IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S154 of 2013

BETWEEN:

RONALD WILLIAMS
Plaintiff

and

COMMONWEALTH OF AUSTRALIA
First Defendant

MINISTER FOR EDUCATION
Second Defendant

SCRIPTURE UNION QUEENSLAND
Third Defendant

THIRD DEFENDANT'S SUBMISSIONS

Dated: 4 April 2014
Filed on behalf of the Third Defendant by
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PART I: PUBLICATION OF SUBMISSIONS

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

PART II: ISSUES

2. The principal issues in this case concern the constitutional validity of Division 3B of Part 4 of the *Financial Management and Accountability Act 1997* (Cth) (the "**FMA Act**"), Part 5AA and Schedule 1AA of the *Financial Management and Accountability Regulations 1997* (the **"FMA Regulations**") and item 9 of Schedule 1 to the *Financial Framework Legislation Amendment Act (No 3) 2012* (Cth) (the "**Financial Framework Amendment Act**").

3. The two principal issues concerning this legislation, which arise on the pleaded case of the third defendant ("**SUQ**"), are as follows:

   (a) on a proper construction of s.32B(1) of the FMA Act:

      (i) does s.32B(1) purport to provide legislative authority to the Commonwealth Executive to make, vary, or administer grants of financial assistance, to a person other than a State or Territory, for the purposes of programs which have been prescribed in the FMA Regulations, whether or not these programs are with respect to matters falling within the ambit of Commonwealth legislative power; or

      (ii) does s.32B(1) purport to provide legislative authority to the Commonwealth Executive to make, vary, or administer grants of financial assistance, to a person other than a State or Territory, for the purposes of programs which have been prescribed in the FMA Regulations, and which are programs with respect to matters falling within Commonwealth legislative power?

   (b) does the Commonwealth Parliament have legislative power to enact a provision having the effect of s.32B(1) of the FMA Act, as properly construed?

4. Depending upon the answers to these issues, the answers to the following two issues will be resolved, as there is no independent argument advanced about these matters:

   (a) does the Commonwealth Parliament have legislative power to enact item 9 of schedule 1 of the Financial Framework Act, which retrospectively gives legal effect to arrangements entered prior to the enactment of s.32B of the FMA Act?

   (b) was the SUQ Funding Agreement entered between the Commonwealth and SUQ on 21 December 2011, and varied from time to time, legally effective, having regard to Part 5AA of the FMA Regulations and item 407.013 of Schedule 1AA to the FMA Regulations?

10 5. Certain other issues arise as between the plaintiff and the first and second defendants (the "**Commonwealth defendants**"), on which SUQ makes no submissions. These are:

   (a) whether the *Appropriation Act (No 1) 2011-2012* (Cth) and the *Appropriation Act (No 1) 2012-2013* (Cth) provided statutory authority for the SUQ Funding Agreement, as varied from time to time, and whether the Commonwealth defendants are prevented from raising this issue;

   (b) whether leave should be granted to re-open *Williams v Commonwealth* [2012] HCA 23; (2012) 248 CLR 156;

   (c) whether the plaintiff has standing to obtain declaratory relief in relation to payments made purportedly under the SUQ Funding Agreement on 11 January
20 2012 and 29 June 2012.

PART III: NOTICES UNDER s 78B OF THE *JUDICIARY ACT 1903*

6. Notices under s.78B of the *Judiciary Act 1903* (Cth) have been served by the plaintiff.

PART IV: MATERIAL FACTS

7. Subject to referring to the source material, SUQ does not challenge the statement of material facts set out in paragraphs 4-15 of the plaintiff's submissions. However in the course of these submissions, SUQ will refer in each section to particular facts that are relevant to the submissions in that section.

PART V: APPLICABLE PROVISIONS

8. The applicable constitutional and statutory provisions are as identified by the plaintiff, as well as:

   (a) section 15A of the *Acts Interpretation Act 1901* (Cth); and

   (b) Part 5 of the *Legislative Instruments Act 2003* (Cth).

PART VI: ARGUMENT

First Issue: Proper Construction of Section 32B(1) of the FMA Act

9. The proper construction of s.32B(1) only arises in relation to s.32B(1)(a)(iii) and (b)(iii). The FMA Regulations do not specify any arrangements or grants which might apply in the present case by virtue of the operation of s.32B(1)(a)(i) or (ii) or (1)(b)(i) or (ii). Of course, the meaning of s.32B(1)(A)(iii) and (b)(iii) may be informed by the other parts of s.32B(1).

10. Section 32B(1) relevantly applies if, apart from its operation, the Commonwealth does not have power to make, vary or administer a grant of financial assistance to a person other than a State or Territory and the grant of financial assistance is for the purposes of a program specified in the FMA Regulations.

11. If these conditions are satisfied, s.32B(1) relevantly provides that the Commonwealth has power to make, vary or administer the grant (including making varying or administering a contract, agreement or deed, that relates to the grant[1]), subject to compliance with the FMA Act, the FMA Regulations, the Finance Minister's Orders, Special Instructions and any other law.

12. The question of construction which needs to be determined is whether "a program specified in the regulations", as that phrase is used in s.32B(1)(b)(iii), is limited to programs with respect to matters within the legislative competence of the Commonwealth Parliament or may include programs which are with respect to matters falling outside the ambit of Commonwealth legislative power.

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1 See the definitions of "administer" and "arrangement" in s.32B(3).

13. The answer to this question depends upon the extent of the power to make regulations specifying programs. If that power extends to include programs which are with respect to matters falling outside the ambit of Commonwealth legislative power, then the programs mentioned in s.32B(1)(b)(iii) should bear a corresponding meaning. On the other hand, if the regulation making power is limited to programs with respect to matters within the legislative competence of federal Parliament, then s.32B(1)(b)(iii) could not be construed as allowing other programs to be specified.

14. The extent of the power to make regulations is governed by s.65 of the FMA Act. Section 65(1) provides a general regulation making power to prescribe matters required or permitted by the FMA Act to be prescribed, or necessary or convenient for carrying out or giving effect to the FMA Act.

15. That power to make regulations must be construed as limited to prescribing matters within the legislative power of the Commonwealth, by reason of s.15A of the *Acts Interpretation Act 1901* (Cth). Even without s.15A, the regulation making power in s.65 of the FMA Act would be confined by implication to prescribing matters within the legislative power of the Commonwealth. It could not presumed that the Commonwealth Parliament had attempted to confer a power to make regulations upon the executive which was outside its own competence.

16. Given the general nature of the regulation making power in s.65 of the FMA Act, this is not a case where the application of s.15A of the *Acts Interpretation Act* would alter the operation of the express terms of a statute or cause it to operate differently. Hence, the references made by the plaintiff and interveners to the principles in *Pidoto v Victoria*,[2] and subsequent cases,[3] are irrelevant.

17. It follows that the proper construction of s.32B(1) depends upon the extent of Commonwealth legislative power. If the Commonwealth has legislative power to make regulations prescribing programs which are with respect to matters outside Parliament's legislative competence, then s.32B(1) applies to such programs. If not, then any regulations which purport to prescribe a program which is with respect to a matter

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2 (1943) 68 CLR 87 at 111.

3 Eg, *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468 at 493; *Re Nolan; Ex parte Young* (1991) 192 CLR 460 at 485-486; *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 at 339,347-348, 372.

outside the Parliament's legislative power will be invalid as ultra vires the regulation making power in s.65 of the FMA Act, but it does not follow that s.32B(1) will be unconstitutional.

18. The extent of the Commonwealth Parliament's power to enact a legislative provision which gives the executive government power to prescribe programs governing the payment of public money concerns the constitutional extent of the Commonwealth Parliament's spending power. This issue is examined in the next section.

Second Issue: Legislative Power to Enact Section 32B

19. There are two possibilities concerning the constitutional extent of the Commonwealth Parliament's spending power:

    (a) the Parliament's spending power may be limited to enacting laws to authorise the Executive to spend money on topics within legislative competence;

    (b) alternatively, the Parliament's spending power may extend to enacting laws to authorise the Executive to spend money with respect to any matters which it considers appropriate, subject only to an implied limit that such a power cannot be exercised to effectively take over regulation of an area outside its legislative competence.

20. The plaintiff and interveners adopt the solution in paragraph 19(a), and there is no dispute that Parliament at least has power to authorise the Executive to spend money on topics within its legislative competence. Such a law may be characterised as a law with respect to the relevant head of power which is within the Parliament's competence.

21. SUQ submits that the Commonwealth Parliament's spending power extends as far as the solution in paragraph 19(b).

22. Before analysing the extent of the Commonwealth Parliament's power to authorise spending, SUQ makes a number of preliminary points.

Preliminary Matters

23. *First*, there is no decision of the High Court which determines the extent of the Commonwealth Parliament's power to authorise the Executive to spend money. Thus,

in *Williams (No 1)*, French CJ adverted to, but left open, the related question (raised by Owen Dixon KC) whether the Commonwealth Parliament could confer general authority upon the Executive to enter contracts.[4]

24. *Secondly*, it is helpful to refer to the nature of a power to spend money. An appropriation law and an expenditure law each govern aspects of the relationship of the Commonwealth Parliament and Executive in relation to financial matters. An appropriation law provides legislative authority to the Executive to draw funds. An expenditure law provides legislative authority to spend funds. By itself, the exercise of any such power does not necessarily represent an attempt to legally regulate the activity upon which money is spent, or an attempt to create legal rights or obligations in conflict with other applicable laws.[5]

25. Just as an appropriation law concerns the relationship between the Commonwealth Parliament and Executive in relation to financial matters, and does not regulate the right, duties or obligations of citizens,[6] so too a law which simply confers legislative authority upon the Commonwealth Executive to spend appropriated money only concerns the financial relations between the Commonwealth and Executive. The provision of authority by the Parliament on the Executive to spend money does not, without more, represent any attempt by the Parliament to exercise legislative authority in relation to the subject matter of the expenditure.

26. Similar points about the nature of an expenditure law have been made in Canadian constitutional cases, where the existence of a federal legislative spending power has been inferred, without it being expressly stated in the Canadian constitution. See in particular, *YMHA Jewish Community Centre v Brown*[7] and *Canada Mortgage and Housing Corporation v Iness*.[8]

27. *Thirdly*, it has long been acknowledged that the Commonwealth may in effect control the expenditure of money on topics outside its legislative competence by means of conditional grants made under s.96 of the *Constitution*, provided that the conditions are

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4 (2012) 248 CLR 156 at 209 [68].

5 *Attorney-General (Vic) (ex rel Dale) v Commonwealth (Pharmaceutical Benefits Act Case)* (1945) 71 CLR 237, 256-257 (Latham CJ).

6 *Pape v FCT* (2009) 238 CLR 1 at 104, [292] (Hayne and Kiefel JJ).

7 [1989] 1 SCR 1532 at 1548-1549.

8 (2004) 236 DLR 4th 241 (Can Ont CA) at [29]-[32].

not coercive[9] and other constitutional requirements are observed.[10] Within that limitation, States are free to accept or reject the conditions imposed by the Commonwealth.

28. In other words, there is no constitutional objection, in itself, to the Commonwealth being able to spend money for purposes outside its legislative competence, so long as this does not represent an attempt to compel States to act in a manner contrary to their interests. The references by the plaintiffs and interveners to there being something inherent within the structure of Chapters I and II of the *Constitution* that prevents the Commonwealth from spending in areas outside its legislative competence is inconsistent with the law concerning s.96. The control mechanisms involved in the present case are similar to those existing in relation to s.96.[11]

29. *Fourthly*, the position which has been adopted in Australia in relation to conditional grants is similar to the position in the federal structure of the United States of America. The most recent expression of the US views occurred in *Obamacare*.[12]

30. The position is also consistent with other federal structures around the world. In a 1999 comparative study of federations in the USA, Switzerland, Australia, Germany, Austria, Belgium, India, Malaysia and Spain, the author of the study remarked that: "It is strikingly clear that in one form or other, all federations considered in this study recognize as constitutionally and legally legitimate a federal spending power in areas of exclusive state or provincial jurisdiction. Thus, the recognition of a federal spending power in areas of exclusive provincial jurisdiction is by no means unusual, and in fact fits the norm among federations."[13]

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9 *Victoria v The Commonwealth (Roads Case)* (1926) 38 CLR 399, *South Australia v The Commonwealth (First Uniform Tax Case)* (1942) 65 CLR 373, *Victoria v The Commonwealth (Second Uniform Tax Case)* (1957) 99 CLR 575.

10 Such as acquiring property on just terms: *P J Magennis Pty Ltd v The Commonwealth* (1949) 80 CLR 382, *ICM Agriculture* ((2009) 240 CLR 140 at [46], and complying with s.116: *Attorney-General (Vic); ex rel Black v Commonwealth (DOGS Case)* (1981) 146 CLR 559.

11 Section 32B of the FMA Act contemplates that there will be a contract or arrangement between the recipient of a grant and the Commonwealth, on terms or conditions agreed by the recipient. See the definition of "vary" in s.32B(3).

12 *National Federation of Independent Business v Sebelius* 132 SCt 2566 (2012) at 2602 (Roberts CJ), 2659-2662 (Scalia, Kennedy, Thomas & Alito JJ).

13 Ronald Watts, "The Spending Power in Federal Systems: A Comparative Study" (1999,

31. This comparison with the position in other federal structures supports the view that it is a natural aspect of a national and sovereign government, even in a federal structure, to be able to authorise the expenditure of money in areas which may fall outside its legislative competence to regulate. This is consistent with SUQ's pleaded position, developed below, that a general expenditure law is within the legislative power of the Commonwealth Parliament by reason that such a law is a necessary incident of the character and status of the Commonwealth as a sovereign government.

Legislative Power to Enact a General Expenditure Law

32. It is clear that the *Constitution* contemplates that the Commonwealth Parliament has power to pass laws appropriating money. That is evident from ss.53, 54, 81 and 83 of the *Constitution.*

33. The power to appropriate funds for particular purposes is not simply part of other enumerated heads of legislative power contained in s.51 of the *Constitution.* That is because an appropriation of funds has no effect in relation to the subject matter of any enumerated head of power. The appropriation of funds may be a condition of spending money upon a subject matter, but it is not in itself an authority to do so.

34. The assumption about the existence of a legislative appropriation power in ss.53, 54, 81 and 83 of the *Constitution* implies the existence of such a power as a separate head of legislative power for the Commonwealth Parliament to make appropriation laws. The present case involves determining the extent of any limits upon that implied power.

35. Once an appropriation law is passed, it is as much a law as any other statute enacted by the Commonwealth Parliament. An appropriation law does not have any lesser or different character compared to other statutes, by virtue of the operation of ss.53 and 54 upon the process of the enactment of appropriation laws.

36. The nature of an appropriation law is that it permits application of the Consolidated Revenue Fund to identified purposes, but does not itself create an obligation to apply the funds for the purposes set out in the appropriation law.[14] It is for the legislature to

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Institute of Intergovernmental Relations, Queens University, Ontario) at pp 49-50.

14 *Pape v FCT* (2009) 238 CLR 1 at [295]-[296], (Hayne and Kiefel JJ); *Williams (No 1)* (2012) 248 CLR 156 at [221] (Hayne J).

identify the degree of specificity with which the purpose of an appropriation is identified.[15]

37. Appropriation "is a necessary but not sufficient step for the spending of money by the Executive".[16] Thus, the segregation or earmarking of funds from Consolidated Revenue is not an end in itself. It is a step towards achieving the identified purposes of the appropriation.

38. The power to appropriate funds for identified purposes is a power vested by the *Constitution* in the Commonwealth Parliament. The question which arises is whether it is incidental to the execution of that power that the funds be spent upon the identified purposes. If so, legislation authorising that expenditure is within the legislative power of the Commonwealth Parliament by reason of s.51(xxxix) of the *Constitution.*

39. If legislation goes beyond simply authorising expenditure of funds which had been appropriated but is, in substance, legislation which endeavours to regulate or control the activity upon which the expenditure is made, then such legislation is not incidental to executing the appropriation. It would then be legislation with respect to the subject matter of the activity upon which funds are spent.

40. There is a distinction between legislation which provides for expenditure of money and legislation which endeavours to regulate the activity upon which money is spent.[17] If legislation simply gives the Executive legislative authority to spend appropriated money, it is not legislation with respect to any enumerated head of legislative power contained in s.51. Instead it is legislation which is incidental to the execution of Parliament's exercise of its appropriation power.[18]

41. That is because there is a direct connection between an appropriation and expenditure. An appropriation can only be made for identified purposes, and legislation is necessary for an appropriated amount to be spent upon those identified purposes. Unless there is

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15 *Combet v The Commonwealth* (2005) 224 CLR 494 at 577, [160]-[161] (Gummow, Hayne, Callinan and Heydon JJ); *Pape v FCT* (2009) 238 CLR 1 at 78, [197] (Gummow, Crennan and Bell JJ). The usual practice adopted by the Commonwealth Parliament has been to use a high degree of generality in identifying such purposes: *Pape v FCT* (2009) 238 CLR 1 at 105 [296] (Hayne and Kiefel JJ).

16 *Pape v FCT* (2009) 238 CLR 1 at 111 [316] (Hayne and Kiefel JJ).

17 *Pharmaceutical Benefits Act Case* (1945) 71 CLR 237, 256-257 (Latham CJ).

18 See, e.g., *Pharmaceutical Benefits Act Case* (1945) 71 CLR 237, 266 (Starke J).

legislative power to permit the Executive to spend money which has been appropriated for a purpose, what is a valid appropriation might never be implemented by the Commonwealth Parliament.

42. There is a possible answer to the point that, unless there is legislative power to permit the Executive to spend money which has been appropriated for a purpose, a valid appropriation might never be implemented by the Commonwealth Parliament. It might be contended that the power of the Commonwealth Parliament to appropriate money for any purpose it chooses is limited to matters within its enumerated and implied legislative heads of power. However, in the present case, the plaintiff has not asserted that there is any limit upon the nature of the appropriations which the Commonwealth Parliament has implied legislative power to make, and has not claimed that the relevant appropriation laws in this case are outside the Commonwealth Parliament's power in any respect. The extent of Parliament's power to appropriate funds has never been finally resolved.

43. The distinction between the nature of an expenditure law, and a law which regulates the rights, duties and obligations of citizens, which has just been described, underpins the reasoning in the *Pharmaceutical Benefits Act Case*.[19] All the justices who held the *Pharmaceutical Benefits Act 1944* to be invalid referred to the fact that the legislation did far more than simply authorise expenditure of appropriated funds. It created a whole new legislative regime relating to the conduct of doctors, pharmacists and hospitals, replete with offence provisions and Ministerial powers to enter upon premises and take samples.[20] As Dixon J observed:[21]

> "Though, of course, the expenditure of money is indispensable to the scheme of the Act yet, ..., it contains a general legislative plan covering much more than the spending of money and involving, moreover, control and regulation by law operating directly upon individuals."

44. Section 32B of the FMA Act is the second occasion on which the validity of a law enacted by the Commonwealth Parliament which confines itself to providing legislative

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19 (1945) 71 CLR 237.

20 *Pharmaceutical Benefits Act Case* (1945) 71 CLR 237, 250, 258 (Latham CJ), 264-265, 266 (Starke J), 267-269 (Dixon J), 279-280 (Williams J).

21 *Pharmaceutical Benefits Act Case* (1945) 71 CLR 237, 268-269 (Dixon J).

authority for spending by the Commonwealth Executive has been challenged in this Court.

45. The earlier occasion was the *Tax Bonus for Working Australians Act (No 2) 2009* (Cth) which provided for payment of a tax bonus to a class of taxpayers. This legislation was upheld by a majority of the High Court in *Pape*.[22]

46. SUQ accepts that the decision in *Pape* was not on the basis that s.51(xxxix) provided legislative power to enact a general expenditure law as incidental to the exercise of Parliament's legislative power of appropriation. Rather, the majority decision in *Pape* was reached on a narrower basis. French CJ, Gummow, Crennan and Bell JJ considered that the Executive had power under s.61 of the *Constitution* to determine that there was a need for expenditure to stimulate the national economy, and that s.51(xxxix) provided legislative power to the Commonwealth Parliament to give effect to that Executive determination.[23] Hayne and Kiefel JJ characterised the *Tax Bonus for Working Australians Act (No 2) 2009* as a law with respect to the subject matter of taxation, rather than simply as a spending law.[24]

47. It is accepted that the narrower basis adopted by the majority in *Pape* would have been unnecessary if the broader propositions advanced had been applied in *Pape*. It is also accepted that there are some observations in *Pape* which are inconsistent with the broader basis which is now advanced: those matters are addressed below. Further, the particular issues in *Pape* about the extent of the Commonwealth Parliament's appropriation power arose in the context of submissions locating that power in ss.81 and 83 of the *Constitution*, rather than in the context of that power being a matter of implication.

48. Prior to *Pape*, there was debate about whether the Commonwealth Parliament's legislative power to make appropriation laws was located in ss.81 or 83 of the *Constitution*, and whether that power was conferred by s.81 for any purposes of the Commonwealth. Thus, a principal focus of the differing views on this issue, expressed in the *Pharmaceutical Benefits Act Case* and the *AAP Case*, was whether the words "for

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22 *Pape v FCT* (2009) 238 CLR 1 (Heydon J dissented).

23 *Pape v FCT* (2009) 238 CLR 1 at 63, [133] (French CJ), and at 91-92, [242]-[243] (Gummow, Crennan and Bell JJ).

24 *Pape v FCT* (2009) 238 CLR 1 at 133, [393].

the purposes of the Commonwealth" or "by law" in ss.81 and 83 respectively of the *Constitution* limited the Commonwealth's power to appropriate revenue or moneys to matters within its enumerated and implied heads of legislative power,[25] or whether it was for the Parliament to determine where a particular purpose should be adopted as a purpose of the Commonwealth.[26] As Dixon J observed, the facts of the *Pharmaceutical Benefits Act Case* did not necessitate a choice between the competing views.[27] Neither view commanded a majority in the *AAP Case*, since Stephen J disposed of the matter by holding that the State of Victoria did not have standing to challenge the appropriation.[28]

49. While re-defining the parameters of this debate, neither *Pape* nor *Williams (No 1)* have resolved the extent of the Parliament's power to appropriate funds.

50. The result of *Pape* was that ss.81 and 83 were not a source of legislative or executive *spending* power. The result of *Williams (No 1)* was that the Executive does not have power to spend money (or enter into contracts) without authority derived from statute or the *Constitution* itself.

51. In *Pape*, French CJ adopted the view expressed by McHugh J in *Northern Suburbs General Cemetery Reserve Trust*[29] that neither ss.81 nor 83 were sources of power to appropriate money for Commonwealth purposes, but rather that the power to appropriate was a necessary incident of the power to make laws with respect to a subject matter and was implied by the grant of such power.[30]

52. Gummow, Crennan and Bell JJ rejected the premise, underlying the argument in the *Pharmaceutical Benefits Act Case*, that s.81 was a source of "spending power".[31] Accordingly, the phrases "for the purposes of the Commonwealth" (in s.81) and "by

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25 *Pharmaceutical Benefits Act Case* (1945) 71 CLR 237, 265-266 (Starke J), 269, 271-272 (Dixon J, Rich J agreeing), 281-281 (Williams J); *Victoria v Commonwealth (AAP Case)* (1975) 134 CLR 338, 356, 359-360 (Barwick CJ), 373-374 (Gibbs J), 412 (Jacobs J).

26 *Pharmaceutical Benefits Act Case* (1945) 71 CLR 237, 253-254 (Latham CJ), 273-274 (McTiernan J); *AAP Case* (1975) 134 CLR 338, 367-369 (McTiernan J), 396 (Mason J), 417, 421 (Murphy J).

27 (1945) 71 CLR 237, 269.8 (Dixon J).

28 (1975) 134 CLR 338, 390 (Stephen J).

29 (1993) 176 CLR 555, 601 (McHugh J).

30 (2009) 238 CLR 1, 55-56 [111]-[113] (French CJ).

31 (2009) 238 CLR 1, 73-74 [178]-[180] (Gummow, Crennan and Bell JJ).

law" (in s.83) were not limitations of legislative power.[32] Hayne and Kiefel JJ suggested that the grant of legislative power relevant to s.81 was found in s.51(xxxix),[33] but considered it unnecessary to decide the scope of the purposes for which the Commonwealth could appropriate funds.[34]

53. Heydon J, who dissented in the final result, considered that the question of what "the purposes of the Commonwealth" means did not arise, because s.81 was not an independent source of legislative power to authorise the Executive to spend appropriated funds.[35] Nonetheless, Heydon J considered that s.81 did not give the Commonwealth a power to appropriate for the general welfare of the Commonwealth, because, if it did, s.51(xxxix) would "make the Commonwealth a government of general and unlimited legislative powers".[36]

54. *Williams (No 1)* was concerned with the extent of Executive power to spend money in the absence of statutory authorisation, whereas the issue in the present case is the validity of such legislative approval. As noted above, French CJ expressly reserved his view on whether the Commonwealth Parliament has power to enact a General Contracts Act.[37] Gummow and Bell JJ and Crennan J noted that there was no involvement of the Parliament in the NSCP beyond the passage of appropriation Acts.[38] Hayne and Kiefel JJ suggested that the existence of s.96 and the distribution of powers between the States and the Commonwealth militated against an implied legislative power to authorise expenditure for any purpose for which the Parliament has appropriated funds.[39] In dissent, Heydon J held that the executive power included power to do what the Parliament could authorise the Executive to do by legislation.[40]

55. Ultimately, as Hayne and Kiefel JJ recognised in *Pape*, "the drafting history of the relevant provisions of the *Constitution* does not point unequivocally to a settled understanding at the time of Federation that the appropriation and spending powers of

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32 (2009) 238 CLR 1, 75 [185], 82-83 [210] (Gummow, Crennan and Bell JJ).
33 (2009) 238 CLR 1, 102 [289] (Hayne and Kiefel JJ).
34 (2009) 238 CLR 1, 108 [305] (Hayne and Kiefel JJ).
35 (2009) 238 CLR 1, 207 [594], 210-212 [600]-[607] (Heydon J).
36 (2009) 238 CLR 1, 213-214 [608] (Heydon J).
37 (2012) 248 CLR 156, 209 [68] (French CJ).
38 (2012) 248 CLR 156, 218 [90] (Gummow & Bell JJ), 336 [451] (Crennan J).
39 (2012) 248 CLR 156, 269-270 [247]-[248] (Hayne J), 373 [591]-[593] (Kiefel J).
40 (2012) 248 CLR 156,, 295 [340] (Heydon J).

the Commonwealth extended to any purpose."[41] However, it is equally true that the drafting history does not point unequivocally against it.[42] Further, if the constitutional drafters had no settled understanding one way or the other, there quickly developed such an understanding by the Commonwealth Parliament immediately thereafter, to the effect that Parliament did have power to appropriate, and then spend, money for any purpose.[43]

56. In these circumstances, as Quick and Garran observed, any limitation upon the Commonwealth's appropriation and spending powers is not express but must be implied.[44] The burden of demonstrating the existence of any limitation is upon those wishing to imply such a limitation.

57. There is no express limit upon the Commonwealth Parliament's appropriations power. Further, due to the acknowledged uncertainty about the actual intention of those drafting the Constitution, no originalist theory of constitutional interpretation which refers to historical materials (such as Convention debates)[45] can be relied upon to support any implied limit upon the extent of the Commonwealth Parliament's appropriation power. Consequently, any such implication must be based upon the inherent nature of a legislative power to appropriate funds, or upon the structure of the Constitution.

58. There is nothing inherent in the nature of the Commonwealth Parliament's appropriations power which supports that power being limited to appropriating money spending upon the subject matter of enumerated heads of legislative power.

59. The plaintiff claims that SUQ's analysis assumes that an appropriation *by its own force* involves the exercise of an executive or legislative power to achieve an objective which

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41 (2009) 238 CLR 1, 108 [305] (Hayne and Kiefel J).

42 The relevant drafting history is helpfully summarized in C.A.Saunders, "The Development of the Commonwealth Spending Power" (1978) 11 MULR 369 at 375-381.

43 See the comments by Dr Evatt and by Sir Robert Menzies in relation to the bill introducing s.51(xxiiiA): *Hansard*, 27 March 1946 at pp 646-647 (Dr Evatt) and *Hansard*, 3 April 1946, p 898 (Sir Robert Menzies).

44 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth 1901* (1st ed) at 666.

45 Compare *Wong v Commonwealth* (2009) 236 CLR 573 and The Sir Maurice Byers Lecture delivered by the Hon J D Heydon on 3 May 2007, "Theories of Constitutional Interpretation: A Taxonomy".

requires expenditure,[46] which is a proposition rejected in *Pape*.[47] However, that is not SUQ's argument. It is well established that an appropriation is the exercise of a power authorising the application of funds to achieve an objective. It does not, of its own force, permit the expenditure of those funds to achieve the objective. That step requires another exercise of legislative power. SUQ maintains that this further exercise of legislative power may be taken in order to execute the purpose of an appropriation law, by reason of the operation of s.51(xxxix).

60. It might be said that providing legislative authority to spend money is not truly incidental to appropriating it for a purpose, and that all that is necessary to execute an appropriation is a mechanism to separate funds within the Consolidated Revenue Fund. However, the logical difficulty with that position is that a lawful segregation of money for a particular purpose is not an end in itself, and does not achieve anything without the Commonwealth Executive having power to spend the appropriated funds for the purpose for which they have been earmarked.

61. There is nothing in the structure of the *Constitution* which permits an inference that the Commonwealth Parliament's appropriations power is necessarily limited.

62. The nature of the Commonwealth as a national and sovereign government is against such an implication. As referred to above, it is a common incident of the character of a national government in a federal sphere that it should be able to provide for spending on purposes which may be outside its legislative competence. The plaintiff simply asserts that such a proposition need only be stated to be rejected.[48] However, the position advanced by SUQ is orthodox by comparison to other federal structures. Further, the proposition is not obviously incorrect once the distinction is recognised between regulating activity upon which money is spent and authorising expenditure of money on an activity.

63. The critical structural point which the plaintiff raises depends upon s.96 being included in the *Constitution*, so that a power of the Commonwealth Parliament to legislate for

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46 Plaintiff's Submissions, [56].
47 *Pape* (2009) 238 CLR 1 at 72, [176] (Gummow, Crennan and Bell JJ).
48 Plaintiff's submissions, [58].

expenditure upon any purpose would effectively bypass s.96 and leave it no work to do. This reflects certain observations made in *Williams (No 1).*[49]

64. However, the fundamental point about s.96 is that it allows the Commonwealth to control public spending in areas, whether within or without the subject matter of its legislative competence, with the agreement of a State. All that is proposed by s.32B of the FMA Act is that the Commonwealth should be able to authorise public spending outside the subject matter of its legislative competence where this does not intrude upon State regulation of that subject matter. That effectively gives the Commonwealth a very similar power to the operation of s.96.[50]

10 65. However, while the premise of s.96 is that the States consensually agree to the conditions imposed by the Commonwealth upon spending, that is unnecessary in relation to the operation of s.51(xxxix) upon an appropriation law. In such a case, the States do not need to agree to public spending proposed by the Commonwealth, because they entirely retain their autonomy to legislate in relation to the subject matter of the spending. If the Commonwealth legislation does more than merely authorise expenditure and purports to regulate a matter beyond the scope of the Parliament's enumerated and implied legislative power, it will be ultra vires because it will, in substance, be legislation with respect to an exclusively State matter, rather than legislation implementing an appropriation for spending money upon a particular
20 purpose.

66. Lastly, no legitimate appeal can be made to any notion of "federal balance" between Commonwealth and State spheres of influence. That is for two reasons. First, the Commonwealth Parliament does not intrude, in any legal sense, upon any area of State responsibility simply by authorising expenditure in that area, without any attempt to regulate or control the subject matter of that area. States may still regulate the subject matter of Commonwealth spending. So, for example, in the present case, it would be open for the States to pass laws which required school chaplains or welfare officers

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49 *Williams (No 1)* (2012) 248 CLR 156 at [143]-[148] (Gummow and Bell JJ), [247] (Hayne J). See, also, *Pharmaceutical Benefits Act Case* (1945) 71 CLR 237, 266 (Starke J).

50 As the opening words of s.96 indicate, s.96 may not always continue as an operative part of the *Constitution.*

employed in public schools to have particular qualifications. It would also be open to States to prohibit public schools from employing school chaplains or welfare officers.

67. Secondly, the idea of an implied federal balance carries a misleading implication of static equilibrium, which is an implication that cannot be accepted after the *Engineers' Case*.[51] Once it is recognised that States may still regulate the subject matter of Commonwealth spending authorised by the Commonwealth Parliament, there is little risk that there will be any threat to the continued existence of the States as separately organised polities.[52] As French CJ observed in *Pape*, it was difficult to see how the spending measures in that case in any way would interfere with the constitutional distribution of powers.[53] While the expenditure in *Pape* consisted of one-off, short term payments, that point is more broadly correct given the inherent nature of spending.

68. It follows from these submissions that the Commonwealth Parliament has power to enact an expenditure law which authorises the Executive to spend money for a purpose identified in an appropriation. However, the plaintiff and the interveners raise two further issues as to whether the Commonwealth Parliament has legislative power to enact a law such as s.32B of the FMA Act (for brevity, a "general expenditure law").

Plaintiff's Dual Objections to a General Expenditure Law

69. The two issues which relate to whether the Commonwealth Parliament has the power to enact a law in the nature of s.32B, on SUQ's primary construction are the following:[54]

(a) such a law is too wide to be a law with respect to any particular head of Commonwealth legislative power; and

(b) such a law is an impermissible delegation of power to the Commonwealth Executive because it leaves it to the Executive to decide how to spend money to achieve the purpose of an appropriation.

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51 *New South Wales v Commonwealth (Work Choices Case)* (2006) 229 CLR 1 at 73-74, [54] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ); *Pape v FCT* (2009) 238 CLR 1 at 117-118, [333] (Hayne and Kiefel JJ).

52 *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31 at 82.

53 *Pape v FCT* (2009) 238 CLR 1 at 60, [127].

54 Plaintiff's Submissions, [37]-[38].

70. While it is true that a general expenditure power is not related to any particular head of legislative power enumerated in s.51 of the *Constitution*, the first objection does not take into account the Commonwealth's legislative power to make an appropriation law. The analysis above explains how s.51(xxxix) enables Parliament to enact a general expenditure law as incidental to the execution of the power to enact an appropriation law.

71. The second objection does not take into account that the Commonwealth Parliament approves the programs for which appropriations are to be made in the first place. This occurs by reason of the legislative approval of the Portfolio Statements, which describe the programs for which appropriations are made. See, for example, s.8(2) of the *Appropriation Act (No 1) 2012-2013*, and the related Portfolio Statements which prescribe the NSCSWP.[55] Only such a program could be included in the regulations for the purposes of s.32B(1)(b)(iii) of the FMA Act. Only expenditure upon such a program would be the execution of the appropriation law.

72. If a different program was contained in regulations made for the purposes of s.32B of the FMA Act, then any person with sufficient standing could challenge the regulation as *ultra vires* the power of the Commonwealth Executive to make regulations executing an appropriation law.

73. Further, the Commonwealth Parliament is able to ensure it maintains additional control over the programs specified for the purposes of s.32B of the FMA Act, by reason that such regulations will need to be laid before the Houses of Parliament and may be disallowed by reason of Part 5 of the *Legislative Instruments Act 2003* (Cth). However, this is an additional Parliamentary control, and even if this did not occur (for example, in the unlikely event that Part 5 was repealed), this would not affect whether a regulation could be challenged as ultra vires for prescribing a program which is not mentioned in an appropriation law.

74. The second objection is, in part, based upon the fact that a general expenditure law does not prescribe a rule of conduct or make a declaration as to power, right or duty. However, as discussed above, the validity of a general expenditure law depends upon it not, in substance, endeavouring to regulate conduct or declare particular powers, rights

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55 Core Application Book, pp 450, 531.

or duties. If it did so, then it would be represent an impermissible attempt to legislate in relation to a particular topic outside the legislative competence of the Commonwealth Parliament.

75. The only purpose of a general expenditure law is to confer a power upon the Executive to spend money for a purpose identified by Parliament. In that respect, a general expenditure law declares a power of the Commonwealth Executive to spend appropriated money for the purpose of a program.

76. The general discretion as to the nature of the expenditures made to pursue a program is a matter for the Commonwealth Executive to determine. Such a discretion exists in relation to every item in an appropriation law, and is not unusual in any way. The existence of such a discretion does not, of itself, involve any impermissible delegation of legislative power.

77. The plaintiff contends that the existence of such a discretion places the Senate in a weaker position than the House of Representatives, because it would allow the Executive to spend money upon a program which has not been authorised by Parliament. The plaintiff says that the position of the Senate to review expenditure upon particular programs would be by-passed.[56]

78. However, SUQ does not advance a construction of s.32B which permits this to occur. Properly construed, s.32B only allows programs specified in the Portfolio Statements approved by Parliament for an appropriation law to be specified in the FMA Regulations.

Constitutional Validity of Section 32B as a General Expenditure Law

79. For the reasons which have been developed, a law which authorises the Commonwealth Executive to spend money upon any programs which have been identified by the Commonwealth Parliament in its appropriation laws, and which are included in regulations made under the FMA Act is constitutionally valid.

80. Section 32B of the FMA Act is such a law, and should not be declared to be constitutionally invalid.

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56 Plaintiff's Submissions, [77]-[78], [83].

Legislative Power to Enact a Particular Expenditure Law

81. If, however, the legislature's power does not extend to enacting a general expenditure law, no-one has disputed that the legislature has a power to enact a particular expenditure law which authorises Commonwealth Executive spending in relation to a matter within the enumerated heads of power in s.51. The question then arises whether the NSCSWP is a program with respect to a matter within an enumerated power contained in s.51 of the *Constitution*.

82. SUQ accepts, for the purposes of this argument, that the program which is specified must be within legislative competence. It is not sufficient that those dealing with the Commonwealth pursuant to a program might or might not be a constitutional corporation. This means that there is no basis for the plaintiff's point that s.32B is too widely expressed to be constitutional, because it is impossible to determine whether programs are within Commonwealth legislative power.[57]

83. The NSCSWP is a program which is within the legislative competence of the Commonwealth Parliament by reason of s.51(xxiiiA) or (xx).

Nature of NSWSCP

84. NSCSWP funding was sought for a school chaplain at the Darling Heights primary school to continue a service which had been provided under the NSCP since 2007,[58] in order to provide the following services over and above those which could be provided by teaching staff:[59]

(a) to allow the existing chaplain to work more days to provide pastoral care to students, staff and parents; to provide individual support for parents in situations affecting students (e.g., family breakdowns); to respond to critical incidents, such as loss of life in the school community due to accidents or suicide; to provide programs for students who are educationally or socially at risk; to participate more fully in personal development programs for students, reading programs and other school activities; to assist student leaders at the school; to provide programs in relation to educational practices, personal grooming and hygiene, nutrition and

57 Plaintiff's Submissions, [47].
58 Special Case, [52], SCB 1/19.
59 Special Case, [54], SCB 1/20.

relationships for Australian and overseas students; and to provide holiday activity programs;[60]

(b) to expand the existing chaplaincy program to allow the chaplain to work with students and reading groups and to provide classroom assistance; to provide programs covering self-esteem, appreciation, positive thinking and talking, responsible behaviour and boys mentoring; and to work with teachers, staff and parents.[61]

85. The stated purpose of the funding providing under the SUQ Funding Agreement is "to contribute to the provision of chaplaincy services at Your school(s), to assist Your School(s) and community(s) in supporting the general spiritual, social and emotional wellbeing of students."[62]

86. School chaplains must abide by the NSCSWP Code of Conduct, which provides that a school chaplain's role is "supporting the spiritual, social, and emotional wellbeing of their students regardless of faith or beliefs".[63] A school chaplain must, inter alia:

(a) "Contribute to a supportive, safe, inclusive and caring learning environment within the school";[64]

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60 See the NSCP funding application at SCB 1/454.25-48.

61 Special Case [37] (SCB 1/16), see also the NSCP funding application at SCB 1/455.11-24, and the NSCSWP Continuation of Service Submissions at SCB 2/968.03-17. The references above to the provision of support by school chaplains to the "school community", to "staff" or to "parents" do not affect the proper characterisation of the NSCSWP at the Darling Heights School as the provision of benefits to students at the school. That is obviously its object. Support under the NSCSWP, of the school community, staff and parents is ancillary and incidental to that object and is for the purpose of providing a better educational outcome for the students. The sole purpose of the school is to provide educational and like benefits for the students. The activities of school chaplains can fairly be characterised as benefits to students: SCB, 1/119-123, see also the NSCSWP Progress Report at SCB 2/996.09-20, and the Chaplain Facilitated Programs in Schools, SUQ Report on August 2013 Pilot Data Collection Project at SCB 2/1009-10. The provision of any incidental benefits of the NSCSWP for parents, staff or the school community is to better enable the school to educate and provide other benefits to the students.

62 Clause C1 of Schedule 1 to the SUQ Funding Agreement (SCB 3/1298.32-35).

63 Code of Conduct (SCB 2/946.15-16).

64 Code of Conduct (SCB 2/946.38-39).

(b) "Actively discourage any form of harassment or discrimination on the grounds of religious ideology, beliefs or sexuality";[65]

(c) "Refer a student to a service or organisation which is best placed to support the student's particular needs in accordance with the student's own beliefs and values";[66]

(d) "Provide accurate and impartial information about the support and services available in the broader community, including community groups and religious groups".[67]

87. The precise nature of the chaplaincy or school welfare services to be provided under the NSCSWP is a matter for individual schools to decide.[68] In the case of Darling Heights State School, the school chaplain's role includes:

(a) "Assisting students to explore their beliefs and world views";[69]

(b) "Facilitating and providing pastoral care and personal support for students, staff and parents of the school community, in accordance with Christian values and in cooperation with the school's support staff";[70]

(c) "Help[ing] students to develop and use resilience skills such as thinking confidently and understanding emotions";[71]

(d) "Engaging in the general life of the school";[72] and

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65 Code of Conduct (SCB 2/946.44-45).
66 Code of Conduct (SCB 2/946.48-49).
67 Code of Conduct (SCB 2/946.50-51).
68 NSCSWP Guidelines Revision 6, [1.1] (SCB 2/904.25).
69 Chaplain Role Statement for the Chaplaincy Service at Darling Heights State School (SCB 3/1012.14).
70 Chaplain Role Statement for the Chaplaincy Service at Darling Heights State School (SCB 3/1012.29-32).
71 Chaplain Role Statement for the Chaplaincy Service at Darling Heights State School (SCB 3/1012.52-53).
72 Chaplain Role Statement for the Chaplaincy Service at Darling Heights State School (SCB 3/1013.03).

(e) "Engag[ing] with local religious groups and community groups, and with parental consent, connect[ing] students with resources and programs provided by these groups."[73]

88. The NSCSWP Guidelines Revision 6, with which a school chaplain is obliged to comply by reason of the Code of Conduct, repeat that the NSCSWP "assists school communities to support the spiritual, social, and emotional wellbeing of their students." The Guidelines also provide that this "can include support and guidance about ethics, values, relationships and spirituality; the provision of pastoral care; and enhancing engagement with the broader community".[74]

89. The Guidelines also state that the objectives of the NSCSWP "are to assist school communities to provide greater pastoral care, and general spiritual, social and emotional comfort to all students, irrespective of their faith or beliefs".[75] As well, they state that the services and actions of a school chaplain could include "Assisting school counsellors and wellbeing staff in the delivery of student welfare services; Providing students, their families and staff with support and or appropriate referrals, in difficult situations such as during times of grief or when students are facing personal or emotional challenges; supporting students to explore their spirituality and providing guidance about spirituality, values and ethical matters or referring students to, or sourcing appropriate services, to meet these needs; and facilitating access to support agencies in the community, where applicable; Supporting students and staff to create an environment which promotes the physical, emotional, social and intellectual development and wellbeing of all students; Supporting students and staff to create an environment of cooperation and mutual respect, promoting an understanding of diversity and the range of cultures and their related traditions; Being approachable to all students, staff and members of the school community; Supporting students, their families and staff of all beliefs and not seeking to impose any beliefs or persuade an individual toward a particular set of beliefs."[76]

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73 Chaplain Role Statement for the Chaplaincy Service at Darling Heights State School (SCB 3/1013.17-18).

74 NSCSWP Guidelines Revision 6, [1.1] (SCB 2/904.24-31).

75 NSCSWP Guidelines Revision 6, [1.3] (SCB 2/905.13-17).

76 NSCSWP Guidelines Revision 6, [1.5] (SCB 2/906).

Section 51(xxiiiA)

90. The provision of "benefits to students" in s.51(xxiiiA) is one of 11 separate heads of legislative power in the placitum, and each head of power should be read independently and as a plenary grant of power.[77] This is confirmed by the exception in respect of civil conscription only applying in respect of two heads.[78]

91. The history of s.51(xxiiiA) does not illuminate the meaning of the particular phrase "benefits to students" to any significant extent. In any event, while the meaning of the phrase in 1946 may inform the "central type" of benefits intended to fall within s.51(xxiiiA), "that does not give us the circumference of the power".[79] The law concerning psychological and mental conditions has developed significantly since 1946.[80] Undoubtedly, there have also been advances in understanding the nature of the stresses to which modern citizens are subjected. It would be surprising if there could not be developments as to what might constitute "benefits" to address the mental well-being of students since 1946, particularly in the context of modern stressors.

92. Further, as Heydon J observed in *Williams (No 1)*,[81] to treat the absence of express Commonwealth legislative power over education as a reason for limiting the meaning of s.51(xxiiiA) would be to defy the principle that the *Constitution* should be construed with all of the generality which the words used permit.[82]

93. There is no requirement that the provision of any benefits must be provided directly to students by the Commonwealth. In *Alexandra Private Geriatric Hospital Pty Ltd v Commonwealth* it was held that the Commonwealth may provide a benefit to patients in

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77 *Federal Council of the British Medical Association v Commonwealth* (1949) 79 CLR 201, 286 (Williams J), and 259 (Dixon J).

78 *Federal Council of the British Medical Association v Commonwealth* (1949) 79 CLR 201; *Alexandra Private Geriatric Hospital Pty Ltd v Commonwealth* (1987) 162 CLR 271, 279. The concept of "civil conscription" was considered in detail in *Wong v The Commonwealth* (2009) 236 CLR 573.

79 Compare *Grain Pool of WA v Commonwealth* (2000) 202 CLR 479 at 493, [19] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ) approving the *Union Label Case* (1908) 6 CLR 469 at 610.

80 For example, the milestone in *Jaensch v Coffey* (1984) 155 CLR 549.

81 (2012) 248 CLR 156 at 328, [427].

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

approved nursing homes by a subsidy paid to the service provider, being the proprietor of the homes.[83]

94. The concept of "benefits" has received a wide interpretation in relation to sickness and hospital benefits. The concept is not confined to the grant of money or some other commodity and may encompass the provision of a service or services.[84] Given the beneficial intent of s.51(xxiiiA), and the specific reference in other heads of power under s.51(xxiiiA) to "allowances", "pensions" and "child endowment", the concept of benefits should not be read down so it is limited to allowances or other financial benefits.

95. In *Williams (No 1)* only Hayne, Heydon and Kiefel JJ specifically dealt with the proper construction of s.51(xxiiiA).

96. Hayne and Kiefel JJ considered that s.51(xxiiiA) related to the provision of benefits to or for identifiable students, and that the NSCP only provided benefits to a school community, not identifiable members of the community. They also considered that the services provided pursuant to the NSCP were not "benefits", because they did not provide material aid in satisfaction of human wants.[85]

97. On the other hand, Heydon J considered that s.51(xxiiiA) provided power to enact legislation permitting the Commonwealth to provide non-monetary benefits to students generally by financing others to provide those benefits. He considered that the services provided under the NSCP involved the provision of benefits as the services provided under the SUQ funding agreement provided:[86]

> "funding to meet needs that experienced school authorities have identified. The operation of the NSCP contemplates decisions about what a particular school thinks it needs, decisions about how those needs could be met by 'chaplaincy services', decisions about how the efficacy of 'chaplaincy services' in meeting those needs could be monitored and evaluated as time goes on, and decisions taken in consequence of that monitoring and

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83 (1987) 162 CLR 271, 281.

84 *Alexander Private Geriatric Hospital Pty Ltd v Commonwealth* (1987) 162 CLR 271, 280-281.

85 *Williams (No 1)* (2012) 248 CLR 156 at [276]-[286] (Hayne J) and [572]-[574] (Kiefel J).

86 *Williams (No 1)* (2012) 248 CLR 156 at [435].

evaluation. Those decisions are made by staff who may reasonably be expected to have the capacity to form appropriate judgments about student wellbeing."

98. Whether the benefits must be provided to identifiable persons or whether it is sufficient if they are provided to an identifiable class is an elusive distinction. The provision of all of the benefits referred to in s.51(xxiiiA) is to a class of persons, until individuals access those benefits. So, maternity allowances may provided to a particular class of women, who may then individually claim an allowance if they satisfy the relevant criteria. The same is also true of students receiving the benefits of the NSCSWP. The services which chaplains provide are not compulsory. Students must choose to access these services. Once that choice is made, they become identifiable as individuals for whom the services are provided. For example, a student may choose to attend a class or program run by a school chaplain, or may choose to seek support or guidance from a school chaplain.

99. Further, there are difficulties in constricting benefits to the provision of material aid in satisfaction of human wants. Assisting school counsellors and wellbeing staff in the delivery of student welfare services has the same quality and character as the provision of psychiatric or counselling services to patients in a nursing home. If payment for the latter type of services can constitute a provision of benefits, then there is no principled reason why the former ought not as well.

100. For these reasons, SUQ submits that the NSCSWP is a program which is with respect to the provision of benefits to students.

Section 51(xx)

101. The NSCWP requires that a "Funding Recipient" must be an organisation incorporated under Commonwealth or State legislation which enters into a Funding Agreement.[87] In other words, only corporations may enter funding agreements.

102. The question which arises is whether a corporation which enters a Funding Agreement will, by the fact of entering a Funding Agreement, be regarded as a trading corporation for the purposes of s.51(xx). The particular activities of SUQ may assist in demonstrating that it is a trading corporation, but the true question is whether the

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87 NSCSWP Guidelines Revision 6, definition of "Funding Recipient", Core Application Book, p 183.

definition of the NSCWP involves only constitutional corporations for which Parliament could legislate.

103. By its nature, a Funding Agreement is a contract which provides for the Funding Recipient to undertake obligations to provide services, for which it is paid. Those payments may be very significant, depending upon the number of schools in which the Funding Recipient provides funding services. For example, SUQ received over $10 million in 2011 and over $13 million in 2012.[88] This was a significant portion of SUQ's overall revenue. Further, the budget allocation for the NSCSWP in 2012-2013 was a total of $74 million for the provision of chaplaincy and student welfare services pursuant to Funding Agreements.[89]

104. As would be expected for such significant sums of money, the Funding Agreements bear all of the hallmarks of ordinary commercial contracts, containing provisions about the management and repayment of funding, subcontracting, insurance, intellectual property rights, indemnities, confidential information, termination and applicable law.[90]

105. The fact of entry into a Funding Agreement, which is an ordinary contract for the provision of services, effectively means that a Funding Recipient is a corporation which is a trading corporation. Substantial trading activity under such a contract is a sufficient condition for characterisation of a Funding Recipient as a trading corporation, regardless of the purpose for which it was formed. Such activity need not be the predominant element of corporate activity, so long as it is not a peripheral part of a corporation's activities.[91] For example, the West Perth Football Club and the Western Australian National Football League,[92] the Royal Prince Alfred Hospital and the Red Cross Society,[93] and the University of Western Australia[94] have all been held to be

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88 Core Application Book, p 106.
89 DEEWR Budget Statements, Core Application Book, p 531.
90 For example, see the terms of the SUQ Funding Agreement, Core Application Book, pp 225 – 337.
91 See *R v Trade Practices Tribunal; ex parte WA National Football League (Inc)* (1979) 143 CLR 190, 208, 234, 239, and see also *Quickenden v O'Connor* (2001) 109 FCR 243, 259 [44], 261 [51] (Black CJ and French J).
92 *R v Trade Practices Tribunal, ex parte WA National Football League (Inc)* (1979) 143 CLR 190.
93 *E v Australian Red Cross Society* (1991) 27 FCR 310.
94 *Quickenden v O'Connor* (2001) 109 FCR 243.

trading corporations. Absent any corporate activity, other indicia may be invoked, such as the constitution of a corporation which has not begun to carry on business.[95]

106. Once attracted, the corporations power extends to:

> "the regulation of the activities, functions, relationships and business of a constitutional corporation, the creation of rights and privileges belonging to such a corporation, the imposition of obligations on it, and in respect of those matters, to the regulation of conduct of those through whom it acts, its employees and shareholders and, also, the regulation of those whose conduct is or is capable of affecting its activities, functions, relationships or business."[96]

Issue 3: Legislative Power to Enact item 9 of Schedule 1 of the Financial Framework Amendment Act

107. No party or intervener has raised any separate issue about legislative power to enact item 9 of Schedule 1 of the Financial Framework Amendment Act. For the same reasons as given in relation to s.32B, this provision is within the legislative power of the Commonwealth Parliament.

Issue 4: Validity of SUQ Funding Agreement

108. If the submissions set out above are accepted, it follows that the SUQ Funding Agreement is valid.

PART VII: PROPOSED ANSWERS TO SPECIAL CASE

109. SUQ adopts the submissions on behalf of the Commonwealth defendants in relation to the validity of s.32B of the FMA Act and the impugned provisions of the FMA Regulations, and also adopts their submissions concerning the authority which that legislation grants the Commonwealth defendants to enter into the SUQ Funding Agreement.

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95 *Fencott v Muller* (1983) 152 CLR 570, 602; *Quickenden v O'Connor* (2001) 109 FCR 243, 260 [45].

96 *Re Pacific Coal Pty Ltd; ex parte Construction, Forestry, Mining and Energy Union* (2000) 203 CLR 346, 375 [83] (Gaudron J) approved in *New South Wales v Commonwealth (Work Choices Case)* (2006) 229 CLR 1, 114-5 [178] (Gleeson CJ, Gummow, Hayne, Heydon, and Crennan JJ).

110. Questions 1(a), (b), and (c) – SUQ makes no submissions on these questions.[97]

111. Assuming, however, that questions 1(a), (b), and (c) are answered "No", questions 2(a), (b), and (c) should each be answered "No".

112. Questions 3(a), (b) and (c) should each be answered "Yes". Accordingly, question 4 does not arise.

113. If question 4 arises, and if the Commonwealth defendants do not successfully re-open *Williams (No 1)*, it should be answered "No".

114. Questions 5(a) and (b) – SUQ makes no submissions on these questions.[98]

115. Question 6 should be answered "No, because the payments were authorised by statute".

116. Question 7 should be answered "None".

117. If the plaintiff fails, SUQ should be entitled to its costs. However, if the plaintiff succeeds, there should be no order for costs made against SUQ as it has acted in good faith in reliance upon the validity of the Commonwealth's legislation. In these circumstances, the Commonwealth alone should be responsible for the plaintiff's costs.

PART VIII: TIME ESTIMATE

118. SUQ estimates that it will require 3 hours for the presentation of its case.

Dated: 4 April 2014

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97 See paragraph [5(a)] above.
98 See paragraph [5(c)] above.