read down on the basis that it would entirely subsume the grant of power in s 51(xxx),[137] so is the case here.

81. In any event, there is no "superfluity". In the specific context of s 51(xxiiiA), this Court has recognised that "medical or dental services" might be provided pursuant to a law with respect to some other "benefit". It is for that reason that, while the Court has held that the "civil conscription" limitation applies only to "medical and dental services",[138] those words are nevertheless relevant to the scope of the other powers in s 51(xxiiiA), because they limit those powers "to the extent that ... medical or dental services are provided pursuant to a law with respect to the provision of some other benefit, e.g. sickness or hospital benefits".[139] That is to say, the words "medical and dental services" mark out the extent to which all heads of power are subject to a prohibition on civil conscription.

---

131 Section 14(a), (b). See *Williams* at 324 [414], 324-325 [417] (Heydon J).

132 Plaintiff's submissions at [141].

133 *Williams* at 325 [418] (Heydon J), rejecting the identical submission that had been made in that case.

134 Plaintiff's submissions at [140].

135 cf Plaintiff's submission at [138]; *Williams* at 325 [419] (Heydon J), pointing out that the same point can be made about the *National Fitness Act 1941* ss 3, 5 (which was concerned with the promotion of "national fitness" and "physical education in schools, universities and other institutions") and the *Re-establishment and Employment Act 1945* ss 48, 57, both of which are also inconsistent with the Plaintiff's submission.

136 *BMA Case* (1949) 79 CLR 201 at 259 (Dixon J); *Williams* at 329-330 [432] (Heydon J).

137 *New South Wales v Commonwealth* (1975) 135 CLR 337 at 471 (Mason J); *Ruhani v Director of Police* (2005) 222 CLR 489 at 527 [103]. The fact that "superfluity" is no reason to read down a grant of power is also powerfully illustrated by the Court's decision in *Work Choices* (2006) 229 CLR 1.

138 *Alexandra Hospital Case* (1987) 162 CLR 271 at 279; *BMA Case* (1949) 79 CLR 201 at 254, 261, 281-282, 286-287. The result of this limit is that the separate specification of medical and dental services fulfils a purpose, even if there is otherwise overlap between the various grants of power.

139 *Alexandra Hospital Case* (1987) 162 CLR 271 at 279.

82. Justice Heydon correctly held that s 51(xxiiiA) would have supported entry into the funding agreement and expenditure thereunder. He recognised that, as a grant of legislative power, s 51(xxiiiA) should be liberally construed. His Honour rejected submissions by the Plaintiff that were materially identical to the submissions advanced in this case, and held that the *BMA Case* and the *Alexandra Hospital Case* both pointed against the narrow construction propounded by the Plaintiff.[140] His Honour held that those cases did not support the Plaintiff's submission that "payment by the Commonwealth to a third party falls within s 51(xxiiiA) only if that payment relieved the person benefited from an obligation to reimburse the third party".[141] Instead, the power extends "to provide non-monetary benefits to students by financing others to provide those benefits. They need not be benefits for which the student would otherwise be obligated to pay".[142] His Honour held that the Commonwealth could have enacted a law providing for the NSCP as a law with respect to the provision of benefits to students, in part because:

82.1. Many school students encounter vicissitudes, either closely connected with studies or vicissitudes of youth rendered more acute by the school environment.[143]

82.2. The need for the services provided under the NSCP was identified by the staff at a given school, these staff being well placed to form judgments about the well-being of students within the school community and the extent to which they would benefit from the availability of additional services.[144]

82.3. Under the NSCP, services at a school were available to any student who needs them, depending on the student's particular circumstances from time to time.[145]

83. The fact that the Funding Agreement contemplates chaplains and student welfare workers making themselves available not just to students, but also to their teachers and families, does not take expenditure under the Agreement outside s 51(xxiiiA). As the Plaintiff acknowledges, students are "admittedly the most important members"[146] of the school community. There is a self-evident connection between the well-being of parents and teachers and that of students. The availability of chaplains and student welfare workers under the NSCSWP to others in the "school community" is properly regarded as incidental to the provision of benefits in the form of chaplaincy and student welfare services to students.[147]

84. For the above reasons, s 32B of the FMA Act, when read with item 407.013 in Sch 1AA, is properly characterised as a law with respect to the provision of benefits to students.

---

140 *Williams* at 326 [421].

141 *Williams* at 327 [425].

142 *Williams* at 329 [429].

143 *Williams* at 332 [438] (Heydon J).

144 *Williams* at 331 [435] (Heydon J).

145 *Williams* at 333 [440] (Heydon J).

146 Plaintiff's submissions at [149].

147 *Williams* at 333 [439] (Heydon J).

(4)(b) Section 32B is supported by the express incidental power (s 51(xxxix))

85. Further or alternatively, in the event that the Court finds that the Commonwealth Executive has broad power to spend and contract pursuant to s 61 of the Constitution (see Section 6), but on the proviso that there is appropriate Parliamentary recognition of that spending and contracting, then 51(xxxix) of the Constitution supports s 32B of the FMA Act and Sch 1AA to the FMA Regulations. The enactment of legislation provides the requisite Parliamentary recognition and is incidental to the execution of the executive power to spend and contract that is found in s 61, such power exercisable only subject to valid appropriation.

10 86. *Williams* should not be read to preclude this submission. The majority in *Williams*, while holding that the absence of a valid law providing statutory authority was fatal to the validity of the funding agreement and spending there in question, did not have to decide the areas in which Commonwealth spending and contracting would be valid if supported by legislation. The majority should not be understood as having impliedly expressed a narrow view on that issue.[148] Nor did the majority have to determine the kind of legislative support that was required, or the heads of power that could support such legislation.[149] These matters rendered it unnecessary to address the relationship between the scope of executive power within s 61 (broad or narrow) and s 51(xxxix) of the Constitution.

20 87. Now that Parliament has enacted a law to supply the previously absent statutory support, it is necessary for the Court to consider whether s 51(xxxix) supports that law. In addressing that issue, three propositions are advanced:

87.1. First, the scope of the legislative power conferred by s 51(xxxix) in relation to the executive power can be determined only in the context of the exercise of a particular executive power. Action that may be justified as incidental to the Commonwealth's responsibility to maintain the Constitution (by, for example, suppressing violent attacks on institutions of government) is obviously different from action that may properly be seen as incidental to paying public money under a contract into which the parties have voluntarily entered.

30 87.2. Secondly, the power under s 51(xxxix) to legislate with respect to matters incidental to the executive power to spend and contract does not extend to:

(a). providing an authority which would otherwise be absent for the recipient to engage in the activity that is to be funded;[150]

---

148 Three members of that majority, Gummow, Crennan and Bell JJ, had previously observed in *Pape v Commissioner of Taxation* (***Pape***) (2009) 238 CLR 1 at 85 [220] that, absent some constraint having its source in the position of the Executive Governments of the States, "there appears no good reason to treat the executive power recognised in s 61 of the *Constitution* as being, in matters of the raising and expenditure of public moneys, any less than that of the executive of the United Kingdom at the time of the inauguration of the Commonwealth."

149 See, eg, *Williams* at 218 [90]-[91] (Gummow and Bell JJ).

150 For example, the Commonwealth could not fund a local council to maintain a local road if local councils had no responsibility for road maintenance under State legislation.

(b). erecting a scheme of regulation that governs the funding recipient or others by requiring a person to accept funding or by allowing enforcement of a voluntary funding agreement otherwise than under its terms.[151]

87.3. Thirdly, where the Commonwealth funds activities undertaken by others, the incidental power may be properly engaged for the limited purposes of:

(a). giving statutory recognition to the bare executive acts of paying money to, and entering into a consensual agreement with, the recipient; and

(b). preventing, to the extent possible, Commonwealth funding being spent other than for the purpose for which it was appropriated and provided.[152]

87.4. Fourthly, the spending must always be subject to a valid appropriation and the law authorising the spending may properly be seen as operating "incidentally" to either or both of the executive decision to spend or the legislative decision to appropriate.

88. Section 32B of the FMA Act is supported by s 51(xxxix) of the Constitution because, taken together with item 407.013, it does not operate contrary to the second principle above, while it does conform to the third and fourth principles above.

(5) The Appropriation Acts as source of authority to spend and contract

(5)(a) The Commonwealth's argument

89. Further or alternatively, the annual Appropriation Acts in each of the relevant years authorised the Funding Agreement.

90. That submission does not deny that the appropriation of money is conceptually discrete from the Executive's authority to spend.[153] But acceptance of that proposition does not mean that an annual Appropriation Act cannot, in addition to appropriating the CRF, also supply any necessary legislative foundation to support the expenditure of funds by the Executive and related administrative action.

91. In *Victoria v Commonwealth* (***AAP Case***),[154] Victoria contended that separate legislation was necessary to validate expenditure of appropriated moneys. Justice Murphy, a former leader of the Opposition and leader of the Government in the Senate, responded to that contention by saying that, if it were correct, "almost seventy-five years of Federal parliamentary practice has been incorrect".[155] Consistently with that observation, prior to *Williams*, Parliament, having enacted the annual

---

151 In *Williams* at 238 [158], Gummow and Bell JJ noted that financial dealings with the Commonwealth had "long had attached to them the sanctions of the federal criminal law". But no criminal sanctions apply to recipients of Commonwealth funding on the basis that they are unable to apply the funding for the purpose for which it was provided. Criminal sanctions arise only if the recipient of Commonwealth funding fraudulently acquired and/or applied that funding, in which case the criminal law is engaged in substantially the same way as if a person fraudulently solicits donations from the public.

152 *Pharmaceutical Benefits Case* (1945) 71 CLR 237 at 250 (Latham CJ).

153 *Pape* (2009) 238 CLR 1.

154 (1975) 134 CLR 338.

155 (1975) 134 CLR 338 at 423.

Appropriation Acts, never considered it necessary separately to authorise the Government to spend the amounts appropriated in those Acts or to enter into agreements for the purposes of that expenditure.

92. Parliament's understanding of the effect of annual Appropriation Acts was not based on an assumption. Nor was it a mere working hypothesis. As Hayne J explained in *Williams*,[156] the annual Appropriation Acts, in addition to authorising amounts to be drawn from the CRF, "provided for ... the application of appropriated sums for the designated purposes". This dual function is expressly recognised in the terms of the Appropriation Acts, which draw a distinction between the "grant" or issuing of funds to the Executive (which involves the making available of funds to the Government) and the legislative authority to "apply" those funds for the purpose specified in the Appropriation Acts (which involves spending those funds for the stipulated purpose up to the stipulated amount).

93. Accordingly, as a matter of ordinary language, the annual Appropriation Acts authorise the Executive to spend the amounts appropriated to it for the specified purposes. Typically, s 7 provides that "[t]he amount specified in a departmental item for an Agency may be applied for the departmental expenditure of the Agency",[157] while s 8(1) provides that "[t]he amount specified in an administered item for an Agency may be applied for expenditure for the purpose of contributing to achieving that outcome". A separate provision then appropriates the CRF for the purposes of expenditure authorised by the Acts.

94. In *Williams,* Hayne J noted[158] that annual Appropriation Acts subsequent to *Appropriation Act (No 3) 2007-2008* do not "on their face" confine the purposes for which expenditures could be made. But the relevant provisions have the same purpose and effect as the corresponding provisions of earlier annual Appropriation Acts. The sole textual difference between the earlier and later versions of ss 7 and 8 is that the earlier versions stated that the amount specified "may only be applied" to specified purposes, while the later versions omitted the word "only". That difference is not material, the "only" having been omitted because it was redundant. Permission to apply money for "X" purpose does not confer permission to apply that money for any purpose other than "X".

95. In *Williams*, Crennan J noted that an Appropriation Act may both appropriate funds and provide statutory authority for expenditure, where the Act is "special" and provides "some detail about the policy being authorised".[159] Her Honour cited the *Appropriation (HIH Assistance) Act 2001* (**HIH Act**) as an example of such an Act. The sole substantive provision of the HIH Act merely appropriated the CRF for a particular purpose. Unlike an annual Appropriation Act, it did not purport to permit the Executive to spend the amount appropriated, and it contained no indication that the Executive was authorised to establish and oversee a complicated administrative scheme under which hundreds of millions of dollars were paid out to tens of thousands of individuals

156 *Williams* at 261 [223].

157 See, eg, *Appropriation Act (No 1) 2013-2014* ss 7(1), 8(1) and 15.

158 *Williams* at 261 [223], 264 [232].

159 *Williams* at 354 [531].

and entities with those individuals and entities subrogating their rights to the Commonwealth.

96. It is submitted that the observations of Crennan J in *Williams* should not be limited to an Appropriation Act that is "special". Thus, in deciding whether the annual Appropriation Acts authorise the expenditure of funds pursuant to the Funding Agreement, the key issue should be whether Parliament has indicated with sufficient specificity its endorsement of expenditure on the NSCSWP. In addressing that issue, the following points are significant:

96.1. The PBS are the primary means by which the Houses of Parliament are informed of the specific programs that the Government proposes to fund under annual Appropriation Acts, so as to allow each House to reach an informed view as to whether it will pass the Appropriation Bills.

96.2. An annual Appropriation Act incorporates the terms of the relevant PBS and, by doing so, particularises the broad items of expenditure authorised by that Act. Thus, s 8(2) of an annual Appropriation Act provides that "[i]f the Portfolio Statements indicate that activities of a particular kind were intended to be treated as activities in respect of a particular outcome, then expenditure for the purpose of carrying out those activities is taken to be expenditure for the purpose of contributing to achieving the outcome."

96.3. Each of the PBS for the relevant Appropriation Acts specifically indicated that expenditure on the NSCSWP was to be regarded as expenditure for the purpose of achieving the relevant outcome stated in those Acts.[160] This both ensured that the Senate was aware that the relevant Appropriation Acts were permitting expenditure on the NSCSWP and, when read with s 8(2) of the Acts, provided a parliamentary endorsement of that expenditure.

96.4. The relevant PBS, as incorporated by s 8(2), also provide a sufficient textual basis to identify the relevant head of legislative power to which the NSCSWP relates (if such identification is necessary). The Court has recognised on several occasions that a short description of the purpose of an appropriation can be used to determine whether expenditure is for a purpose related to a matter within the legislative power of the Commonwealth.[161]

97. For the above reasons, the Appropriation Acts provided any necessary legislative authority to allow the Commonwealth to enter into agreements and expend funds for the purposes of the NSCSWP.

98. Section 54 of the Constitution does not provide any basis for refusing to view annual Appropriation Acts as authorising expenditure.

98.1. Section 54 states that "[t]he proposed law which appropriates revenue or moneys for the ordinary annual services of the Government shall deal only

---

160 See SCB CV, Annexures 62, 66 and 68, at 368, 466 and 581 respectively.

161 See, eg, *Surplus Revenue Case* (1908) 7 CLR 179 at 192 (Barton J); *AAP Case* (1975) 134 CLR 338 at 375 (Gibbs J).

with such appropriation". That section has always been regarded as non-justiciable, with its reference to "proposed laws" recognising that it is dealing with the intra-mural relations of Parliament.[162]

98.2. Even if s 54 could be subject to judicial consideration, authorising the Executive to make payments for particular purposes is sufficiently connected to an appropriation for the ordinary annual services of government to "deal with" that appropriation. That follows because an appropriation is the grant of permission for the Executive to draw money from the Treasury for a particular purpose within the terms of ss 81 and 83 of the Constitution. That necessarily contemplates paying money to someone other than the Commonwealth.[163] The permission involved in an appropriation passed by the Parliament is so closely connected with the actual application of the funds appropriated that any authorisation to apply those funds "deals with" the appropriation.[164]

99. The above submissions are supported by *Permanent Trustee Australia Ltd v Commissioner of State Revenue (Victoria)*,[165] including in particular the Court's finding that the requirement in the first paragraph of s 55 of the Constitution was designed to prevent the "tacking" of extraneous matters onto Bills imposing taxation; and its conclusion that any provision that was "fairly relevant or incidental to" the imposition of tax could be said to "deal with" that imposition. Further, in relation to the justiciable requirements of the second paragraph of s 55, the Court has consistently maintained that it will not interfere with the understanding of the Parliament as to whether a tax imposition law "deals with" the same subject of taxation unless that understanding is clearly wrong.[166]

(5)(b) Availability of the Commonwealth's argument

100. The Plaintiff submits that it is not open to the Commonwealth to contend that the annual Appropriation Acts in each of the relevant years authorised the Funding Agreement.[167] That submission should be rejected.

101. No payment the validity of which is challenged in the present proceedings was the subject of a challenge in *Williams*. The closest connection between the two proceedings that the Plaintiff identifies is that both are said to involve a challenge to the validity of "expenditure-related Executive act[s] occurring in the 2011-2012 financial year".[168] In fact, however, *Williams* did not involve a challenge to any payment made in the 2011-2012 financial year.[169] It follows that the question whether s 8(1) of

---

162 See, eg, *Pape* (2009) 238 CLR 1 at 70 [165] (Gummow, Crennan and Bell JJ).

163 Parliament abandoned fund accounting in 1999: see *Financial Management Legislation Amendment Act 1999*. There is now only the self-executing CRF, comprising all money held by, or for and on behalf of, the Commonwealth.

164 See *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555 at 581-582 (Brennan J).

165 (2004) 220 CLR 388 at 418-419.

166 *State Chamber of Commerce and Industry v The Commonwealth* (**Second Fringe Benefits Case**) (1987) 163 CLR 329 at 344.

167 Plaintiff's submissions at [18]-[24].

168 Plaintiff's submissions at [21].

169 See *Williams* at 183 [14] (French CJ). The last challenged payment was made on 11 October 2010 for chaplaincy services to be provided in the period to 31 December 2011. While the Court answered

the *Appropriation Act (No 1) 2011-2012* authorised payments under the Darling Heights Funding Agreement was entirely irrelevant to those proceedings.[170] That question can thus hardly be said to have been "so relevant to the subject matter of [*Williams*] that it would have been unreasonable [for the Commonwealth] not to rely on it".[171] Nor could there even potentially be any inconsistency between the judgments in the two proceedings in the relevant sense (ie, the declaration of inconsistent rights "in respect of the same transaction"[172]). The Plaintiff's principal contention in relation to the existence of an *Anshun* estoppel thus fails.

102. The Plaintiff also contends that, because the provisions of Appropriation Acts in different years are "substantially identical",[173] an *Anshun* estoppel arises generally by reason of the Commonwealth's failure to advance this argument in *Williams*. Fundamentally, this submission must fail because *Anshun* is not concerned with arguments, but rather claims or defences. The defences that the Commonwealth raises in these proceedings (ie, the spending authority conferred by the 2011-2012 and subsequent Appropriation Acts) would not have constituted a defence to any claim in *Williams*. There is simply no scope for the operation of the *Anshun* doctrine.

103. Finally, even if there were scope for the *Anshun* doctrine to apply, having regard to the way that the issues evolved in *Williams* (addressed below), it was reasonable for the Commonwealth not to have raised an argument analogous to the present argument in that proceeding, so that doctrine should not be held to preclude reliance on the Appropriation Acts.

(6) The executive power to spend and contract: the correct principles

104. Even if s 32B of the FMA Act, when read with item 407.013 in Sch 1AA, is invalid, the Funding Agreement and payments made thereunder are nevertheless supported by the executive power of the Commonwealth. The Commonwealth accepts that, to put this argument, it must obtain leave to re-open *Williams*.

(6)(a) Leave to re-open Williams

105. The principles in accordance with which this Court will grant leave to re-open one of its prior decisions are identified in *Commonwealth v Hospital Contribution Fund*[174] and *John v Commissioner of Taxation*.[175] Those principles must be adapted to the circumstances of the particular case. Re-opening should occur rarely, for obvious reasons. The Commonwealth ordinarily would be very slow to urge a re-opening. However, this represents a compelling case to do so for four main reasons.

---

a question about standing to challenge payments in the 2011-2012 financial year, it did not determine the validity of any payment made in that financial year.

170 cf Plaintiff's submissions at [19]-[20].

171 *Port of Melbourne Authority v Anshun Pty Ltd* (**Anshun**) (1981) 147 CLR 589 at 602.

172 *Anshun* (1981) 147 CLR 589 at 604.

173 Plaintiff's submissions at [23].

174 (1982) 150 CLR 49 at 56-58 (Gibbs J, with whom Stephen J at 59 and Aickin J at 66 agreed).

175 (1989) 166 CLR 417 at 438-439.

106. First, the principle identified in *Williams* was not carefully worked out in a significant succession of cases. On the contrary, it constituted a radical departure from what had previously been assumed by all parties to be the orthodox legal position.

107. Secondly, as a result of the manner in which the issues were joined in *Williams*, the Court did not receive sufficient argument, or sufficient material by way of constitutional fact, on what became the ultimate issue. To flesh out this point:

107.1. Prior to the hearing in *Williams*, all parties and interveners asserted or assumed the correctness of a proposition that Commonwealth executive power to spend and contract extended at least as far as the heads of legislative power (**the Common Assumption**[176]). This had two consequences for the written submissions: (a) neither the Plaintiff nor the interveners asserted that the NSCP exceeded power because it lacked a statutory backing, meaning that the Commonwealth did not respond to any such proposition; (b) the submissions on the appropriation topic were directed to whether the appropriation was valid (there being no occasion to explore whether, if valid, it served not just to permit the withdrawal of funds from the CRF for the purpose of the NSCP, but also positively to provide statutory authorisation for expenditure on the program).

107.2. Questioning from the Court on the first day of the hearing revealed that the Court had doubts about the Common Assumption. The Plaintiff took time to consider the point and, late on the first day, affirmed his submission that the Common Assumption was correct.[177] The most the Plaintiff did to embrace the possibility of an "about face" was to submit that if (contrary to what he had put) there was a class of spending and contracting which required legislative support beyond appropriation, then being "novel" and "opportunistic",[178] he would in the alternative take the point that there was no such legislation.

107.3. Late on the first day, and during the next day, the interveners made oral submissions which, to varying degrees, sought to resile from the Common Assumption. Those submissions never clearly identified the limitation on Commonwealth executive power for which they were contending.[179]

107.4. The Plaintiff in reply departed from his position in chief.[180] His only real attempt to delineate what spending or contracting could occur under s 61 without enabling legislation came in the final minutes of the hearing.[181]

107.5. The opportunity for further written submissions after the hearing did not entirely overcome the problem that the shift in the position of the Plaintiff and interveners had created.[182] That was partly because the case that the

---

176 *Williams* at 160 and 179 [3] (French CJ) and 296 [343], 319-320 [404] (Heydon J).

177 *Williams v Commonwealth* [2011] HCATrans 198 (9 August 2011), lines 1850-2435.

178 *Williams v Commonwealth* [2011] HCATrans 198 (9 August 2011), lines 2435-2450.

179 A point noted by Heydon J in *Williams* at 313 [386].

180 *Williams v Commonwealth* [2011] HCATrans 200 (11 August 2011), lines 9315-9325.

181 *Williams v Commonwealth* [2011] HCATrans 200 (11 August 2011), lines 9645-9965.

182 *Williams* at 319-320 [404] (Heydon J).

Commonwealth had to meet had not been clearly articulated, and partly because it was not possible, at a stage after the hearing was complete, to reflect fully on what material by way of constitutional fact should be assembled and placed before the Court if it were to enter into fundamental issues that had not been raised at the time when the Special case was finalised. Such material included: evidence of how the Senate in fact functions in and about the appropriation process; and evidence of consultation with the States in relation to the NSCP, and their approval of it.[183]

108. Thirdly, the reasons of the four Justices constituting the majority in *Williams* do not contain a single answer to the following three related questions:

108.1. In what circumstances will Commonwealth spending require authorising legislation?

108.2. To the extent there is such a requirement, is it based on an implication drawn from responsible government, the role of the Senate, the need to protect the States, the quasi-regulatory nature of the particular program or some mix of these considerations?

108.3. To what extent does a requirement for authorising legislation operate solely at Commonwealth level or at both Commonwealth and State levels, and if there is a differential operation, why?

109. Fourthly, *Williams* has led to considerable inconvenience with no significant corresponding benefits. It required emergency legislation to provide authority for hundreds of spending programs and billions of dollars of public expenditure. It has also created considerable uncertainty.[184]

110. Overall, we now have a law enacted to remedy the gap identified in *Williams* and to authorise a range of identified executive expenditures. In attacking that law, the Plaintiff[185] and interveners go well beyond what was put, or decided, in *Williams*, and with the benefit of written submissions on the point and the reasons for judgment in *Williams*, the Commonwealth seeks to develop its response to these issues. If *Williams* is in error, it can be corrected now, before it leads to the setting in stone of practices which the Constitution does not require. In these circumstances, the Court now has the opportunity to provide a clear statement of principle on most fundamental matters that will shape government at federal, and arguably also at State, level. In light of the significance of the issues, the Court should receive full argument and decide the case as it considers the Constitution requires.

111. The Plaintiff makes a separate, erroneous contention that the question of leave to re-open does not arise because: (a) the Commonwealth is bound by an issue estoppel; or (b) any attempt to reargue would constitute an abuse of process.[186] Against the background recited above, in which the Plaintiff availed himself of an "opportunistic"

183 See [7], [37]-[40].

184 See [141.2] below.

185 Plaintiff's submissions at [67]-[87].

186 Plaintiff's submissions at [95]-[104].

reversal of argument, the invocations of notions of estoppel, let alone abuse of process, are, to say the least, a bit rich. To the extent notions of unreasonableness underpin such doctrines, they are inapposite. Further, if application of the principles in *Commonwealth v Hospital Contribution Fund* and *John v Commissioner of Taxation* would lead to the conclusion that it was appropriate to re-open *Williams*, then it could hardly be an abuse of process so to argue. If, on the other hand, leave to re-open *Williams* would not be granted, then there is nothing left for the abuse of process argument to do.

112. Some other more detailed responses to the assertion of issue estoppel may be made:

10 112.1. The Commonwealth does not ask the Court to answer any question, or to grant any relief, in a manner which contradicts any answer, or relief, given in *Williams*. This case concerns a separate program, separate funding agreements, and separate appropriations to *Williams*.[187]

112.2. Even if *Blair v Curran* were to apply with full force in matters of constitutional law (as to which, see below), the focus is on those matters of fact or law which were necessary to decide, and were decided, as the groundwork of the earlier decision.[188] As seen above, four Justices in *Williams* held that the executive power did not support the agreement there in question; but no further ratio can be discerned as to when or why the dividing line is drawn between contracts
20 which require statutory authorisation and those which do not.

112.3. Precision is needed when seeking to identify propositions of law that are said to be the subject of an estoppel. The propositions that the Plaintiff says may not be advanced do not accurately capture the nature of the Commonwealth's arguments. The Commonwealth's submission as to the scope of the executive power, and the limitations to which it is subject, differs from the contentions rejected in *Williams* that are pleaded by the Plaintiff.

112.4. A pure, or "unmixed", question of law cannot be the subject of issue estoppel.[189] Decisions in relation to such questions have precedential effect, but do not attract the operation of the doctrine of issue estoppel.[190]

30 113. That last point is even stronger when the issue of law in relation to which there is said to be an issue estoppel is an issue of constitutional law. This Court has never resolved the question whether the doctrine of *res judicata* (or issue estoppel) applies in constitutional litigation.[191] In the Commonwealth's submission, it does, but with a

---

187 cf *Broken Hill Proprietary Co Ltd v The Municipal Council of Broken Hill* (1925) 37 CLR 284 at 289; *Society of Medical Offices of Health v Hope* [1960] AC 551 at 562-563; *Cafoor v Commissioner of Income Tax Colombo* [1961] AC 584 at 599-601; *Chamberlain v Deputy Commissioner of Taxation* (1988) 164 CLR 502 at 510; *Spassked Pty Ltd v Federal Commissioner of Taxation (No 2)* (2007) 165 FCR 484 at 500-505. Those cases ought not be regarded as a unique and unprincipled "revenue" exception to *Blair v Curran* (1939) 62 CLR 464, but rather an example of the operation of the ordinary rule itself, analogous to the present circumstances: see *Spassked* at 500-501 [52(2)].

188 *Blair v Curran* (1939) 62 CLR 464 at 531-532.

189 See *United States v Moser* 266 US 236 (1924).

190 To take an example of current legal uncertainty, a finding that an award of compensation pursuant to s 87 of the *Competition and Consumer Act 2010* may not be reduced by reference to considerations of the defendant's relative or comparative fault for the plaintiff's loss could not mean that all future litigation between the same parties for relief under that section must be determined on that basis.

191 See *Re Macks; ex parte Saint* (2000) 204 CLR 158 at 238 [224].

"different and less stringent application".[192] In particular, it is submitted that pure questions of constitutional law (as opposed to their application to particular facts[193]) can never be subject to an estoppel.[194] That is so for (at least) the following reasons:

113.1. The rights declared in constitutional litigation will frequently have an impact beyond the particular parties to the litigation. That is a further factor against the resolution of these proceedings on the basis of an issue estoppel, because the determination of the validity of the NSCSWP should not depend on whether the plaintiff who challenges that program is Mr Williams or someone else. Considerations of this kind may be seen to inform the Court's decision in *Pape* concerning the plaintiff's standing.[195]

113.2. The strict application of *res judicata* or issue estoppel in constitutional cases, as Stephen J observed in *Queensland v Commonwealth*, may lead to "that rigidity in constitutional interpretation which the Court has otherwise successfully avoided in the application of the doctrine of precedent to its previous decisions".[196] If the Court is persuaded that it is appropriate to re-consider the questions of law decided in *Williams*, then it is not precluded from doing so by those doctrines. As Barwick CJ observed in that same case: "[t]o refuse to decide in a constitutional case what one is convinced is right because there is a recent decision of the Court is, to my mind, to deny the claims of the Constitution itself and to substitute for it a decision of the Court".[197]

114. It follows that the question whether a particular point of constitutional principle or law decided in an earlier case ought to be revisited should be resolved, not by reference to the doctrines of *res judicata* and issue estoppel, but by applying the principles to determine when the Court will revisit its earlier decisions.[198] For the reasons advanced above, in this case those principles favour granting leave to re-open *Williams*, so that all relevant issues can be fully exposed and decided.

(6)(b) Determining the scope of the executive power to spend and contract: a two-stage approach to the issue

115. The executive power of the Commonwealth to spend and contract is, by s 61 of the Constitution, vested in the Queen and exercisable by the Governor-General as her representative. The Constitution nowhere supplies an exhaustive definition of that power, although it does provide certain specific examples of its content (including, to take the obvious example, that s 61 provides that executive power "extends to" the execution and maintenance of the Constitution and the laws of the Commonwealth).

---

192 cf *Re Wakim; ex parte McNally* (1999) 198 CLR 511 at 590 [156].

193 See, eg, *James v Commonwealth* (1935) 52 CLR 570.

194 See, eg, *Victoria v Commonwealth* (1957) 99 CLR 575 at 654-655; *Queensland v Commonwealth* (1977) 139 CLR 585 at 597.

195 See *Pape* (2009) 238 CLR 1 at 69 [158] (Gummow, Crennan and Bell JJ), 99 [274] (Hayne and Kiefel JJ), 138 [401] (Heydon J).

196 (1977) 139 CLR 585 at 605.

197 (1977) 139 CLR 585 at 593-594.

198 See, eg, *Victoria v Commonwealth* (1957) 99 CLR 575 at 654-655; *Queensland v Commonwealth* (1977) 139 CLR 585 at 593, 602-603.

116. It is necessary to distinguish the content of executive power from the limitations on its exercise.[199] Fundamentally, the identification of the content of the executive power should proceed from two premises: (a) a polity must possess all the powers that it needs in order to function as a polity; and (b) the executive power is all that power of a polity that is not legislative or judicial power. The simpler aspect of the identification of the content of executive power thus becomes a negative inquiry (ie, excluding legislative and judicial functions from its scope).[200]

117. The spending of money, whether under contract, by gift, or otherwise, is part of the power any polity must have. The same is true of the power to enter into contracts. Both those powers are classically executive in character.[201] Such activities are, as Harrison Moore observed, part of the Executive's role "to represent the Commonwealth whenever that is necessary", a role for which "no express power appears to be necessary; it follows of necessity from the establishment of the Commonwealth as a new political community".[202]

118. The critical question is when the Commonwealth may exercise its power to spend independently of authorising legislation (it being important to recall that the Court has accepted that there will be occasions upon which it may do so[203]). That question invites a two-stage inquiry. The first stage involves a consideration of the historical conception of executive power in the English and British constitutional tradition generally. The second stage involves consideration of the particular features of the Australian constitutional structure.

119. The question should be approached in that two-step manner for two principal reasons:

    119.1. First, as French CJ observed in *Pape*, "the scope of s 61 ... is informed by history and the common law relevant to the relationship between the Crown and Parliament".[204] Of course, that does not mean that s 61 is a "locked display cabinet in a constitutional museum".[205] But it does mean that any attempt to understand the scope of the executive power conferred by s 61 must commence with an understanding of executive power at common law.

    119.2. Secondly, identification of the precise source of any limitation on Commonwealth executive power permits the nature and significance of both the source, and the resulting limitation, to be clearly appreciated. Thus:

---

199 Limitations are addressed below at [129]-[136].

200 See the authorities referred to in Chief Justice French, "The Executive Power", Inaugural George Winterton Lecture, Sydney Law School, University of Sydney, 18 February 2010.

201 See *Bardolph* (1934) 52 CLR 455 at 509; *Williams* at 259 [217] (Hayne J).

202 Harrison Moore, *The Constitution of the Commonwealth of Australia* (2nd ed, 1910), at 295.

203 See, eg, *Williams* at 216-217 [83] (French CJ), 233 [139] and 235 [146] (Gummow and Bell JJ), 250 [196] (Hayne J), 354 [529] (Crennan J).

204 *Pape* (2009) 238 CLR 1 at 60 [127] (French CJ). To similar effect, "[t]he Commonwealth Constitution, an enactment of the Imperial Parliament, took effect in a common-law system, and the nature and incidents of the authority of the Crown in right of the Commonwealth are in many respects defined by the common law": see *FCT v Official Liquidator of E O Farley Ltd* (1940) 63 CLR 278 at 304.

205 *Pape* (2009) 238 CLR 1 at 60 [127] (French CJ).

(a). To the extent that any feature of the Australian constitutional structure is suggested as the source of a limitation on the ability of the Commonwealth Executive to spend and contract, that suggestion must be tested against whether the same features have historically generated an equivalent limitation. If not, the structural feature that is postulated as the source of the limitation is unlikely to provide a basis for it.

(b). Conversely, if a particular structural feature has historically grounded a limitation on executive power, then to the extent that the constitutional structure is the same at Commonwealth and State levels, the limitation should apply equally to both the Commonwealth and State Executives.[206]

(6)(c) Stage one: history

120. The history of the English, and later British, constitution discloses the gradual movement away from the personal exercise of all governmental powers by the monarch in person, to the modern distribution of legislative, executive and judicial powers among different arms of government carried on in the monarch's name. Fundamentally, that movement saw the Executive denied the ability to legislate (ie, create new law or dispense with the operation of existing law: as to the former, *Case of Proclamations*[207] and, as to the latter, *Case of the Seven Bishops*[208]) and the ability to adjudicate (*Prohibitions del Roy*[209]).

121. More particular limitations also developed. Most famously, the Executive was denied the power to tax, save with the consent of Parliament (a proposition usually regarded as having been first established by *Magna Carta* (cl 12), then called into doubt in later times,[210] but decisively resolved by the Civil War and the *Bill of Rights* (s 4)). Parliament's control over public finances was later further strengthened by denying to the Executive the ability to withdraw money from the Consolidated Fund, save with the consent of Parliament.[211]

122. That history, involving the growing power of Parliament over the Executive, does not disclose any general limitation on the ability of the Executive to spend and contract without statutory authority. While the fundamental nature of executive power, as it has developed, may be seen to give rise to certain particular limitations on the ability to spend and contract (discussed below), Parliament's control over the Executive was not historically thought to require spending and contracting to be authorised by legislation. On the contrary, an early and famous example of the exercise of the executive power to contract absent legislative authority may be seen in the *Bankers Case*,[212] where the Crown was held to have the ability to enter into contracts to borrow money, secured against hereditary revenues, to fund the activities of government.

---

206 As to which see *Victoria v CFMEU* [2013] FCAFC 160 at [26]-[27] (Kenny J) and [146], [150] (Buchanan and Griffiths JJ).

207 (1611) 12 Co Rep 74; 77 ER 1352.

208 (1688) 12 St Tr 183; 87 ER 136.

209 (1607) 12 Co Rep 63; 77 ER 1342.

210 See *Bates' Case* (1606) 2 St Tr 371 and *Ship Money Case* (1637) 3 St Tr 825.

211 See the history summarised in *Pape* (2009) 238 CLR 1 at 36-38 [54]-[60] (French CJ) and 76-79 [191]-[200] (Gummow, Crennan and Bell JJ).

212 *R v Hornby* (**Bankers Case**) (1700) 14 St Tr 1; 87 ER 500.

123. Other cases have either explicitly or implicitly confirmed the absence of any requirement for parliamentary authority for the Executive spend and contract. For example, in *R v Criminal Injuries Compensation Board; ex parte Lain*,[213] Diplock LJ observed that "the only limitation upon the power of the executive government to confer benefits upon subjects by way of money payments is a practical one, to wit, the necessity to obtain from Parliament a grant-in-aid for that purpose". And, while the Executive may not impose a tax without parliamentary authority, it may enter into contracts pursuant to which it provides a service that it is not otherwise bound to provide in return for payment.[214] Viscount Haldane provided an accurate description of the power of the Executive under the wider British constitutional tradition to contract when he summarised *Commercial Cable Company v Government of Newfoundland*[215] as standing for the proposition that "the Governor-General, as representing the Crown, could enter into contracts as much as he liked".[216]

124. The ability of the Executive to spend without parliamentary authorisation is now well-established in the United Kingdom,[217] despite the fact that the precise juridical basis for that position is not settled (and notwithstanding the fact that reliance on the Crown's status as a common law corporation sole, with all the capacities and powers of a natural person, may not be a completely satisfactory explanation).[218]

125. In light of the above, as a matter of historical description Evatt J was clearly correct when he observed at first instance in *Bardolph* that "[n]o doubt the King had special powers, privileges, immunities and prerogatives. But he never seems to have been regarded as being less powerful to enter into contracts than one of his subjects."[219]

126. It follows that what might be described as the inherent or traditional limits on executive power, as they emerged from the historical relationship between Parliament and the Executive, have not hitherto been treated as the source of any general limitation on the ability of the Executive to spend and contract without legislative authority. That is an important insight, because to a significant extent the Australian constitutional structure reflects the relationship between Parliament and the Executive that evolved in England. Given that that relationship has not historically required legislative authorisation for Executive spending or contracting (beyond an appropriation), the features of the Australian Constitution that reflect the traditional relationship between Parliament and the Executive likewise ought not to be treated as the foundation for any such limitation.

127. Accordingly, if such a limitation is to be found, it must be found solely in <u>other</u> particular features of the Australian constitutional structure. Such feature must not only be of such a nature as to have brought the relevant limitation into existence at

---

213 [1967] 2 QB 864 at 886.

214 See *China Navigation Company Ltd v Attorney-General* [1932] 2 KB 197.

215 [1916] 2 AC 610.

216 A description given during oral argument in *Kidman v Commonwealth* (1925) 32 ALR 1 at 2. That description is not limited to executive action under the British North America Act: cf *Williams* at 216 [82] (French CJ).

217 *R (Hooper) v Secretary of State for Work and Pensions* [2005] 1 WLR 1681.

218 See *R v Secretary of State for the Home Department* [2013] 1 WLR 2358 at 2371 [28].

219 (1934) 52 CLR 455 at 475.

federation, but also (unless the same limit applies to the Executives of the States[220]) to have done so at only one level of government.

(6)(d) Stage two: the Australian constitutional structure

128. There are various features of the Australian constitutional structure, most of which are shared with or inherited from the traditional or common law conception of executive power, that limit, affect, or inform the power of the Executive to spend and contract. Seven such features are identified below.

129. First, the distribution of the legislative and executive power to the Parliament and the Governor-General, respectively, and the supremacy of the former over the latter, make plain that the executive power may not stray into an area reserved for legislative power.[221] While this limitation might be seen as based on the provisions of Ch I and Ch II of the Constitution, it is equally a fundamental feature of the historical conception of executive power. It is this limitation that ought to be regarded as explaining the decision in *Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (***Wooltops Case***).[222] That is to say, the carrying out of three[223] of the agreements at issue in that case would have amounted to the imposition of taxation, that being a matter reserved for Parliament.[224]

130. Secondly, an exercise of executive power cannot fetter the exercise of legislative power, nor dispense with the operation of law.[225] This poses an obvious, but again important, limitation on the scope of the executive power to contract. Once again, it is a feature observed in both the traditional and Australian concepts of executive power.

131. Thirdly, no withdrawal of money from the CRF may be made by the Executive for the purposes of complying with contractual obligations without parliamentary authority in the form of appropriation legislation. Although this feature is given further definition by specific provisions of the Constitution (most obviously ss 81 and 83), fundamentally it derives from the traditional conception of executive power. The *Bankers Case* provides an obvious historical illustration of the proposition that, although the Crown may validly incur liabilities, it is for Parliament to provide the funds to meet them. More relevantly in modern times, the absence of an appropriation will simply mean that an implied contractual condition has failed, not that there was no power to enter into the contract,

---

220 Again as to which see *Victoria v CFMEU* [2013] FCAFC 160 at [26]-[27] (Kenny J) and [146], [150] (Buchanan and Griffiths JJ).

221 See *Williams* at 232 [136] (Gummow and Bell JJ).

222 (1922) 31 CLR 421.

223 The invalidity of the fourth agreement resulted from an application of the then-accepted doctrine that such a promise, absent an existing appropriation, cannot be carried out and was thus *ultra vires*.

224 *Wooltops Case* (1922) 31 CLR 421 at 433-434, 443-445 (Isaacs J), 460-461 (Starke J). This consideration may also explain the observation of Knox CJ and Gavan Duffy J at 432 that none of the agreements was "prescribed or even authorised by the Constitution itself". Cases like the *Wooltops Case* aside, the creation of rights and liabilities by way of contract will rarely amount to an exercise of legislative power because contractual rights and liabilities are voluntarily assumed, and thus lack the general indicium of legislative power (ie, the determination of the content of a law as a rule of conduct or a declaration as to power, right or duty). The fact that contractual rights and liabilities are voluntarily assumed also belies any notion that the Commonwealth may "regulate" by contract.

225 See, eg, *Port of Portland Pty Ltd v Victoria* (2010) 242 CLR 348.

or that it is invalid.[226] Nevertheless, the requirement for an appropriation, with the specific roles assigned to both the House of Representatives and the Senate by the Constitution in that regard, constitutes a real and substantial limitation on the power of the Executive to implement programs that require the expenditure of money. Furthermore, any payment made by the Executive absent such authority is recoverable.[227]

132. Fourthly, Parliament retains the ability to control the exercise of executive power, both generally, and in relation to particular programs. That is to say, s 51 of the Constitution provides every power necessary for the Parliament to prohibit or control the activity of the Executive in spending.[228] It follows that, in common with all other executive powers, the power to spend may be rendered entirely statutory, or otherwise regulated and controlled, to the extent Parliament sees fit. Parliament has, in fact, exercised this power in some areas.[229] The amenability of exercises of executive power to legislative control is, of course, a fundamental feature of the historic conception of executive power.

133. If the Executive contracts or spends in areas outside the specific legislative powers of the Commonwealth, s 51(xxxix) of the Constitution ensures that Parliament nevertheless has power to control that activity. As the joint reasons for judgment in the *Second Fringe Benefits Tax Case* stated, the legislative powers which the Commonwealth has as a body politic include "a power for the regulation and supervision of the polity's own activities, the exercise of its powers and the assertion or waiver of its immunities".[230] For that reason, irrespective of the width of the power to spend, s 51(xxxix) ensures that Parliament has power to give effect to the basic principles of responsible government and parliamentary democracy that require Parliament to have power to control or regulate the spending and contracting of the Executive.

134. Fifthly, the executive power of the Commonwealth is exercised by the Governor-General on the advice of Ministers. The Ministry holds office with the confidence of the House of Representatives. Individual Ministers are responsible to Parliament under s 64 of the Constitution for the conduct of the Departments of State, and all spending must be administered by a Department. Through this collective and individual responsibility, Parliament exercises substantial control over spending. Beyond this, an ultimate constraint on the inappropriate exercise of executive power lies with the people. If Parliament permits the Executive to engage in programs of spending and contracting which do not sufficiently conform to the judgment of the people as to what a national government should do – a question that may in turn reflect on taxation extracted by the Commonwealth – the remedy lies at the ballot box. Once again these

---

226 *Bardolph* (1934) 52 CLR 455 at 498, 509.

227 *Auckland Harbour Board v The King* [1924] AC 318.

228 *AAP Case* (1975) 134 CLR 338 at 406; *Brown v West* (1990) 169 CLR 195 at 202.

229 See, eg, FMA Act (including ss 12, 37, 39, 39A, 43, 44) and FMA Regulations (including regs 8-12); *Lands Acquisition Act 1989* s 40; *Public Works Committee Act 1969* s 18(5).

230 (1987) 163 CLR 329 at 357. There has been a debate as to whether this power is properly regarded as an "implied" power or is referable rather to s 51(xxxix). The plurality in the *Second Fringe Benefits Tax Case* considered it to be an implied power, but said that the authority could also be provided by s 51(xxxix) in combination with other constitutional provisions.

features, although reflected to a greater or lesser extent in the particular terms of the Constitution, are shared with the traditional conception of executive power.

135. Sixthly, the Constitution assumes the separate existence and continued organisation of the States. The *Melbourne Corporation* principle applies directly to the exercise of executive power, as well as legislative power. It may be accepted that this limitation does not find any equivalent in the traditional conception of executive power, being a limitation explicable only by reference to the Australian constitutional structure.

136. Seventhly, State laws of general application apply to spending and contracting by the Commonwealth without legislative authority.[231] Such laws may affect Commonwealth contracts in a variety of ways.[232]

137. It will be observed that only the last two of the above limitations could be regarded as unique to the Australian constitutional structure, with the other five being shared with the traditional or historical conception of executive power. None of the first five features provide any basis for inferring that, upon federation, a limitation was created on executive power as it was then understood to operate in the former colonies, and the United Kingdom and Canada, such that the new Commonwealth Executive alone required parliamentary authorisation for contracting and spending. On the contrary, there is no necessity to imply any such limitation, for the features of the system identified above give Parliament ample control over contracting by the Executive.

(6)(e) The concerns reflected in the majority's reasoning in Williams

138. The various features of the Australian constitutional system that were relied upon to support the contrary conclusion in *Williams* do not require that result.

139. First, the "basal assumption of legislative predominance" [233] inherent in the relationship between Ch I and Ch II of the Constitution is not undermined by the absence of a requirement that parliamentary authority be obtained before a contract is entered into. Even if the government contract is "now a powerful tool of public administration", such contracts are no threat to the constitutionally pre-eminent position of the legislature.[234] That is true particularly because:

    139.1. It remains open for Parliament, pre-emptively, to regulate the circumstances in which the Executive may spend and contract.[235] Its failure to do so is properly to be seen as consent to the continued existence of the power always previously assumed to exist. Further, either House of Parliament may initiate legislation dealing with particular spending programs already underway. It follows that Parliament is capable of regulating the ability of the Executive to promote policy through contracts generally, or in specific instances.

---

231 Subject to the limitation recognised in *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 427, 443-444, 455, 473-474.

232 See *Pape* (2009) 238 CLR 1 at 85-86 [223] (Gummow, Crennan and Bell JJ).

233 See *Williams* at 232-233 [136] (Gummow and Bell JJ).

234 cf *Williams* at 193 [38] and 213-214 [77]-[78] (French CJ), 352 [521] (Crennan J).

235 See *AAP Case* (1975) 134 CLR 338 at 406; *Brown v West* (1990) 169 CLR 195 at 202.

139.2. Parliament retains the ability to deny to the Executive the funds required for its spending programs. For that reason, the fact that Commonwealth spending involves public money does not supply a reason why parliamentary authority is required.[236] Parliament retains complete control over public finances, because no money may be spent pursuant to any program undertaken by the Executive unless Parliament has appropriated funds for that purpose.

140. Secondly, the fact that the Senate has a particular and defined role in the appropriation process does not mean that the system of representative democracy prescribed by the Constitution, and in particular the representation of the States in the Senate, would be undermined unless Parliamentary approval of (some but not all) spending and contracting is required.[237] Even if control over appropriations was the sole means by which Parliament could control the Executive in this respect (which it is not), the role of the Senate in that process does not point to any deficiency in the ability of the Senate to control executive activity:

140.1. As discussed above (see again [35]ff), the Senate's role in the appropriation process is meaningful: it may withhold money if it is unhappy in any respect with any program. There is no basis for concluding that the Senate's role in the appropriations process insufficiently involves the Senate as the States' House, such that some (but not all) programs at Commonwealth level need an express authorising statute so as to engage the Senate meaningfully.

140.2. The role that the Senate plays in the appropriation process is the role that was assigned to it under the Constitution. The fact that the Senate's role is different from that of the House of Representatives provides no basis for suggesting that there is a deficiency in the Senate's powers that must be remedied by denying power to the Executive. For that reason, the nature and extent of the Senate's role in the appropriations process says nothing as to the nature and extent of the power of the Executive to spend. The balance struck by these provisions is not to be re-set by imposing a new requirement that some Commonwealth spending programs must jump through two parliamentary hurdles.

141. Thirdly, the fact that s 64 provides for Ministers to "administer [the] departments of State" does not give rise to any inference that s 64 demarcates when the executive power to spend and contract requires or does not require an authorising statute:[238]

141.1. Given the expansive words at the end of s 61 ("and extends to"), it is simply not possible to read the words "to administer ... departments of State" as defining the outer boundaries of the power of the executive to spend and contract without an authorising statute.

---

236 cf *Williams* at 236 [151] (Gummow and Bell JJ) and 352 [519] (Crennan J), 368-369 [577] (Kiefel J).

237 cf *Williams* at 205-206 [60]-[61] (French CJ), 232-233 [136] (Gummow and Bell JJ), 343 [487] (Crennan J).

238 cf *Williams* at 191 [34] (French CJ), 214-215 [79] (French CJ).

141.2. Moreover, the potential for any such inference is outweighed by countervailing considerations. For one thing, how is a court, let alone a prospective contractual counter-party, to judge whether a contract is made in the ordinary course of government administration?[239] The introduction of such a requirement for validity would introduce a risk akin to that found before the abolition of the doctrine of *ultra vires* in relation to corporations. It should not be inferred that the Constitution intended such a result.

141.3. Further, any attempt to limit the power to spend to those activities constituting the "ordinary" administration of a department risks constitutionalising a particular conception of what government does (or should do), a question which is fundamentally one of politics (and ultimately one for the people). Government programs of contracting and spending will change from time to time as government – and society – changes. What is novel or extraordinary at one point in time may later present as entirely ordinary (and vice versa).[240] Indeed, in *Bardolph* itself, the Court's view of what was "ordinary" was influenced by the terms of the Appropriation Act in force at the time.[241]

141.4. Finally, a distinction between spending in the ordinary administration of a department, and other contracts, is not necessary for reasons of accountability, or to protect any other constitutional interest. All programs of spending will require administration by a department or statutory authority. They will thus always fall under the responsibility of a Minister to Parliament. There is no difference in the level of required accountability between programs of expenditure in the administration of a department, and other programs, that should produce a different outcome in terms of the constitutional requirement for authorising legislation.

142. Fourthly, s 96 of the Constitution cannot be regarded as restricting the means by which the Commonwealth, absent legislation, may fund programs.[242]

142.1. That no such far-reaching purpose can be attributed to s 96 is confirmed by the fact that its operation may be terminated by Parliament at any time after ten years following the establishment of the Commonwealth.

142.2. Section 96 should not be regarded as playing any greater role than Mason J identified in the *AAP Case*.[243] That is to say, s 96 was not intended to create a power to make grants to States – rather, it serves to put beyond question that legally enforceable conditions can be attached to such grants. Even if the presence of s 96 is consistent with the Commonwealth not having an unlimited executive power to engage in activities that may be the subject of s 96 conditions, it does not establish a default position that, absent valid Commonwealth legislation, if the Executive identifies a desirable program

239 See E Campbell, "Commonwealth Contracts" (1970) 44 *Australian Law Journal* 14 at 15.

240 See *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 403 [15], 460 [211].

241 See *Bardolph* (1934) 52 CLR 455 at 507 (Dixon J, Gavan Duffy CJ agreeing); see also 496 (Rich J).

242 See *Williams* at 235-236 [147]-[148] (Gummow and Bell JJ), 267-270 [243]-[248] (Hayne J), 346-349 [497]-[507] (Crennan J), 373 [592]-[593] (Kiefel J).

243 (1975) 134 CLR 338 at 395, 398.

then the only means to implement that program is to fund a State willing to take on the primary service delivery role.

143. Fifthly, the fact that particular exercises of Commonwealth executive power might "overlap" with that of the States (in the sense that both may be exercised over or in relation to similar subject matter) does not provide any basis for inferring that parliamentary authority is required before the Commonwealth may spend and contract.[244] The potential for exercises of Commonwealth and State executive power (at least in the sense of spending and contracting) in relation to the same subject matter does not give rise to any "competition" that is problematic in a constitutional sense:

143.1. While there are plainly some areas in which the executive power of the Commonwealth or States will be exclusive, there are also large areas in which the concurrent exercise of Commonwealth and State executive power may occur. Within those areas, the Commonwealth and States may choose whether to exercise their power. If both choose to act, that does not mean that there is a conflict, or competition, in any sense prohibited by the Constitution. The circumstances in *Pape*, for example, might properly have given rise to executive action by both the Commonwealth and States.

143.2. The Commonwealth and a State may "compete" in the terms of a contract that they offer to a person; but there is nothing troubling about that. If a person binds him or herself to contracts with each of the Commonwealth and a State, those contracts might "compete", in the sense that they may impose inconsistent obligations on the person. But if that occurs, the person will be required to choose which contract to perform, leaving the other government to its remedies for breach of contract in the ordinary way. No constitutional issue arises.

143.3. If there is inconsistency between a Commonwealth contract and State legislation, the State law will prevail (provided the State law regulates the exercise of the Commonwealth's capacity to contract, and does not attempt to restrict or modify that capacity itself[245]).

143.4. Any more general concern about the intrusion of the Commonwealth into areas of State "concern" involves reasoning of the impermissible "reserved powers" kind long rejected by this Court. Similarly, reasoning that Commonwealth executive action in an area over which both the Commonwealth and States have legislative competence would involve an "extension" of Commonwealth executive powers begs the question.[246] The absence of legislation will frequently impact upon the effectiveness of executive action. But the possibility of State legislation in an area cannot supply a reason for holding that Commonwealth executive power does not extend to that area.

---

244 See *Williams* at 353 [522] (Crennan J), 372 [590] (Kiefel J).

245 *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 427, 443-444, 455, 473-474.

246 cf *Williams* at 216-217 [83] (Gummow and Bell JJ).

(6)(f) A limitation on the areas in which the Commonwealth may spend and contract?

144. If the Court accepts the Commonwealth's submission that the central holding in *Williams* – that many, but not all, instances of executive spending and contracting require legislative authorisation – was wrong, a question will arise as to whether the scope of the spending and contracting power that is authorised by s 61 is limited in some way beyond the seven limitations identified above.

145. The Commonwealth submits that no further limitations are required, and in particular that there is no limitation based on the "areas" within which the power to spend and contract may be exercised. However, if an "area" based limitation is thought to exist, the Commonwealth advances the following argument in the alternative.

146. A good starting point is that of Mason J in *Barton v Commonwealth*,[247] who said that the executive power "enables the Crown to undertake all executive action which is appropriate to the position of the Commonwealth under the Constitution and to the spheres of responsibility vested in it by the Constitution". That statement properly reflects that the executive power of the Commonwealth will be broad in its areas of reach, but acknowledges that it may be subject to some limits (derived from the "position of the Commonwealth under the Constitution").

147. The same possibility may flow from the phrase "purposes of the Commonwealth" in s 81 of the Constitution, which on one view implicitly acknowledges that a purpose of the Commonwealth is not any purpose whatsoever. This is not to descend into an argument about whether the words "purposes of the Commonwealth" provide a justiciable limitation on the scope of the power to appropriate. It is simply to acknowledge that the Constitution is framed upon an assumption that the purposes of the Commonwealth are, while no doubt broad, not unlimited.

148. This is not a reversion to the argument that the executive power is limited to the performance of actions that could have been authorised by a (hypothetical) law of the Parliament. Rather, it is to observe that the enumeration of specific legislative powers will ordinarily be a consideration entitled to great weight in identifying the sphere of authority or responsibility that was intended to be occupied by the Commonwealth within the Federation. The relevance of any individual head of legislative power arises not through a simplistic "mapping exercise", because the making of laws and the taking of executive action are different in character and should not be confused. The point is, instead, that the heads of legislative power reveal something important about the sort of "national government" that the Constitution created.

149. Ultimately, the significance of s 51 of the Constitution in this context arises not only from the content of the discrete heads of power (whether they concern purposes, subject matters, persons or places), but also from the overall meaning or texture they give to the concept of a "national government". The heads of legislative power in s 51 reveal that the national government that the Constitution created was not a narrow or limited thing, concerned solely with matters such as defence or the external affairs of the nation (including international relations, migration, naturalisation, and the like).

---

247 (1974) 131 CLR 477 at 498 (McTiernan and Menzies JJ agreeing at 491).

Instead, the national government is properly concerned with other matters relevant to the creation of a harmonious, productive and "national" society (postal services, banking, currency, weights and measures, marriage and divorce, pensions and allowances, etc) and with matters that are otherwise of concern to the national government because of the Commonwealth's responsibility for them (such as the welfare of Aboriginal and Torres Strait Islander peoples, individually or collectively).

150. Consistently with the above, the allocation of legislative responsibilities between the Commonwealth and the States has been used by this Court in the past to inform the allocation of the prerogative between the Commonwealth and the States, and there is no reason why the scope of non-prerogative executive power should be approached on a narrower basis. In *Barton v Commonwealth*,[248] for example, the Court held that the prerogative in relation to requesting a foreign state to detain and surrender a person who was alleged to have committed an offence against the law of Australia resided with the Commonwealth. The Court did so on the basis of the spheres of responsibility conferred on the Commonwealth by the Constitution.[249]

151. Likewise, in cases involving non-prerogative, non-statutory executive power, the allocation of legislative responsibilities between the Commonwealth and the States has been regarded as performing the type of "informing" role referred to above. For example, in *Bogle v Commonwealth*, the Court had to determine the legal status of Migration Hostels Ltd, a company established by the Commonwealth to provide accommodation to migrants. It concluded that it was "simply a company formed in the ordinary way under the *Companies Act* of the State, and functioning as such within the legal system of the State".[250] The executive power could be used to establish the company and conduct the migrant hostel. The immigration power lay implicit in this.[251]

152. In light of the above, if a limitation beyond the seven limitations identified above is considered necessary, the Commonwealth submits, in the alternative, that that limitation should be framed as follows: executive power to contract and spend under s 61 of the Constitution extends to all those matters that are reasonably capable of being seen as of national benefit or concern; that is, all those matters that befit the national government of the federation, as discerned from the text and structure of the Constitution. This is the corollary embedded in s 61 of the Constitution to the "purposes of the Commonwealth" referred to s 81 (in the specific context of spending).

---

248 (1974) 131 CLR 477.

249 (1974) 131 CLR 477 at 498 (Mason J). See also *Cadia Holdings P/L v New South Wales* (2010) 242 CLR 195 at 226 [87], where Gummow, Hayne, Heydon and Crennan JJ noted that "the creation of the federation presented issues still not fully resolved of the allocation between the Commonwealth and the States of prerogatives which pre-federation had been had been divided between the Imperial and colonial governments, and of their adaptation to the division of executive authority in the federal system established by the *Constitution*".

250 (1952-53) 89 CLR 229 at 267 (Fullagar J, with whom Dixon CJ, Webb and Kitto JJ agreed).

251 *Bogle v Commonwealth* is consistent with a number of cases where the Court adjudicated in relation to exercises of non-prerogative, non-statutory executive power involving spending, contracting and more substantial executive acts (such as establishing and operating enterprises) without suggesting that such actions required legislative backing or recognition: see G Lindell, "The Changed Landscape of the executive power of the Commonwealth after the *Williams* case" (2013) 39(2) *Monash University Law Review* 1 at 16.

153. The above analysis permits the conclusion that the existing authorities that have recognised the validity of executive spending programs without statutory authority do not represent isolated, disjointed "pockets" of permissible executive action, but rather identify species of a common genus. Thus a unity can be properly seen between:

153.1. expenditure on matters where one or more heads of legislative power assist in evidencing that the matter is reasonably capable of being seen as of national benefit or concern;

153.2. expenditure on activities and enterprises "peculiarly adapted to the government of a nation" and which cannot otherwise be carried on for the benefit of the nation (including activities such as national cultural, scientific and research activities);[252]

153.3. expenditure on administering Commonwealth departments of state, or in the ordinary course of administering a recognised part of the government;[253]

153.4. expenditure pursuant to intergovernmental agreements between the Commonwealth and the States on matters of joint interest, not limited to matters which may require for their implementation joint legislative action;[254] and

153.5. expenditure in formulating and the co-ordination of plans and purposes which can reasonably be seen as calling for national rather than local planning.[255] Even without a relevant head of legislative power it would, for example, extend to formulating and funding a national fitness campaign.

(6)(g) Conclusion: application of the correct principles to the NSCSWP

154. The executive power supports the spending and associated contracting under the NSCSWP because:

154.1. The power to spend is committed to the Commonwealth Executive under s 61 of the Constitution (at [115]-[117] above).

154.2. That power may be exercised without statutory authority (at [118]ff).

154.3. The NSCSWP does not infringe any of the seven limitations recognised above (at [128]-[137]).

154.4. If this is necessary, the NSCSWP is reasonably capable of being seen as a matter of national benefit or concern by reason of the facts that:

(a). the program operates on a national level and does not simply target a need in a particular school, or a need in the schools of one particular State where a State might separately act;

---

252 *Pape* (2009) 238 CLR 1; *Davis* (1988) 166 CLR 79 at 94 (Mason CJ, Deane and Gaudron JJ). To deny the Executive the capacity to formulate and fund national schemes of these kinds could see the nation deprived of initiatives which involve no incursion into the responsibilities of the States.

253 *Wooltops Case* (1922) 31 CLR 421 at 432 (Knox CJ and Gavan Duffy J); *Williams* at 207-208 [65], 211-212 [74] and 214-215 [79] (French CJ), 233 [139] (Gummow and Bell JJ), 256 [209] (Hayne J), 342 [484], and 345 [493] and 354 [530] (Crennan J). See also *Bardolph* (1934) 52 CLR 455 at 496, 502-503, 507-508.

254 *R v Duncan; Ex parte Australian Iron & Steel Pty Ltd* (1983) 158 CLR 535 at 560 (Mason J).

255 *AAP Case* (1975) 134 CLR 338 at 413 (Jacobs J).

(b). following consultation by the Commonwealth with the States concerning the NSCSWP, the States supported the extension of that program;

(c). education of youth is capable of being regarded as an ultimate well-spring of national prosperity and success, especially as Australia increasingly competes in the wider world;

(d). insofar as the NSCSWP targets student welfare or wellbeing, s 51(xxiiiA) of the Constitution (the scope of which is addressed in Section 4(a)) confirms the Commonwealth's role with respect to that matter;

(e). to the extent that the NSCSWP involves payments to constitutional corporations, s 51(xx) of the Constitution confirms the Commonwealth's role with respect to those corporations.

155. Something more should be said here about s 51(xx) of the Constitution. That section indicates that "the regulation of the activities, functions, relationships and business of a corporation", the "rights and privileges belonging to a corporation, the imposition of obligations upon it", or "the regulation of the conduct of those through whom it acts"[256] are proper matters for national attention. That being so, the Executive can properly engage with trading corporations in relation to such matters.

156. It is sufficient to bring a matter within the executive power of the Commonwealth that the person with whom the Commonwealth contracts, or the person to whom money is paid, is a trading corporation, and the contract or the money relates to the corporation's existing activities. In such cases it can properly be said that the subject matter of the relevant exercise of power is the corporation. Further, the making of a contract with or a payment to a trading corporation obviously affects the rights of, and relates to the business of, that corporation, and therefore falls within an area of proper Commonwealth concern.[257]

157. Existing authority in this Court correctly establishes that (leaving aside the special case of a newly-formed or nascent corporation), a corporation is relevantly a "trading corporation" if trading forms a sufficiently significant proportion of its overall activities.[258] This is so notwithstanding that such trading activities might not be "predominant or characteristic", and may take place in order that the corporation can undertake some other primary or dominant undertaking.

158. SUQ's trading activities are substantial.[259] The special case shows that SUQ's income, which was approximately $32.5 million for the year ended 31 December 2012, included (in addition to over $13.2 million from the NSCSWP): $111,000 in income from sales; $454,000 in income from interest; $1,112,000 in income from the provision of training programs for reward; $1,398,000 in income from miscellaneous sources;

---

256 Applying *Re Pacific Coal Pty Ltd; Ex parte Construction, Forestry, Mining and Energy Union* (2000) 203 CLR 346 at 375 [83] (Gaudron J); *Work Choices* (2006) 229 CLR 1 at 114-115 [178] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

257 *Work Choices* (2006) 229 CLR 1 at 114-115 [178] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

258 *State Superannuation Board v Trade Practices Commission* (1982) 150 CLR 282 at 303-304 (Mason, Murphy and Deane JJ); *Commonwealth v Tasmania* (1983) 158 CLR 1 at 155-157 (Mason J), 179 (Murphy J), 240 (Brennan J), 292-293 (Deane J); *R v Federal Court of Australia; Ex parte Western Australian National Football League (Inc)* (1979) 143 CLR 190 at 233 (Mason J).

259 The Plaintiff concedes that they are "not insubstantial": Plaintiff's submissions at [118(d)].

and $1,972,000 in income from fees charged for camps, missions and other programs organised by SUQ.[260] The costs associated with these activities were significant.[261]

159. Having regard to the scale of its trading activities, both in absolute terms and as a proportion of SUQ's overall activities, SUQ is a trading corporation. For that reason, payments made pursuant to the Funding Agreement are valid.

160. It is not to the point that s 51(xx) would not, by itself, support legislation creating the entire NSCSWP,[262] because the considerations of characterisation and reading down upon which that conclusion depends are not relevant where the question is whether particular Executive action has validly been undertaken with respect to a particular trading corporation. On this limb of the argument, the question is simply whether payments made pursuant to the Funding Agreement with SUQ are valid. Those payments are valid irrespective of whether other parties have contracted with the Commonwealth in similar terms, and irrespective of the legal character of the parties to any such contracts.

(7) Submissions of the State Attorneys-General

161. Any requirement at the Commonwealth level for legislation authorising spending and contracting would flow through to the State level unless an asymmetrical conception of executive power through the Federation were adopted. The basis for any such asymmetry is far from clear. In particular, if the Court considers that the need for legislative authorisation for spending and contracting arises because executive power often does not extend to these activities in the absence of legislative support, the same must be true at State level unless Commonwealth and State executive power are held to be fundamentally different in character (inconsistently with the observation of Quick and Garran that Commonwealth and State executive authority "is of the same nature and quality"[263]).

162. If, by contrast, the need for legislative authorisation for spending and contracting arises from an implied limit on executive power, then at least to the extent that any such implied limit is based on responsible government, and/or on possible competition between Commonwealth and State executive power, the implication should apply equally to both the Commonwealth and the States.

163. Further, acceptance of the States' submissions on the need for legislative authority for spending programs has clear potential to affect federal-state co-operation, as it would require Commonwealth spending to be supported by legislation that would engage the full force of s 109 of the Constitution, with the result that not only would State executive power be displaced, but State legislation would be rendered invalid to the extent that it impaired the carrying out of the spending program.

164. The interests of the federation are better advanced by focusing on what expenditure the Commonwealth Parliament may permit, rather than on how the Commonwealth Parliament chooses to permit that expenditure. That approach also recognises that the

---

260 SCB CV 106-109.

261 SCB CV 110-111.

262 cf *Williams* at 275-276 [267], 276 [269], 276-277 [272] (Hayne J). See also 368 [575] (Kiefel J).

263 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, at 702. See also s 70 of the Constitution. Further, see, in the Canadian context, *Bonanza Creek Gold Mining Co Ltd v R* [1916] 1 AC 566, 579-581, 586-587 (Viscount Haldane).

judicial function under the Constitution in relation to the Commonwealth and State Parliaments is largely concerned with the respective limits of the legislative power of those Parliaments, rather than with superintendence of legislative procedures.[264]

PART VII QUESTIONS RESERVED

165. The questions that have been reserved for the opinion of the Full Court should be answered as follows:

Question 1:	"Yes (as to each of parts (a) to (c))".
Question 2:	"Unnecessary to answer". Alternatively, "No".
Question 3:	"Unnecessary to answer". Alternatively, "Yes".
Question 4:	"Unnecessary to answer". Alternatively, "Yes".
Question 5:	"Yes".
Question 6:	"No".
Question 7:	"None".
Question 8:	"The Plaintiff should pay the costs of the First and Second Defendants".

PART VIII LENGTH OF ORAL ARGUMENT

166. It is estimated that 4 ½ hours will be required for the presentation of the oral argument of the First and Second Defendants.

Dated: 4 April 2014

.....
Justin Gleeson SC
Solicitor-General of the Commonwealth
Telephone: 02 6141 4139
Facsimile: 02 6141 4149
Email: justin.gleeson@ag.gov.au

.....
Stephen Donaghue SC
Douglas Menzies Chambers
Telephone: 03 9225 7919
Facsimile: 03 9225 6058
Email: s.donaghue@vicbar.com.au

.....
Guy Aitken
Telephone: 02 6253 7084
Facsimile: 02 6253 7304
Email: guy.aitken@ags.gov.au

.....
Nicholas Owens
Telephone: 02 8257 2578
Facsimile: 02 9221 8387
Email: nowens@stjames.net.au

[264] *Western Australia v Commonwealth* (1975) 134 CLR 201 at 276. The exceptions to this general proposition flow from the terms of particular provisions of the Constitution, such as ss 55 and 57.