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

BETWEEN

RONALD WILLIAMS
Plaintiff

10

AND

COMMONWEALTH OF AUSTRALIA
First Defendant

MINISTER FOR EDUCATION
Second Defendant

SCRIPTURE UNION QUEENSLAND
20 Third Defendant

PLAINTIFF'S SUBMISSIONS

Date of Document: 28 February 2014

Filed on behalf of Plaintiff by
Horowitz & Bilinsky
Level 1, 229-231 Macquarie Street
Sydney NSW 2000

DX 1050 SYDNEY
Tel: 02 9233 1777
Fax: 02 9223 3165
Reference: Claudius Bilinsky

Part I: Publication of Submissions

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

Part II: Issues

2. The issues that arise in these proceedings are as follows:

(a) Having regard to:

(i) the issues in *Williams v The Commonwealth*[1] ("***Williams (No. 1)***"), which included the lawfulness of various payments made by the First Defendant ("**the Commonwealth**") in favour of the Third Defendant ("**SUQ**") pursuant to what was termed the Darling Heights Funding Agreement in the 2011-2012 financial year; and

(ii) the Commonwealth's failure to rely on the *Appropriation Act (No. 1) 2011-2012* (Cth) ("**the 2011-2012 Appropriation Act**") as supporting the expenditure of moneys appropriated for the purpose of achieving the outcomes stated in respect of the Department of Education, Employment and Workplace Relations ("**DEEWR**"),

are the First and Second Defendants ("**the Commonwealth Defendants**") precluded in these proceedings from contending:

(iii) that the Commonwealth's purported entry into a Funding Agreement dated 21 December 2011 with SUQ ("**the SUQ Funding Agreement**") was supported by the 2011-2012 Appropriation Act; and

(iv) that the Commonwealth's entry into various Deeds of Variation for the purpose of amending the SUQ Funding Agreement was authorised by the 2011-2012 Appropriation Act, *Appropriation Act (No. 3) 2011-2012* (Cth) ("**the 2011-2012 Appropriation Act (No. 3)**"), the *Appropriation Act (No. 1) 2012-2013* (Cth) ("**the 2012-2013 Appropriation Act**") and the *Appropriation Act (No. 1) 2013-2014* (Cth) ("**the 2013-2014 Appropriation Act**")?

(b) If not:

(i) was the Commonwealth's purported entry into the SUQ Funding Agreement authorised by the 2011-2012 Appropriation Act? And

(ii) was the Commonwealth's purported entry, between 2012 and 2014, into fourteen Deeds of Variation for the purpose of amending the SUQ Amending Agreement authorized by the 2011-2012 Appropriation Act, the 2011-2012 Appropriation Act (No. 3), the 2012-2013 Appropriation Act and the 2013-2014 Appropriation Act?

(c) If either the answer to (a) is Yes or the answer to both limbs of (b) No, are:

(i) s 32B of the *Financial Management and Accountability Act 1997* (Cth) ("**the FMA Act**");

(ii) Part 5AA and Schedule 1AA of the *Financial Management and Accountability Regulations 1997* ("**the FMA Regulations**"); and

(iii) item 9 of Schedule 1 to the *Financial Framework Legislation Amendment Act (No. 3) 2012* (Cth) ("**the Financial Framework Amendment Act**"),

---

[1] (2012) 248 CLR 156.

wholly invalid on the basis that:

(iv) on its proper construction, s 32B of the FMA Act purports to empower the Commonwealth to make, vary or administer arrangement or grants, irrespective of whether they are with respect to matters falling within the ambit of Commonwealth legislative, and cannot be read down;

(v) s 32B lacks the hallmark of the exercise of legislative power, namely, the determination of "the content of a law as a rule of conduct or a declaration as to power, right or duty";[2] or

(vi) by permitting the Executive to determine, by regulations, those purposes for which it is empowered to make, vary or administer arrangements or grants involving the expenditure of public money, s 32 impermissibly weakens the role of the Senate?

(d) If not, is the purported authorisation of the SUQ Funding Agreement, as amended from time to time, by the combination of:

(i) s 32B of the FMA Act;

(ii) Part 5AA and Schedule 1AA of the FMA Regulations; and

(iii) item 9 of Schedule 1 to the Financial Framework Amendment Act,

supported by:

(iv) s 51(xxiiiA) of the *Constitution*;

(v) s 51(xx) of the *Constitution*; or

(vi) s 51(xxxix) of the *Constitution*, operating in conjunction with s 61?

(e) To the extent that the Commonwealth Defendants, in litigating the issues outlined at (c) and (d) above, seek to contest the correctness of what was decided in *Williams (No. 1)*:

(i) are they precluded from doing so by any issue estoppel arising in the earlier proceedings or by the principles articulated in *Reichel v Magrath* [3] concerning abuse of process? and

(ii) is there an occasion to re-open the decision in *Williams (No. 1)*?

(f) Having regard to the manner in which the question of standing was determined in *Williams (No. 1)*, is it open to the Commonwealth Defendants to contest the Plaintiff's standing to challenge the lawfulness of various payments made in favour of SUQ pursuant to the SUQ Funding Agreement, being payments made on 11 January 2012 ("**the January 2012 Payment**") and 29 June 2012 ("**the June 2012 Payment**")?

(g) If so, does the Plaintiff have standing, not merely to challenge the validity of the SUQ Funding Agreement, but also to impugn the lawfulness of January 2012 Payment and the June 2012 Payment?

Part III: Notices under section 78B of the *Judiciary Act 1903*

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

Part IV: Material facts

4. The relevant facts are set out in the Special Case ("**SC**"). The following is provided

[2] *Commonwealth v Grunseit* (1943) 67 CLR 58 at 82 per Latham CJ.
[3] (1889) 14 App Cas 665.

by way of background.

5. The Plaintiff is the father of four children currently enrolled at the Darling Heights State Primary School in Toowoomba, Queensland ("**the School**") [SC [1]].

6. On 20 June 2012, this Court published its reasons and orders in *Williams (No. 1)*, concluding, in effect, that the executive power of the Commonwealth did not support its purported entry into the Darling Heights Funding Agreement, pursuant to which the Commonwealth had been obliged to provide funding to SUQ in order to assist in the delivery of chaplaincy services at the School. That agreement had been entered into as part of the National School Chaplaincy Program ("**the NSCP**") [SC, Vol 1, 399-419].

7. On 7 September 2011, whilst the decision in *Williams (No. 1)* remained reserved, the Commonwealth government announced, among other things, that the NSCP would be extended, both as to the life of that program and the amount of funding available, and re-named the National School Chaplaincy and Student Welfare Program ("**the NSCSWP**") [SC [40]; SC, Vol 1, 464-465]. Guidelines for the extended program were subsequently issued, and have since been revised, the current version being, as at the date of these submissions, Revision 6 of the Guidelines ("**the Guidelines Revision 6**") [Core Special Case Book ("**CSC**"), 136].

8. That document, in Section 1.5, describes chaplaincy or student welfare as a service that:

(a) complements the care offered by other helping disciplines; and

(b) aims to assist school communities through the provision of help and care to support the personal and social wellbeing of students and the school community [CSC, 146].

9. Significantly, the provision of funding under the NSCSWP is conditional upon entry into a Funding Agreement by the Commonwealth and a "Funding Recipient" – that is, a legal entity (being an organisation incorporated under Commonwealth or State legislation) charged with the responsibility of managing funding under the NSCSWP on behalf of a school community [CSC, 147-148]. Where an organisation is acting as Funding Recipient for a number of schools, the Commonwealth may enter into a single Funding Agreement with that organisation which covers all schools for which it is acting as Funding Recipient, with the maximum amount available per school being up to $20,000 excluding GST per annum (or $24,000 excluding GST per annum for remote schools) [CSC, 155].

10. As part of the transition from the NSCP to the NSCSWP, a National School Chaplaincy and Student Welfare Program Continuation of Service Submission was lodged in respect of the School with the Department of Education, Employment and Workplace Relations ("**DEEWR**") in or about November 2011 [CSC, 203]. That document identified SUQ as the current chaplaincy service provider and funding recipient in respect of the School, and indicated an intention on the part of the school community to continue its relationship with SUQ.

11. On 21 December 2011, both the Commonwealth, as represented by DEEWR, and SUQ entered into the SUQ Funding Agreement, which is expressed to govern SUQ's role as Funding Recipient in relation to a multitude of schools, including the School [CSC, 225]. That agreement relevantly provides:

(a) that the Guidelines for the NSCSWP form part of the agreement (Sched 1, cl B.1 [CSC, 245]);

(b) that those Guidelines may be amended by the Commonwealth as necessary (Sched 1, cl B.2 [CSC, 245]);

(c) that if there is a discrepancy between the SUQ Funding Agreement and the

Guidelines, the former shall take precedence to the extent of any inconsistency (Sched 1, cl B.3 [CSC, 245]); and

(d) that the agreement shall commence on 1 January 2012 and, unless terminated, expire on the Completion Date, being 31 January 2015 (cl 1.1 [CSC, 227]).

12. Furthermore, in its original incarnation, the SUQ Funding Agreement provided for the payment of the following amounts to SUQ, subject to the availability of sufficient funds for the NSCSWP and compliance by SUQ with its obligations under the agreement:

(a) $4,740,000.00 on or after 1 January 2012;

(b) $4,740,000.00 on or after 1 June 2012;

(c) $9,480,000.00 on or after 1 January 2013; and

(d) $9,420,000.00 on or after 1 January 2014,

where:

(e) this funding included goods and services tax of $2,838,000; and

(f) the approved total grant (excluding goods and services tax) in respect of the provision of chaplaincy services at the School was $60,000 [CSC, 254].

13. The amount of total funding to which SUQ is entitled under the agreement has since been varied following the entry by the Commonwealth and SUQ into:

(a) a Deed of Variation dated 1 February 2012 ("**the First Variation Deed**");

(b) a Deed of Variation dated 18 April 2012 ("**the Second Variation Deed**");

(c) a Deed of Variation dated 11 May 2012 ("**the Third Variation Deed**");

(d) a Deed of Variation dated 12 June 2012 ("**the Fourth Variation Deed**");

(e) a Deed of Variation dated 18 July 2012 ("**the Fifth Variation Deed**");

(f) a Deed of Variation dated 29 August 2012 ("**the Sixth Variation Deed**");

(g) a Deed of Variation dated 30 October 2012 ("**the Seventh Variation Deed**");

(h) a Deed of Variation dated 2 January 2013("**the Eighth Variation Deed**"); and

(i) a Deed of Variation dated 11 February 2013 ("**the Ninth Variation Deed**");

(j) a Deed of Variation dated 18 June 2013 ("**the Tenth Variation Deed**");

(k) a Deed of Variation dated 31 July 2013 ("**the Eleventh Variation Deed**");

(l) a Deed of Variation dated 15 November 2013 ("**the Twelfth Variation Deed**");

(m) a Deed of Variation dated 7 January 2014 ("**the Thirteenth Variation Deed**"); and

(n) a Deed of Variation dated 23 January 2014 ("**the Fourteenth Variation Deed**") [SC, Vol 3, 1341, 1363, 1409; Vol 4, 1442, 1493, 1544, 1595, 1646, 1697, 1750, 1803, 1854, 1905].

14. It should be noted that while the questions stated in the Special Case focus attention on the validity of the SUQ Funding Agreement, as varied by the First to Fourteenth Variation Deeds, the parties' amended pleadings have not, as at the date of these submissions, been further amended to include reference to the Thirteenth and Fourteenth Variation Deeds. Given the likelihood that further Deeds of Variation will be entered into prior to the hearing date, the parties have agreed that leave to file further amended pleadings, as well as any amended Special Case, will be sought closer to that date.

15. Finally, on 28 June 2012, in response to what was decided in *Williams (No. 1)*, the

Commonwealth Parliament passed, and Royal Assent was given to, the Financial Framework Amendment Act, which inserted into the FMA Act and the FMA Regulations the various provisions impugned in these proceedings.

Part V: Reasons for judgment in the Court below

16. Not applicable.

Part VI: Plaintiff's Argument

17. Given that there appears to be no dispute that the Plaintiff has standing to challenge the validity of the SUQ Funding Agreement, it is convenient first to address that question before turning to the sufficiency of his standing to impugn the lawfulness of the January and June 2012 Payments.

The effect of the pleaded Appropriation Acts

The availability of the argument to the Commonwealth Defendants

18. The questions referred for consideration in *Williams (No. 1)* disclose that, quite apart from any contest concerning the validity of the Darling Heights Funding Agreement, there was an issue in those proceedings as to the lawfulness of payments made by the Commonwealth pursuant to that agreement, including during the 2011-2012 financial year. So much is apparent from the terms of Questions 1(c) and 4,[4] both of which focused attention upon whether, even if the Darling Heights Funding Agreement were itself invalid, the contested payments made by the Commonwealth to SUQ could otherwise take lawful effect – either as a gift or as a grant.[5]

19. In those circumstances, it was open to the Commonwealth, as part of its defence, to contend that s 8(1) of the 2011-2012 Appropriation Act empowered the Executive to expend public funds in order to achieve the outcomes stated for DEEWR in Schedule 1 to that statute[CSC, 346, 356]. On that basis, having regard especially to s 8(2) and the activities identified in the Portfolio Budget Statements for DEEWR in the 2011-2012 financial year (of which the NSCP was one) [CSC, 421], the Commonwealth could have sought to resist any attack upon the lawfulness of any payments made to SUQ during that financial year for the purposes of the NSCP.

20. Indeed, an argument to this effect was briefly outlined, if only to take notice of it, in the reasons of Hayne J.[6] At the very least, this indicates that having regard to the nature and subject matter of the Plaintiff's claim in the earlier proceedings, it would have been expected that the Commonwealth would avail itself of the argument that the 2011-2012 Appropriation Act, properly construed, did not merely appropriate funds, in the sense of setting them apart from the Consolidated Revenue Fund, but also authorised expenditure. Such a course would have been all the more expected, given that, as was recorded in Question 3 in the Amended Special Case in *Williams (No. 1)*, the meaning and effect of the 2011-2012 Appropriation Act were in issue in those proceedings. Instead, however, the Commonwealth unsuccessfully invoked s 44 of the FMA Act as the source of statutory authority to enter into, and to perform, the Darling Heights Funding Agreement.[7]

21. Having thus eschewed reliance upon the 2011-2012 Appropriation Act in *Williams (No. 1)*, the Commonwealth seeks now, as against the same Plaintiff, to call in aid that statute, and the construction of it or its like posited by Hayne J, in order to demonstrate the existence of statutory authority for another expenditure-related Executive act occurring in the

---

[4] (2012) 248 CLR 156 at 375-376.
[5] (2012) 248 CLR 156 at 225-226 [118].
[6] (2012) 248 CLR 156 at 262-265 [226]-[233].
[7] (2012) 248 CLR 156 at 209-211 [69]-[72] per French CJ, 222 [103] per Gummow and Bell JJ, 359 [547] per Crennan J and 374 [596] per Kiefel J.

2011-2012 financial year, namely, entry into the SUQ Funding Agreement. This is despite the absence of any explanation as to why the construction of the 2011-2012 Appropriation Act now contended for was not raised in the earlier proceedings, let alone an explanation resembling the various illustrations given in *Cromwell v County of Sac*[8] for why a party might legitimately refrain from putting its whole case in previous litigation.

22. In the Plaintiff's submission, the failure by the Commonwealth to rely on the 2011-2012 Appropriation Act in *Williams* was unreasonable, giving rise to an estoppel of the sort described in *Port of Melbourne Authority v Anshun Pty Ltd*,[9] by which both the Commonwealth and the Second Defendant as a privy of the Commonwealth are bound. To conclude otherwise would be to sanction the possibility of an inconsistency between the judgment or judgments in these proceedings, assuming the Court's acceptance of the Commonwealth defendants' contentions concerning the meaning and effect of the 2011-2012 Appropriation Act, and the answer given to Question 4 in *Williams (No. 1)*.

23. The same estoppel should extend also to precluding the Commonwealth defendants from relying upon the 2011-2012 Appropriation Act (No. 3) [SC, Vol 5, 2127], the 2012-2013 Appropriation Act [CSC, 443] and the 2013-2014 Appropriation Act [CSC, 555]. These Acts are said to support the Commonwealth's entry into the various deeds by which the SUQ Funding Agreement was purportedly varied. However, given that their relevant provisions are substantially identical to those of the 2011-2012 Appropriation Act, what is said by the Commonwealth defendants concerning their effect involves precisely the same point as that taken in relation to the earlier statute.

24. In any event, for the reasons that follow, even if it were available to the Commonwealth defendants in these proceedings, that point should be rejected.

No authorisation for the SUQ Funding Agreement, as amended

25. Section 54 of the *Constitution* provides that a "proposed law which appropriates revenue or moneys for the ordinary annual services of the Government shall deal only with such appropriation". Relevantly, an appropriation effects no more than an "earmarking" of funds[10] or a "provisional setting apart or diversion from the Consolidated Revenue Fund of the sum appropriated".[11] One result of this is to prevent that sum from being expended for any purpose other than that for which the appropriation was made.[12] Thus, the effect of s 54 is to require that any bill appropriating revenue or moneys for the ordinary annual services of the Government be concerned exclusively with the creation of "a capacity to withdraw money from the Consolidated Revenue Fund and [to] set it aside"[13] for the specific purpose of those ordinary annual services. Given what was said in *Pape v Federal Commissioner of Taxation*,[14] that is a function to be understood as entirely separate from the conferral of power to spend such money.

26. Nonetheless, it is precisely this function that the Commonwealth Defendants seek to attribute to the Appropriation Acts upon which they rely, notwithstanding that each is expressed to be an "Act to appropriate money out of the Consolidated Revenue Fund for the ordinary annual services of the Government, and for related purposes". In other words, the argument advanced on behalf of those Defendants proceeds upon the premise that the enactment of these various Appropriation Acts involved a contravention of s 54 of the

---

[8] 94 US 351, 356 (1876).
[9] (1981) 147 CLR 589 at 602.
[10] *Victoria v Commonwealth and Hayden (AAP Case)* (1975) 134 CLR 338 at 411.
[11] *Surplus Revenue Case* (1908) 7 CLR 179 at 190-191.
[12] *Commonwealth v Colonial Ammunition Co Ltd* (1924) 34 CLR 198 at 222, 224-225.
[13] *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 210 [601].
[14] (2009) 238 CLR 1 at 55 [111] per French CJ, 72-73 [176]-[178] per Gummow, Crennan and Bell JJ, 210-211 [601]-[602] per Heydon J.

Constitution.

27. To make this observation is not to deny that a breach of s 54 is neither justiciable nor capable of rendering a resulting Appropriation Act invalid.[15] However, a construction of an annual Appropriation Act, the logical conclusion of which is that its enactment involved such a breach, is not something lightly to be preferred. That approach, at least in so far as the expression "the ordinary annual services of the Government" was concerned, found reflection in the reasoning of the Court in *Brown v West*.[16] Its justification lies in the circumstance that s 54 was intended to afford the Senate a measure of protection from prejudice, given that s 53 of the *Constitution* deprives that chamber of any power to amend proposed laws appropriating revenue for the ordinary annual services of the Government.[17] To put it another way, a proposed law conferring power upon the Executive to expend public funds is a matter in respect of which, pursuant to s 53 of the *Constitution*, the power of the Senate is equal to that of the House of Representatives. However, on the argument advanced by the Commonwealth Defendants, a power to spend was conferred by legislation that was beyond the reach of the Senate's power to amend.

28. Focusing then on the 2011-2012 Appropriation Act, the starting point for that argument is s 8(1) [CSC, 346], which provides that "[t]he amount specified in an administered item for an outcome for an Agency may be applied for expenditure for the purpose of contributing to achieving that outcome". It is said, by reference to the outcomes for DEEWR stated in Schedule 1 to the 2011-2012 Appropriation Act [CSC, 356] and the Portfolio Budget Statements for that Department [CSC, 421], the significance of which is addressed in ss 4 and 8(2) of the Act, that s 8(1) provided statutory authority for the Commonwealth's entry into the SUQ Funding Agreement.

29. There is no contest that this last provision effected, at the very least, a grant of "permission" to the Executive to expend public funds for the purposes of contributing to an Agency's stated outcome, in the sense that it relaxed any prohibition on the drawing of such funds from the Treasury. However, the grant of such permission in the form of an appropriation – which s 83 of the *Constitution* prescribes as a condition precedent to the drawing of money from the Commonwealth Treasury – is not to be conflated with the conferral of power to spend or to engage in activities that call for such spending. Each is a separate and distinct legal pre-condition to expenditure by the Commonwealth.[18] And merely having permission to do something does not necessarily entail being empowered to do it. It must therefore be asked whether s 8(1) should be construed as being directed towards the satisfaction of both pre-conditions.

30. It is convenient in this regard to begin with the relevant portion of Schedule 1 to the 2011-2012 Appropriation Act, which is reproduced below:

---

[15] *Osborne v Commownealth* (1911) 12 CLR 321 at 336, 352, 356, 373; *Buchanan v Commonwealth* (1913) 16 CLR 315 at 329; *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555 at 578.

[16] (1990) 169 CLR 195 at 207-211.

[17] J Quick and R R Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 674.

[18] *Pape* (2009) 238 CLR 1 at 210-211 [601].

EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS PORTFOLIO

Appropriation (plain figures) – 2011-2012
Actual Available Appropriation (italic figures) – 2010-2011

	Departmental	Administered	Total
	$'000	$'000	$'000
DEPARTMENT OF EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS			
Outcome 1 –	86,731	412,586.421	499,046
Improved access to quality services that support early childhood learning and care for children through a national quality framework, agreed national standards, investment in infrastructure, and support for parents, carers, services and the workforce	*84.043*	*396,020*	*480,063*
Outcome 2 –	168,059	556,701	724,760
Improved learning, and literacy, numeracy and educational attainment for school students, through funding for quality teaching and learning environments, workplace learning and career advice	*177,451*	*415,756*	*593,207*
Outcome 3 –	152,585	886,868.07722	2,214,206
A growth in skills, qualifications and productivity through funding to improve teaching quality, learning, and tertiary sector infrastructure, international promotion of Australia's education and training sectors, and partnerships with industry	*166,423*	*1,908,996*	*2,075,419*
Outcome 4 –	367,576	2,382,745	2,750,321
Enhanced employability and			

acquisition of labour market skills and knowledge and participation in society through direct financial support and funding of employment and training services	*360,478*	*2,961,121*	*3,321,599*
Outcome 5 –	32,857	112,854	145,711
Safer, fairer and more productive workplaces for employers and employees by promoting and supporting the adoption of fair and flexible workplace arrangements and safer working arrangements	*29,480*	*205,388*	*234,868*
Total: Department of Education, Employment and Workplace Relations	**750,624.099** *817,875*	**5,526,236** *5,887,281*	**6,334,044** *6,705,156*

31. The expression "administered item" is relevantly defined to mean an amount set out opposite an outcome in the column headed "Administered". To say this, however, is not to shed any light upon the relationship, for the purposes of the Act, between an administered item and a given outcome. Certainly, no such light is cast by the appropriating provision, s 16, which provides merely that the Consolidated Revenue Fund is appropriated as necessary for the purposes of the 2011-2012 Appropriation Act, including the operation of that statute as affected by the FMA Act.

32. It is s 8(1), then, that links each administered item to the outcome opposite which it appears in Schedule 1. In so doing, that provision ensures compliance by the 2011-2012 Appropriation Act with the principle that "there cannot be appropriations in blank, appropriations for no designated purpose".[19] Accordingly, the combined effect of ss 8(1) and 16 is merely to appropriate the amount stated in each administered item for the purpose of the outcome opposite which that item appears, and to that extent – and in the Plaintiff's submission, *to that extent only* – s 8(1) grants permission for the Commonwealth Executive to expend public funds for the purposes recorded in each outcome. So understood, the operation of s 8(1) does not involve the additional step of conferring power upon the Executive to spend with a view to achieving those outcomes. That work is left to be done by some other enactment (if there be one), thus avoiding any breach of s 54 of the *Constitution*.

33. This last consideration alone affords a sufficient basis for preferring the construction outlined above, which, it should be emphasised, does no violence to the ordinary meaning of the words in s 8(1), given the distinction, previously developed, between permitting and empowering the Commonwealth to extend public funds.

34. Regard should also be had to the observation by the plurality in *Pape*[20] that given the degree of abstraction with which the purposes of an appropriation may be, and are

[19] *Attorney-General (Vic) v Commonwealth* (1945) 71 CLR 237 at 253; *Brown v West* (1990) 169 CLR 195 at 208.
[20] (2009) 238 CLR 1 at 78 [197].

increasingly,[21] expressed, the statement of purpose that attends an item of appropriation provides "an insufficient textual basis for the determination of issues of constitutional fact" relevant to the validity of any particular expenditure by the Commonwealth. This was said by their Honours to underline the proposition that s 81 of the *Constitution* should not be seen as the source of any "spending power".[22]

35. If that be accepted, then it should be asked why, by means of an Appropriation Act, the Commonwealth Parliament should be understood as conferring power upon the Executive to spend in terms that, as a matter of drafting, suffer the deficiencies that their Honours described. In the Plaintiff's submission, that question admits of no cogent answer.

36. There is accordingly no basis for construing the 2011-2012 Appropriation Act as providing statutory authority for the Executive to engage in activities identified in the Portfolio Budget Statements of various departments, including DEEWR, where these require the expenditure of public money. That statute does no more than to earmark funds that may, assuming the existence of such authority, be expended in the course of those activities. And the same might be said, *mutatis mutandis*, in respect of the equivalent provisions in the 2011-2012 Appropriation Act (No. 3), the 2012-2013 Appropriation Act and the 2013-2014 Appropriation Act.

The validity of s 32B of the FMA Act

The excessive breadth of s 32B

37. A power to make subordinate legislation, if broadly conferred by a Commonwealth enactment, may at the very least be impugned, if not held invalid, on one of two grounds. The first, and most obvious, is that the power is attended by "such a width or such an uncertainty of the subject matter to be handed over" by Parliament to the Executive that the law conferring it cannot be supported by any head of Commonwealth legislative power.[23]

38. However, it has also been recognised that such a "delegation" of power may, depending upon the breadth with which it is expressed, lack "that hallmark of the exercise of legislative power"[24] described by Latham CJ in *Commonwealth v Grunseit*,[25] namely, the determination of "the content of a law as a rule of conduct or a declaration as to power, right or duty". It was on this basis that the plurality in *Plaintiff S157/2002 v Commonwealth* expressed some doubt as to the validity of a hypothetical enactment, posited in argument by the Commonwealth, which conferred upon the Minister for Immigration "the power to exercise a totally open-ended discretion" as to which aliens may or may not come to and remain in Australia.[26] Such doubt persisted even in the face of the Commonwealth's acknowledgment that the power in question would be subject to this Court's jurisdiction to determine any dispute concerning the "constitutional fact" of alien status.

39. In like fashion, the majority in the *Work Choices Case*[27] appeared to accept that invalidity might befall a statute that purported to confer a power to make regulations, unaccompanied by any indication of the parameters within which those regulations might extend. Thus, in that case, whether or not there was a "law" in the sense described in *Grunseit* turned upon whether the effect of the relevant regulation-making power was to define the "prohibited content" which was to be prescribed in the regulations as being

---

[21] See *Combet v Commonwealth* (2005) 224 CLR 494 at 577 [160]-[161]; *Williams (No. 1)* (2012) 248 CLR 156 at 261 [222] per Hayne J.
[22] (2009) 238 CLR 1 at 72 [197].
[23] *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73 at 101.
[24] *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 513 [102].
[25] (1943) 67 CLR 58 at 82.
[26] (2003) 211 CLR 476 at 512-513 [101]-[102].
[27] (2006) 229 CLR 1 at 176 [400].

"whatever the Executive says should not be contained in a workplace agreement".[28] That this last question was answered in the negative does not detract from the circumstance that the question itself was an appropriate expression of the principle outlined above.

40. Nor should it be thought that the notion of a "delegation" of law-making power rendered invalid on some basis other than an insufficient connection with a head of Commonwealth legislative power is a recent development. Indeed, in the context of considering the validity of ss 99 and 99A of the *Income Tax Assessment Act 1936* (Cth), Kitto J in *Giris Pty Ltd v Federal Commission of Taxation*[29] observed that a provision pursuant to which the Commissioner of Taxation was free to determine which of those provisions would apply in the taxation of a trust estate "should be held invalid as an attempt to invest an officer of the executive government with part of the legislative power of the Commonwealth".

41. In the Plaintiff's submission, to s 32B of the FMA Act engages both of the bases for challenge outlined above. So much must follow from what is pleaded in paragraph 57 of the Statement of Claim concerning the proper construction of that provision.

42. In resisting this aspect of the Plaintiff's case, the Commonwealth Defendants assert that because the validity of the regulations made pursuant to s 32B is dependent upon their having a sufficient connection with matters falling within the ambit of Commonwealth legislative power, s 32B should be construed as operating only with respect to such matters.

43. However, this fails adequately to recognise that:

(a) the regulations contemplated by s 32B serve the stated purpose of bringing within the scope of the authority conferred by that provision arrangements or grants of financial assistance that "the Commonwealth [otherwise] does not have power to make, vary or administer"; and

(b) in any given case, the Commonwealth might lack such power, not only because of what would, but for s 32B, be an absence of legislative authorisation for the making, varying or administration of a particular arrangement or grant, but also because the legislative power of the Commonwealth may not support the conferral of such authorisation.

In other words, s 32B purports to fill some lacuna in the power of the Commonwealth and to that end, is drafted in terms, the ordinary meaning of which could well extend to situations of insufficiency of Commonwealth legislative power.

44. At the very least, that should engage, in relation to the construction of that provision, either s 15AB(1)(a) or (b)(i) of the *Acts Interpretation Act 1901* (Cth). As has previously been noted, s 32B was purportedly inserted into the FMA Act by the Financial Framework Amendment Act. This latter statute, to the extent that it addresses anything beyond the insertion of s 32B, thus constitutes "material not forming part" of the FMA Act that "is capable of assisting in the ascertainment of the meaning" of that provision. This necessarily encompasses the amendments purportedly made by the Financial Framework Amendment Act to the FMA Regulations, including the list of programs specified for the purposes of s 32B(1)(b)(iii) that appears in Part 4 of Schedule 1AA to those regulations.

45. By way of example, one finds among those programs – which, at the risk of repetition, were specified in the FMA Regulations, not by the Governor-General, but by Parliament itself – the following:

"407.042 National Rewards for Great Teachers

---

[28] *Ibid.*

[29] (1969) 119 CLR 365.

Objective: To recognise and reward quality teachers in Australia who achieve certification at the highest levels of the National Professional Standards for Teachers.

...

410.022 Australian Housing and Urban Research Institute
Objective: To contribute to the research undertaken on housing and homelessness.

...

414.001 Local Solutions Fund
Objective: To support social and economic participation in Local Government Areas and to provide funding to community organisations to employ and manage Community Action Leaders.

...

419.017 Cloncurry Community Precinct

Objective: To provide financial assistance to enable the construction of a community centre at Cloncurry.

...

421.005 Sport and Recreation

Objective: To increase participation in physical and active recreation activities and excellence in high-performing athletes, including investment in sport infrastructure and events, research and international cooperation."

It should readily be apparent that these programs bear little, if any, connection with the matters in respect of which the Commonwealth is empowered to make laws. That being so, it is difficult to attribute to Parliament an intention that s 32B of the FMA Act should operate in conjunction only with regulations touching upon matters falling within the ambit of Commonwealth legislative power.

46. Consequently, if that provision is to be regarded as being so confined in its operation, this can only be the result of a process of reading down pursuant to s 15A of the *Acts Interpretation Act 190*. However, for that process to be available in relation to a particular law, it is necessary that:

(a) some standard, criterion or test for reading down be discernible in the law itself, either expressly or by implication, or in the nature of the subject matter with which the law deals;

(b) there be no alteration in the policy or operation of the law with respect to those cases which, after its being read down, would still remain within its terms; and

(c) in circumstances where the law "can be reduced to validity by adopting one or more of a number of possible limitations", there be some reason "based upon the law itself" for favouring one limitation over another.[30]

47. It is this last requirement[31] that is most relevant in so far as s 32B of the FMA Act is concerned. In order to understand why, it is necessary to observe, in relation to the programs

[30] *Pidoto v Victoria* (1943) 68 CLR 87 at 111; *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; *Victoria v Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416 at 502.

[31] As to its application, see *APLA Ltd v Legal Services Commissioner* (2005) 224 CLR 322 at 371-372 [94]-[95] per McHugh J.

specified in the regulations contemplated by s 32B(1)(b)(iii), that while those regulations may identify a set of programs for the purpose of engaging the power purportedly conferred by s 32B, they do not incorporate, or otherwise give the force of law to, the terms of any arrangement or grant by which those programs are implemented. It is thus possible to posit a situation in which the regulations identify a program that, on its face, bears no connection whatsoever with any head of Commonwealth legislative power, but where such a connection may nonetheless be discerned in the terms of an arrangement entered into as part of that program – for example, because it requires that the party dealing with the Commonwealth be a constitutional corporation.

48. In these circumstances, the effect of adopting the Commonwealth Defendants' preferred construction of s 32B, which involves reading the word "regulations" to mean regulations with respect to matters falling within the scope of Commonwealth legislative power,[32] would arguably be to invalidate the arrangement. After all, the item in the regulations specifying the relevant program would lack support in any of the grants of Commonwealth legislative power, which deficiency would not be capable of being overcome by the terms of the arrangement concerned. This is because:

(a) those terms are not given the force of law either in the regulations or otherwise; and

(b) in identifying the relevant program, the regulations are not couched in language, the effect of which would be to authorise the implementation of the program on the terms set out in the arrangement.

There would accordingly be no relevant law with respect to the matters addressed in the terms of the arrangement. Consequently, even though the arrangement may bear a close connection with some matter in respect of which the Commonwealth has power to make laws, it would not be authorised by s 32B, whose operation with respect to programs is dependent upon the programs in question being specified in valid regulations.

49. Nonetheless, there are other ways in which s 32B may be read down so as to extend or otherwise modify the reach of that provision. For instance, as is proposed, albeit obliquely, in SUQ's Amended Defence at [34], the word "arrangement" may be read to refer only to arrangements with respect to matters falling within the compass of the Commonwealth's power to enact legislation. On this limited construction, s 32B would authorise the Executive to make, vary or administer arrangements that pertain to matters that engage the legislative power of the Commonwealth, notwithstanding that the items in the regulations specifying the programs implemented by those arrangements might suggest no connection whatsoever with such matters.

50. The circumstance that the Defendants have, amongst themselves, advanced two different ways in which s 32B may be read down, or its scope confined to the reach of Commonwealth legislative power, is itself a powerful indication of the extent to which that provision does not satisfy the conditions for reading down.

51. Indeed, it is possible also to read down the term "arrangements" so that it is taken to denote any arrangement, even one couched in terms so general as to involve matters both within and beyond the scope of Commonwealth legislative power, *to the extent that* the arrangement can be said to be "with respect to" a matter within the legislative power of the Commonwealth. The limitation proposed in [34] of SUQ's Amended Defence would permit the Commonwealth to make, vary or administer only those arrangements that are wholly concerned with a matter within the ambit of Commonwealth legislative power, whereas the alternative limitation described in this paragraph would operate more expansively. It would,

[32] See also SUQ's Amended Defence at [36], which speaks of the "the limit that an arrangement or grant must be for the purposes of a program with respect to matters falling within the ambit of Commonwealth legislative power".

after all, give partial or limited authorisation to the formation and performance by the Commonwealth of any arrangement, whatever be its subject matter.

52. To these possibilities may be added the further alternative that the words "make, vary or administer" may be read down to mean "make, vary or administer, to the extent that such act is with respect to a matter within the ambit of Commonwealth legislative power". Even if only as a theoretical exercise, it is possible to imagine that an act done in performance of an arrangement wholly concerned with matters beyond the bounds of the express grants of Commonwealth legislative power might nonetheless bear a substantial connection with the subject matter of any such grant. If read down in the manner currently being posited, s 32B might well authorise the doing of such an act.

53. However, as between these alternatives, which may not exhaust the universe of possible limitations, s 32B offers no basis for preferring one over the others or even for thinking that merely one should be preferred. If that be right, any effort by the Court to decide between those alternatives would involve, "in the guise of construing a challenged federal law ... a feat that is, in essence, legislative and not judicial",[33] and thus beyond the scope of the direction given in s 15A of the *Acts Interpretation Act*. That the Explanatory Memorandum in respect of the Bill for the Financial Framework Amendment Act speaks of s 32B being read subject to s 15A does not overcome this difficulty.

54. It is convenient at this point to observe, having regard to the terms of their Defence, that the Commonwealth defendants appear to accept that if s 32B were to operate on matters beyond the legislative power of the Commonwealth and be incapable of being read down, it would be invalid. The same, however, cannot be said of SUQ, on whose behalf it is suggested[34] that the Commonwealth may validly enact a law conferring upon the Executive a power to expend public money in administering any arrangement or grant, even though it may otherwise lack a sufficient connection with a head of Commonwealth legislative power, provided that:

(a) there is an appropriation for the purposes of such expenditure; and

(b) the arrangement or grant is for the purposes of a program identified in regulations tabled for scrutiny in the Houses of Parliament.

55. This power is said in the first instance to flow from ss 51(xxxix), 53 and 61 of the *Constitution*, in the sense that it is incidental to the execution by the Commonwealth Parliament of its power to make laws which appropriate revenue or moneys.[35] As has already been noted, an appropriation effects no more than the legal segregation of an amount of money from the Consolidated Revenue Fund and its dedication to "the execution of some purpose which either the *Constitution* has itself declared, or Parliament has lawfully determined, shall be carried out".[36] Thus, the existence of a power to appropriate assumes either the authorisation of specific expenditure by the *Constitution* or the existence of a power so to authorise in the Commonwealth Parliament.

56. However, it does not follow from this that Parliament's power to authorise expenditure is required to be of some specific width. Less still is it necessary for or incidental to the "execution", within the meaning of s 51(xxxix) of the *Constitution*, of the power to appropriate that Parliament should be able to authorise expenditure on programs that otherwise bear no connection whatsoever with matters falling within the ambit of Commonwealth legislative power. To assert the contrary, as SUQ does, is to assume as a

---

[33] *Work Choices Case* (2006) 229 CLR 1 at 240 [596].
[34] See SUQ's Amended Defence at [28]-[30].
[35] See SUQ's Amended Defence at [29].
[36] *New South Wales v Commonwealth* (1908) 7 CLR 179 at 200; *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 72 [176] per Gummow, Crennan and Bell JJ, 211 [602] per Heydon J.

starting point for analysis the existence of a power to appropriate, unbounded as to subject matter, and then to accept as correct the proposition, rejected in *Pape*, that an appropriation "by its own force" involves "the exercise of an executive or legislative power to achieve an objective which requires expenditure".[37]

57. Moreover, while the existence of an appropriation may be a necessary pre-condition to expenditure by the Commonwealth, this does not, of itself, render such expenditure an incident of the exercise of the power to appropriate. As Hayne and Kiefel JJ remarked in *Pape*,[38] "[t]he appropriation of funds, standing alone, does not and never has required the application of the amounts appropriated."

58. In the alternative, SUQ contends that the enactment of what it terms a "general expenditure law" is "a necessary incident of the character and status of the Commonwealth as a sovereign government". This necessarily proceeds upon the premise that the executive power of the Commonwealth extends, without limitation, to action in areas beyond the express grants of Commonwealth legislative power, with the result that legislation authorising expenditure for the purposes of such action is supported by s 51(xxxix) of the *Constitution*. However, that proposition needs only to be stated to be rejected. This is particularly because it is not sufficient, if Commonwealth executive power is to be enlivened in relation to matters outside the express heads of Commonwealth legislative power, that those matters engage the character and status of the Commonwealth as a national or sovereign government. The activities concerned must also be "peculiarly adapted to the government of a nation and ... cannot otherwise be carried on for the benefit of the nation",[39] a requirement which "invites consideration of the sufficiency of the powers of the States to engage in the enterprise or activity in question".[40]

59. It follows then that s 32B of the FMA Act is not supported by any identifiable head or heads of Commonwealth legislative power.

60. No less importantly, the absence of any obvious tether linking that provision to the range of matters in respect of which the Commonwealth is empowered to make laws is indicative of the extent to which the parameters within which regulations may be promulgated for the purposes of s 32B are left entirely undefined in the FMA Act, as amended by the Financial Framework Amendment Act.

61. It is true, of course, that s 65 of the FMA Act confers upon the Governor-General the power to make regulations prescribing matters "required or permitted by [that] Act to be prescribed" or "necessary or convenient to be prescribed for carrying out or giving effect" to it. In the *Work Choices Case*, the presence of a "necessary or convenient" clause in the form of s 846(1)(b) of the *Workplace Relations Act 1996* (Cth) provided a basis for saying that extent of the Governor-General's power to make regulations prescribing "prohibited content" in relation to workplace agreements was "marked out by inquiring whether [any such regulation could] be said to have a rational connection with the regime established by [the Act] for workplace agreements".[41] However, s 65 of the FMA Act serves no equivalent function in relation to s 32B. Indeed, there is nothing in that provision 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.

---

[37] (2009) 238 CLR 1 at 72 [176].
[38] (2009) 238 CLR 1 at 105 [296].
[39] *Victoria v Commonwealth v Hayden* (1975) 134 CLR 338 at 397; *Davis v Commonwealth* (1988) 166 CLR 79 at 111; *Pape* (2009) 238 CLR 1 at 87 [228].
[40] *Davis v Commonwealth* (1988) 166 CLR 79 at 111; *Pape* (2009) 238 CLR 1 at 91 [239].
[41] (2006) 229 CLR 1 at180-181 [415]-[416].

62. It may therefore be asked how s 32B can possibly constitute a "law", as defined by Latham CJ in *Grunseit*, if what his Honour identified as the relevant hallmark of the exercise of legislative power is to be regarded as lacking where a "totally open-ended discretion" is conferred upon the Minister for Immigration to determine which aliens may enter into and remain in Australia. Indeed, how can an Act that reposes in the Executive the function of determining which arrangements or grants it has power to make be valid if, as Kitto J opined in *Giris*, invalidity would attend an enactment that purported to empower an officer of the executive government to decide which law would apply in a given situation? In the Plaintiff's submission, neither question can be answered in the affirmative.

10 **63.** Furthermore, the observations of the plurality in *Plaintiff S157* suggest that it is possible for an enactment not to answer the description of a "law", despite being "with respect to" a subject matter falling within the ambit of Commonwealth legislative power. Thus, the circumstance that the hypothetical power considered in that case involved a ministerial discretion with respect to aliens was insufficient to quell the plurality's doubts as to the validity of its conferral.

64. That being so, even if s 32B of the FMA Act were read down so as to have some connection with the various heads of Commonwealth legislative power, this would not preserve its validity. Its purported effect would still be to confer upon the Executive the power to make, vary or administer such arrangements or grants of financial assistance as the
20 Executive determines it should be empowered to make, vary or administer, albeit on the proviso that they relate to some subject matter within the reach of Commonwealth legislative power. However, for the reasons given in the preceding paragraph, this last proviso would not suffice to render s 32B any more of a "law".

65. To put it another way, the effect of reading down is merely to confine the operation of a law to those cases where it would have a sufficient connection with a head of Commonwealth legislative power. Its curative effect – for want of a better expression – is available only where a purported Commonwealth law is so broad that its operation is not, on its face, bounded by those matters falling within the ambit of Commonwealth legislative power. But it cannot endow an enactment that lacks the relevant hallmarks of the exercise of
30 legislative power with the qualities of a "law".

66. Accordingly, s 32B of the FMA Act and the various provisions that depend upon it, including item 9 in Schedule 1 to the Financial Framework Amendment Act and the relevant provisions of the FMA Regulations, are invalid.

A distortion of the relationship between Ch I and Ch II of the Constitution

67. Reference was earlier made in these submissions to Isaacs J's description in the *Surplus Revenue Case*[42] of an appropriation as involving the legal segregation of money "from the general mass of the Consolidated Revenue Fund" and its dedication "to the execution of some purpose which either the *Constitution* has itself declared, or Parliament has lawfully determined, shall be carried out". Crucially, in speaking of the lawful determination
40 by Parliament of purposes requiring the appropriation of money, his Honour was not merely alluding to the proposition that "there cannot be ... appropriations for no designated purpose".[43] This is because, as was emphasised in *Pape*,[44] an appropriation, being no more than an "earmarking" of funds, does not itself represent the legislative adoption of a policy authorising or requiring the Executive to engage in activities that call for the expenditure of public money. In other words, an appropriation does not, of itself, constitute a lawful

---

[42] (1908) 7 CLR 195 at 208.
[43] *Attorney-General (Vic) v Commonwealth* (1945) 71 CLR 237 at 253.
[44] (2009) 238 CLR 1 at 72 [176] per Gummow, Crennan and Bell JJ, 105 [296] per Hayne and Kiefel JJ, 211 [602] per Heydon J.

determination by Parliament of a purpose to be carried out.

68. That being so, Isaacs J's remarks should instead be understood as giving expression to the notion, quite separate from any principle that appropriations must be accompanied by a designated purpose, that it is for Parliament to determine the purposes for which the Executive shall have power to expend money. His Honour thus anticipated what was determined in *Williams (No. 1)* in so far as he regarded the actual exercise of legislative power as a necessary pre-condition to spending by the Executive where the *Constitution* itself does not confer power or impose an obligation to spend.[45] However, his Honour also took the further step of identifying the form required to be taken by such an exercise of legislative power, namely, as a pronouncement by Parliament of a purpose to be carried out.

69. Implicit in this is the rejection of any suggestion that the Executive may be empowered by legislation to undertake activities requiring the expenditure of public monies in terms which, if they do not specify those activities, eschew any attempt at stating the purposes to which those activities should be directed. In the Plaintiff's submission, Isaacs J was correct in so rejecting.

70. As has previously been noted, the plurality in *Pape* remarked upon the insufficiency of the textual basis afforded by an item of appropriation for the determination of issues of constitutional fact relevant to the validity of any specific expenditure of public funds. That insufficiency is all the more striking, given that, as was observed in *Combet v The Commonwealth*,[46] "since the mid-1980s the chief means of limiting expenditures made by departments of State that has been adopted in annual appropriation Acts has been to specify the *amount* that may be spent".

71. Nonetheless, having regard to the limited function served by an appropriation, any lack of specificity in the terms in which it is granted should ultimately be of little concern. After all, if it is to the *Constitution* or to a substantive Commonwealth enactment that one is directed in locating the source of the Executive's power to engage in some activity requiring or involving the expenditure of public funds, then an appropriating provision or statute will rarely inform any determination as to whether that activity was validly pursued.[47]

72. However, what was said in *Pape* would tend to favour the conclusion that where Parliament does confer power or authority to spend, it must do so in terms that exhibit greater specificity than one would associate with an item of appropriation. Crennan J appeared to suggest as much in *Williams (No. 1)*:[48]

> "As confirmed in *Pape*, statutory authority for executive action (including spending) is distinct conceptually from the appropriation of funds from the Consolidated Revenue Fund for a particular purpose. It is possible for an Act to do both where it amounts to a special appropriation Act *and provides some detail about the policy being authorised*" (emphasis added).

73. At the very least, her Honour's observations, and those of the plurality in *Pape*, speak against any contention that there can be a conferral of power to spend "in blank". To countenance the possibility of such a course would be to permit the enactment of legislation that provides no textual basis whatsoever for the determination of issues of constitutional fact relevant to the validity of any Executive act involving the expenditure of public funds. And for the reasons developed below, it would also "distort the relationship between Ch I and Ch

---

[45] See also *The Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 445-451.
[46] (2005) 224 CLR 494 at 577 [161].
[47] *Williams (No. 1)* (2012) 248 CLR 156 at 261 [222].
[48] (2012) 248 CLR 156 at 354 [531].

II of the *Constitution*".[49]

74. Something further should presently be said concerning the appropriation process. That it is for Parliament to determine the degree of specificity with which the purpose of an appropriation is identified is not contested.[50] However, that should not be permitted to obscure the extent to which the purposes of an appropriation, and the terms in which they are expressed, are set by the Executive Government. Section 56 of the *Constitution* prescribes, as a condition precedent to the passage of a proposed law appropriating revenue or moneys, a recommendation of the purpose of the relevant appropriation by message of the Governor-General to the House in which that proposal originated. That provision, when read in conjunction with s 53, suggests that embedded in the *Constitution* is a residual trace of the notion, prevailing in Westminster at the time of federation, that "[t]he Crown ... makes known to the Commons the pecuniary requirements of the Executive Government; and the Commons, upon this information ... grant such supplies towards these requirements as they see fit".[51]

75. Nonetheless, the fact that those sitting in the Federal Executive Council, whose authority flows from the confidence of the House of Representatives,[52] may thus seek from Parliament the appropriation of funds in terms marked by a degree of abstraction for which they themselves are largely responsible, opens up the possibility of prejudice to the Senate. As was explained in *Combet*,[53] the Houses of Parliament, in 1965, reached an accommodation, since referred to as "the Compact of 1965", concerning the manner in which appropriation Bills would be presented to Parliament, having regard to the constraints placed upon the Senate by s 53 of the *Constitution*. That accommodation contemplated the division of annual appropriation Bills into two classes – one for the ordinary annual services of the Government; and the other for expenditure on: (a) the construction of public works and buildings; (b) the acquisition of sites and buildings; (c) items of plant and equipment which are clearly definable as capital expenditure; (d) grants to the States under s 96 of the *Constitution*; and (e) new policies not authorised by special legislation. Even at this time, there was nothing novel in the suggestion that the ordinary annual services did not extend to "expenditures for new purposes not already covered by the existing powers or functions of a department".[54]

76. Unsurprisingly, the Compact of 1965 has since been modified, most relevantly as a consequence of the adoption in 1999 of accruals budgeting by the Commonwealth Government, and with it, a new method, also considered in *Combet*,[55] for specifying the purpose of an appropriation in an annual appropriation Bill – that is, by reference to outcomes and outputs, as distinct from programs and inputs.

77. Given that such outcomes are not infrequently "stated at a high level of abstraction" and "expressed in value-laden terms which import political judgment",[56] it requires little effort to imagine that they afford a vehicle by which the Executive might, in a given case, describe an existing appropriation as extending to a new policy or program, notwithstanding that:

---

[49] *Williams (No. 1)* [2012] HCA 23; (2012) 86 ALJR 713 at 750 [136].
[50] *Combet v The Commonwealth* (2005) 224 CLR 494 at 577 [160]; *Pape* (2009) 238 CLR 1 at 72 [197].
[51] W E Hearn, *The Government of England: Its Structure and Its Development*, 2nd ed (1886) at 376, quoted in Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 681.
[52] See *New South Wales v Bardolph* (1934) 52 CLR 455 at 509.
[53] (2005) 224 CLR 494 at 573 [150].
[54] (2005) 224 CLR 494 at 536-537 [47].
[55] (2005) 224 CLR 494 at 523 [6] per Gleeson CJ, 540-542 [55]-[56] per McHugh J, 575 [154] per Gummow, Hayne, Callinan and Heydon JJ.
[56] *Combet* (2005) 224 CLR 494 at 523 [6].

(a) that policy or program was not put before either House of Parliament in the course of debate on the relevant appropriation Bill; and

(b) to the extent that the Bill was intended to appropriate moneys for the ordinary annual services of the Government, it was beyond the reach of the Senate's power of amendment.

78. If, against this background, it were permissible for Parliament to grant the Executive authority to spend in terms which do not, at the very least, identify or limit the purposes of that spending, and if such authority were in fact granted, the result would be to sanction a weakening in the accountability of the Executive to Parliament, and to the Senate in particular. After all, the Executive would, in such circumstances, be free, not only to evade the strictures of s 54 of the *Constitution* by contending that funding for some new policy is covered by an existing appropriation for the ordinary annual services of the Government, but also to determine, without any input from Parliament, that that new policy is a purpose for which public funds should be expended. In other words, in initiating and implementing new policies, the Executive would be able to dispense entirely with seeking the approval of the Senate, relying only upon the continued confidence of the House of Representatives as the source of its authority.

79. This then prompts the question whether the consignment of the Senate to such a position of inequality relative to the House of Representatives is capable of being accommodated by the text and structure of the *Constitution*. The answer to this question commences with the proposition that when one has regard to the inclusion of the phrase "directly chosen by the people" in ss 7 and 24 of the *Constitution*, the Senate is revealed to be no less an organ of representative government than the House of Representatives. Especially is this so in light of the "vestigial" nature of the intended function of the Senate "as a chamber designed to protect the interests of the States".[57]

80. Nonetheless, while that function may be vestigial, there can be no denying that much like the adoption of the amendment procedure in s 128, the establishment and design of the Senate was part of an effort by the framers of the *Constitution* to adapt the principles of representative government to the concept of federalism. This explains the importance of the requirement in s 24 that the number of members of the House of Representatives "be, as nearly as practicable, twice the number of the senators". As Gummow J observed in *McGinty v Western Australia*,[58] this was intended "to preserve the integrity of the Senate in its relations with the House of Representatives in at least two senses", the first being the significance of the ratio of members of the House to senators in the event of disagreement between the chambers, particularly in the operation of the procedure laid down by s 57 of the *Constitution*, and the second being the need to secure the prestige and standing of the Senate.

81. These concerns arose in the minds of the framers precisely because the constitutional arrangements by which they were proposing to inaugurate the Commonwealth contemplated the establishment of a "truly federal government".[59]

82. Consequently, the *Constitution* should not lightly be construed as placing the Senate, or permitting the Senate to be placed, in a position of inequality relative to the House of Representatives beyond what is expressly stated in s 53. Indeed, even as that section:

(a) identifies the House of Representatives as the exclusive organ of legislative power in which bills for the appropriation of money and for the imposition of taxation are to originate; and

---

[57] *Williams (No. 1)* (2012) 248 CLR 156 at 205 [61].
[58] (1996) 186 CLR 140 at 277.
[59] A Inglis Clark, *Studies in Australian Constitutional Law* (1901) at 12.

(b) deprives the Senate of the power to amend such bills, except in so far any appropriations are intended for purposes other than the ordinary annual services of the Government,

it also provides that the Senate is otherwise to enjoy "equal power with the House of Representatives in respect of all proposed laws". And as Quick and Garran record,[60] the *Constitution* was adopted in the context of an appreciation (or apprehension) by some of the framers that:

> "in a Federation, it is a fundamental rule that no new law shall be passed and no old law shall be altered without the consent of (1) a majority of the people speaking by their representatives in one House, and (2) a majority of the States speaking by their representatives in the other house; that the same principle of State approval as well as popular approval should apply to Executive action, as well as to legislative action; that the State should not be forced to support Executive policy and Executive acts merely because ministers enjoyed the confidence of the popular Chamber".

83. In the Plaintiff's submission, the conferral upon the Executive of a power to spend on terms which leave the Executive free, subject only to the appropriation process, to determine the purposes of such spending, would impermissibly elevate the authority that flows from commanding a majority in the House of Representatives over "the federal conception which informed the function of the Senate as a necessary organ of Commonwealth legislative power".[61] Given the role attributed by Isaacs J in the *Surplus Revenue Case* to Parliament in setting the purposes for which the Executive may expend public funds, that federal conception must necessarily involve the notion that the States should have, in the form of the Senate, "every facility for the advocacy of their peculiar and special interests,[62] not merely with respect to proposed laws, but also in relation to Executive action.

84. Of course, it may be asked why the conferral upon the Executive of a power to spend "in blank" should be beyond the legislative power of the Commonwealth, if the Senate, being an organ of legislative power, is amply capable of protecting itself from proposed laws that might detract from the discharge of its functions. In other words, why should this aspect of the Senate's relations with the Executive government not be left to the workings of the political and legislative processes to resolve? On this view, if the Senate were agreeable to some diminution in the extent of its actual control over the spending activities of the Executive, that would be conclusive of the matter.

85. There are two rejoinders to this mode of reasoning. The first is that the role of the Senate in the control and supervision of the Executive is no mere privilege bestowed upon that chamber, which it may choose to waive by enactment as it sees fit; it is instead an integral feature of the regime of self-government embodied in the *Constitution.* The second is that the Senate's capacity to protect itself from a legislative abridgment of its role with respect to the approval of proposed expenditure by the Executive is neither absolute nor assured. This is because, whilst the Senate might well reject or fail to pass a proposed law to this effect, the Executive Government, armed with the confidence of a substantial majority in the House of Representatives, could, in favourable political circumstances, deploy the procedure contemplated by s 57 of the *Constitution* in order to overcome any Senate opposition to such a Bill.

86. To the extent then that it would weaken the role of the Senate, particularly by depriving that chamber of any protection against an attempt at circumventing s 54 of the *Constitution*, the conferral of statutory authority upon the Executive to spend "in blank"

---

[60] Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 706.
[61] *Williams (No. 1)* (2012) 248 CLR 156 at 205 [60] per French CJ.
[62] Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 414.

should be regarded as being beyond the reach of Commonwealth legislative power. Thus, while it may be true to say, at one level, that the legislative conferral of authority to spend "in blank" would involve or entail the engagement of the Senate beyond the appropriation process, such a purported law would nonetheless fail to demonstrate a sufficient degree of engagement, having regard to the text and structure of the *Constitution*.

87. It is convenient at this point to observe that under s 32B of the FMA Act, the purposes of the expenditure or other forms of executive action purportedly authorised by that provision are set, not by Parliament, but rather by the Executive itself in the exercise of the regulation-making power conferred by s 65(1) of that statute. That the initial tranche of regulations made for the purposes of s 32B was enacted by Parliament in Schedule 2 to the Financial Framework Amendment Act does not presently detract from the proposition that s 32B would, if valid, permit the Executive to commence spending public funds on new policies or programs without having first submitted those policies or programs to the Senate for its consideration and approval. Put simply, if, for the reasons outlined in these submissions, s 32B is invalid, then the regulations inserted into the FMA Regulations by Schedule 2 to the Financial Framework Amendment Act must similarly be invalid, notwithstanding that they were promulgated, not by the Governor-General, but by Parliament.

88. In attempting to meet what is submitted above, the Defendants assert that s 42 of the *Legislative Instruments Act 2003* (Cth) affords a mechanism by which the Senate, acting alone, may scrutinise, and ultimately disallow, any regulations made for the purposes of s 32B of the FMA Act. It is thus said that even if there were some constitutional limit upon the legislative adoption of processes that would tend to weaken the role of the Senate, particularly in its relations with the Executive government, this is simply not engaged by s 32B.

89. Critically, in the *First Uniform Tax Case*,[63] Latham CJ observed that several difficulties attended the suggestion that "an Act which does not refer to or incorporate any other Act, and which when considered by itself is not invalid, may be held to be invalid by reason of the enactment of other Acts". If that be right, then similar difficulties should be seen as plaguing the proposition that an otherwise invalid Act may be rescued from invalidity by the operation of some other statute enacted at a prior time.

90. Nonetheless, it is upon the premise afforded by that last proposition that the Defendants' invocation of s 42 of the *Legislative Instruments Act* appears to proceed. That that provision currently affords a procedure by which regulations may be disallowed by a single House of Parliament may merit applause as a measure intended to enhance the accountability of the Executive to the legislative branch of government. But it is neither an inevitable nor an immutable feature of the context in which s 32B of the FMA Act was enacted. And just as s 32B would not be any more or less valid if s 42 of the *Legislative Instruments Act* were repealed, so does the validity of s 32B not depend upon the present inclusion of that provision in the Commonwealth statute book.

91. It follows then that s 32B of the FMA Act should neither be understood, nor tested as to its validity, on the basis that it forms part of a scheme which was intended to allow the Executive some flexibility in determining the nature and extent of its spending activities whilst bestowing upon the Senate the opportunity to scrutinise, and the power to disallow, the Executive's choices in that regard. In other words, the validity of s 32B is to be assessed in isolation from the operation of s 42 of the *Legislative Instruments Act*. Any contention to the contrary is heterodox.

92. However, even if that were not so, s 42 would not assist the Defendants. It must be borne in mind:

---

[63] (1942) 65 CLR 373 at 411.

(a) that s 42 establishes a procedure, not for the prior approval, but rather for the subsequent disallowance by a single House of Parliament, of legislative instruments, including regulations; and

(b) that that procedure is available only after the delivery, pursuant to s 38 of the *Legislative Instruments Act*, of a copy of the relevant instrument "to each House of Parliament to be laid before each House within 6 sitting days of that House after the registration of the instrument".

93. Thus, if regulations were made during, say, a Senate recess with a view to specifying some program for the purposes of s 32B of the FMA Act, the Executive would be able first to enter into arrangements in the course of implementing that program and then to expend significant amounts in the performance of those arrangements well before the relevant regulations were ever laid before the Senate. Indeed, one may posit a circumstance in which a spending program of limited scope is completely implemented even before the Senate has had the opportunity to consider the disallowance of the regulations that specify that program for the purposes of s 32B. In such a situation, there would have been no expression of approval – or perhaps more accurately, no meaningful omission to express disapproval – on the part of the Senate in relation to action undertaken by, or on the authority of, those who command the confidence of the House of Representatives. Having regard to the matters outlined above, this is precisely the sort of relationship of inequality as between the House of Representatives and the Senate that, in the Plaintiff's submission, is at odds with the federal design of the *Constitution*. Section 42 of the *Legislative Instruments Act* thus cannot be said to qualify the operation of s 32B of the FMA Act so as to avoid the invalidity of the latter.

94. Accordingly, even if the reach of s 32B could be confined to matters falling within ambit of the legislative power of the Commonwealth, it would nonetheless be invalid.

No scope for re-opening Williams (No.1)

95. As was recorded in the reasons of Hayne J, the Commonwealth in *Williams (No. 1)* advanced two alternative submissions concerning the ambit of the executive power with respect to the formation of contracts and the expenditure of public funds.[64] The first, which was described as indicating a "narrow basis" upon which the impugned payments could have been supported, was that the executive power of the Commonwealth "in all its aspects" is:

> "limited to the subject-matters of the express grants of legislative power in ss 51, 52 and 122 of the Constitution (together with matters that, because of their distinctly national character or their magnitude and urgency, are peculiarly adapted to the government of the country and otherwise could not be carried on for the public benefit)" (footnotes omitted).

It was thus said, by reference to s 51(xx) and (xxxiiiA) of the *Constitution*, that because the payments made pursuant to the Darling Heights Funding Agreement could have been authorised by a valid Commonwealth law, the Executive had power to make those payments, even in the absence of such a law having been enacted.

96. In the alternative, the Commonwealth proffered a "broad basis" for its position, one whose logical conclusion was that "the Executive's power to spend money lawfully available to it [is], in effect, unlimited".[65] Underpinning that claim was the notion that the "capacities" of the Executive to expend funds the subject of an appropriation or to enter into contracts:

> "do not involve interference with what would otherwise be the legal rights and duties of others. Nor does the Commonwealth, when exercising such a capacity, assert or

[64] (2012) 248 CLR 156 at 242-243 [176]-[177].
[65] (2012) 248 CLR 156 at 243 [177].

enjoy any power to displace the ordinary operation of the laws of the State or Territory in which the relevant acts take place."

97. This latter submission was rejected by six Justices of the Court,[66] with the "narrow basis" – specifically, the unqualified suggestion that the Executive is empowered to enter into contracts, and to make payments, which could validly have been authorised by legislation – meeting a similar fate at the hands of four of those six.[67] The four Justices in question thus did not consider it necessary to determine whether s 51(xx) or (xxxiiiA) of the *Constitution* might have supported the enactment of legislation authorising the Commonwealth's entry into the Darling Heights Funding Agreement. That being so, there can be no doubt that the rejection of both submissions advanced on behalf of the Commonwealth was "legally indispensable to the conclusion"[68] in *Williams (No. 1)*. As Dixon J observed in *Blair v Curran*, "[a] judicial determination directly involving an issue of fact *or of law* disposes for all of the issue, so that it cannot afterwards be raised between the same parties of their privies" (emphasis added).

98. It is true that the Minister was not a party in *Williams (No. 1)*, but he stands, quite clearly, in a position of privity of interest with either the Commonwealth or his own predecessor, both being parties to the earlier litigation. As a consequence, the determinations described above are binding upon all the parties in these proceedings, and there can be no suggestion of an entitlement in the Commonwealth to seek leave to re-open those aspects of what was decided in *Williams (No. 1)*.

99. Indeed, even if the Court were not persuaded that those matters engage the doctrine of issue estoppel, it must be borne in mind that proceedings may involve an abuse of process "if, notwithstanding that the circumstances do not give rise to an estoppel, their continuance would be unjustifiably vexatious and oppressive for the reason that it is sought to litigate anew a case which has already been disposed of in earlier proceedings".[69]

100. This is not to say that every instance of threatened re-litigation should be characterised as involving an abuse of process of the sort described in *Reichel v Magrath*[70] as "a scandal to the administration of justice". In particular, as was explained in *Haines v Australian Broadcasting Corporation*:[71]

> "[t]he issue determined in the earlier case which is sought to be litigated in the later case must be one which the party propounding it lost in the former … It must be an issue which was necessarily determined in the earlier case, and one of importance to the final result. It must have been properly argued – by which I mean that it is readily apparent from whatever records there are of the earlier case that the tribunal which decided it was an appropriate one to do so, that the parties were appropriate contradictors and that the issue was regarded by them as one of importance in that case. In normal circumstances, the decision disposing of the issue must have been a final one – by which I mean that it is not subject to appeal."

101. In the Plaintiff's submission, there can be little doubt that the Court's conclusions concerning the broad and narrow bases upon which the Commonwealth contended in favour of the validity of the Darling Heights Funding Agreement are such as would lend the character of an abuse of process to any attempt to re-open them in these proceedings. This is

---

[66] (2012) 248 CLR 156 at 192-193 [37]-[38] per French CJ, 236-239 [150]-[159] per Gummow and Bell JJ, 265-271 [234]-[253] per Hayne J, 352-524 [517]-[524] per Crennan J and 368-374 [576]-[595] per Kiefel J.
[67] (2012) 248 CLR 156 at 180 [4], 186-191 [27]-[34] per French CJ, 232-233 [134]-[137] per Gummow and Bell JJ and 355-358 [535]-[547] per Crennan J.
[68] *Blair v Curran* (1939) 62 CLR 464 at 532 per Dixon J.
[69] *Walton v Gardiner* (1993) 177 CLR 378 at 393. See also *Rogers v The Queen* (1994) 181 CLR
[70] (1889) 14 App Cas 665 at 668.
[71] (1995) 43 NSWLR 404 at 414.

particularly because, notwithstanding the remarks of Heydon J concerning the course of argument in *Williams (No. 1)*,[72] the Commonwealth was afforded a full opportunity in that earlier litigation to develop the submissions described above.

102. The same might also be said of the finding by French CJ, Gummow and Bell JJ, and Crennan J that entry into the Darling Heights Funding Agreement was not supported by that aspect of the executive power of the Commonwealth which does not correspond to the express grants of legislative power, particularly in so far as it derives from the character and status of the Commonwealth as a national government.[73] Given that this finding was confined only to the Darling Heights Funding Agreement, there is no suggestion that the Commonwealth Defendants are precluded by an issue estoppel from contending that consideration of the SUQ Funding Agreement should yield a contrary outcome. Nonetheless, any submission to that effect would – and should – prompt one to ask whether the Commonwealth Defendants are seeking to relitigate as against the same Plaintiff a question that was decided in *Williams (No. 1)*.

103. It follows then that these proceedings do not afford any occasion for considering the factors that were described in *John v Federal Commissioner of Taxation*[74] as justifying the departure by this Court from its previous decisions, and any attempt by the Commonwealth Defendants to contest the correctness of what was determined in *Williams (No. 1)* must fail.

104. Furthermore, as Kirby J observed,[75] in a remark that subsequently met with the approval of Kiefel and Keane JJ in *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship*,[76] "care should be taken to avoid *(especially within a very short interval)* the re-opening and re-examination of issues that have substantially been decided by earlier decisions in closely analogous circumstances" (emphasis added). There was, significantly, no material difference in the reasoning of the four Justices who concluded that the Darling Heights Funding Agreement was invalid for want of any statutory support, and the Commonwealth can point to no inconvenience caused by their Honours' conclusions during the brief period between the decision in *Williams (No. 1)* and the commencement of these proceedings. Indeed, the only notable development to have during that period was a change in the composition of this Court. Needless to say, it would ill serve the regularity and consistency that have been described as important attributes of the rule for law for that to form part of the context for a hasty retreat from what was determined in *Williams (No. 1)*.

105. In any event, having regard to the textual and structural features of the *Constitution* discussed in paragraphs 74 to 85 above, there is:

(a) simply no basis for contending that the reasons of French CJ, Gummow and Bell JJ and Crennan J in that case were attended by error; and therefore

(b) no scope for concluding that the Commonwealth's entry into, and performance of, the SUQ Funding Agreement were supported by the executive power of the Commonwealth, in the absence of any authorising legislation.

106. To the extent that the Commonwealth Defendants maintain a contrary position, the substance of their arguments will be addressed in the Plaintiff's submissions in reply.

Section 51(xx) of the Constitution

107. It was earlier observed that one may discern in the Defendants' pleadings two

---

[72] (2012) 248 CLR 156 at 295-296 [341]-[344].
[73] (2012) 248 CLR 156 at 216 [83] per French CJ, 234-236 [143]-[148] per Gummow and Bell JJ and 348-349 [503]-[507] per Crennan J.
[74] (1989)166 CLR 417 at 438-9.
[75] *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 at 569 [246].
[76] [2013] HCA 53 at [198].

alternative proposed limitations, subject to which it is said that s 32B of the FMA Act may be read so as to preserve some valid operation for it. These are:

(a) that having regard to the scope of the Commonwealth's power to promulgate delegated legislation, the programs specified in the regulations contemplated in s 32B(1)(b)(iii) must be with respect to matters falling within the ambit of Commonwealth legislative power; and

(b) that irrespective of the terms in which the relevant program is identified in the regulations, the arrangement in question implementing that program must be with respect to such matters.

10 **108.** The first of these alternatives focuses attention on the language of the regulations and invites consideration as to whether, as described, a particular program can be said to have a sufficient connection with the subject-matter of a grant of Commonwealth legislative power. In contrast, the application of the second proposed limitation requires a determination as to whether such a connection is disclosed by the terms, not of the regulations, but of the particular impugned arrangement which is said to implement a program identified in those regulations.

109. Accordingly, even if the Defendants were successful in demonstrating that the reach of s 32B extends, or can be taken to extend, no further than the ambit of Commonwealth legislative power, the relevant question for present purposes is not whether SUQ is a trading
20 corporation. Rather, the focus of inquiry must be the character of either the relevant provisions in the FMA Regulations or the SUQ Funding Agreement.

110. In that regard, the adoption of the first proposed limitation would be fatal to any suggestion, of the sort advanced on behalf of the Defendants, that in so far as it authorises the Commonwealth's entry into and performance of the SUQ Funding Agreement, the operation of s 32B of the FMA Act is supported by s 51(xx) of the *Constitution*. This is because, in identifying the NSCSWP for the purposes of s 32B(1)(b)(iii), item 407.013 of Part 4 of Schedule 1AA to the FMA Regulations makes no mention of trading, financial or foreign corporations. And contrary to what is pleaded in SUQ's Amended Defence at [38(b)], the mere circumstance that SUQ is a trading corporation (which is not conceded by the Plaintiff)
30 cannot be sufficient to render the NSCSWP a program with respect to constitutional corporations.

111. After all, if s 32B were read down to reflect adoption of the first proposed limitation, the question falling for determination by the Court would be whether s 51(xx) of the *Constitution* empowers Parliament to authorise the formation and performance by the Commonwealth of arrangements in order "[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". In the Plaintiff's submission, that question, which arises by dint of the language of item 407.013, can only be answered in the negative.

40 **112.** Indeed, even if the Guidelines Revision 6, as incorporated into the SUQ Funding Agreement, did require a Funding Recipient to be a constitutional corporation, this would not lend any greater validity to the purported authorisation of that agreement by s 32B. As has previously been explained, the stipulations of the Guidelines Revision 6 are not incorporated into, or otherwise given the force of law by, item 407.013 or any other provision in the FMA Regulations. Nor does s 32B, when read in conjunction with the FMA Regulations, purport to authorise agreements which contain terms such as those set out in the Guidelines Revision 6. There is accordingly no law with respect to constitutional corporations that can be said to confer power upon the Commonwealth to enter into, and to perform, the SUQ Funding Agreement.

113. In any event, the Guidelines Revision 6 do not require that Funding Recipients such as SUQ be constitutional corporations. Section 2.6 of those Guidelines provides that "[f]or the purposes of this Program, a Funding Recipient is a legal entity (an organisation incorporated under Commonwealth or state legislation) that may enter into a Funding Agreement", but there is no stipulation concerning the need for such corporations to engage in financial or trading activities. Indeed, among the parties eligible to be Funding Recipients are:

(a) "school community organisations" – for example, school governing bodies or Parents' and Citizens' Associations – which are not readily amenable to being described as "trading or financial corporation"; and

(b) "Government Education Authorities" [CSC, 147-148].

The NSCSWP thus does not answer the description of a program with respect to constitutional corporations, and given incorporation of the Guidelines Revision 6 in the SUQ Funding Agreement, as amended from time to time, the purported operation of that agreement is completely unaffected by the extent of SUQ's trading activities.

114. Therefore, despite the apparent differences between the guidelines that governed the administration of the NSCP, which made no reference to the corporate status of funding recipients,[77] and the Guidelines Revision 6, it is difficult to resist the conclusion that the SUQ Funding Agreement is no more than an example of "a particular kind of contract in which one contracting party could be, but need not be, a constitutional corporation providing services for reward".[78] In the Plaintiff's submission, that alone is sufficient to deprive that agreement of any plausible claim to being an arrangement with respect to constitutional corporations.

115. To suggest, as the Defendants do, that an arrangement can have that character by virtue only of one of its parties being a constitutional corporation is to countenance the notion that the validity of a contract entered into by the Commonwealth may depend upon a circumstance which, given the questions of fact and degree involved, is not always apparent to the parties at the time of formation of the contract. It is necessary also to ask what would happen if, during the life of the contract, the company in question ceases to answer the description of a trading corporation. Is the contract thereby discharged? And if so, would this discharge operate *in futuro* or *ab initio*? These observations demonstrate the difficulty, if not the absurdity, involved in attempting to determine whether an arrangement is "with respect to" constitutional corporations merely by focusing upon the all too mutable character of the party or parties with which the Commonwealth transacts,

116. Consequently, adoption of the second proposed limitation upon the scope of s 32B would not assist in attracting s 51(xx) of the *Constitution* as support for the authorisation of the SUQ Funding Agreement purportedly effected by that provision.

117. It should be emphasised at this point that the Defendants have not, as yet, foreshadowed reliance upon some proposed limitation on the reach of s 32B that would render the valid operation of that provision, to the extent that it purports to authorise the Commonwealth's entry into the SUQ Funding Agreement, conditional upon SUQ being a trading corporation. Any such reliance must necessarily be premised upon demonstrating that this unidentified limitation should be preferred over those that emerge from the Defendants' current pleadings. This is in circumstances where, as submitted above, s 32B provides no guidance as to how, if at all, it should be read down. That being so, the questions whether SUQ is a trading corporation and what criteria should inform an assessment of its asserted character as such strictly do not arise.

---

[77] (2012) 248 CLR 156 at 276 [271].
[78] (2012) 248 CLR 156 at 277 [272].

118. Nonetheless, if the Court were minded to think otherwise, the following matters are of significance:

(a) the precise test for determining whether an entity answers the description of a trading corporation was a matter in respect of which the majority in the *Work Choices Case* emphatically refrained from expressing a view;[79]

(b) there is force in the suggestion that "a corporation cannot take its character from activities which are uncharacteristic, even if those activities are not infrequently carried on";[80]

(c) even if the test involved determining whether trading constitutes "a sufficiently significant proportion of [a corporation's] overall activities",[81] it is not sufficient merely to demonstrate that the entity's trading activities yield, and involve the expenditure of, substantial sums of money, or that its trading income constitutes a significant proportion of its overall income. This is because the conduct of trade as an insubstantial proportion of a corporation's overall activities may generate substantial revenue;

(d) although that SUQ's financial reports suggest the revenues generated by, and the expenses incurred in the course of, its trading activities are not insubstantial, this does not suffice to establish its character as a trading corporation. Especially is this so because its Financial Report for the year ended 31 December 2011 described SUQ's principal activities as being:

  (i) making God's Good News known to children, young people and families; and

  (ii) encouraging people of all ages to meet God daily through the Bible and prayer so that they may come to personal faith in our Lord Jesus Christ, grow in Christian maturity and become both committed church members and servants of a world in need [SC, Vol 1, 152].

119. Section 51(xx) of the *Constitution* affords no succour to the Defendants' cause.

Section 51(xxiiiA) of the Constitution

120. In so far the Defendants' invocation of s 51(xxiiiA) of the *Constitution* is concerned, there appears to be no contest that the "provision" of the "benefits" described in that placitum is confined to the provision of benefits by the Commonwealth. More controversial, however, are the extent to which, and the manner in which, those "benefits" – and in particular, benefits to students – may be said to include the provision of services.

121. In that regard, the construction of s 51(xxiiiA) for which the Plaintiff contends is that favoured by Hayne J in *Williams (No. 1)* – that is, that "the central notion" conveyed by use of the word "benefits" is:

> "a payment *to or for an individual* for provision of relief against the consequences of identified events or circumstances: sickness, unemployment, hospital treatment, pharmaceutical needs or being a student" (emphasis added).[82]

122. In contrast, the inclusion, at the insistence of the Commonwealth Defendants, of paragraphs 66 to 74 of the Special Case and the materials therein referred to suggests the adoption by those Defendants of the premise, rejected by Dixon J in *British Medical Association v The Commonwealth* ("***BMA Case***"),[83] that "the word 'benefit' covers anything

---

[79] (2006) 229 CLR 1 at 74 [55], 75 [58], 108-109 [158] and 117 [185].
[80] *Fencott v Muller* (1983) 152 CLR 570 at 588.
[81] *Commonwealth v Tasmania* (1983) 229 CLR 1 at 233.
[82] (2012) 248 CLR 156 at 279 [282].
[83] (1949) 79 CLR 201 at 260.

tending to the profit advantage good or gain of a man". If that were accepted, the question whether or not s 51(xxiiiA) is engaged in relation to a law said to confer benefits would depend upon the existence of a constitutional fact – in this case, whether the payments contemplated by the SUQ Funding Agreement would tend to the profit, advantage, good or gain of students.

123. The framing of the determinative question in this manner might be thought, at the very least, to raise concerns similar to those voiced by Lord Simonds in *Gilmour v Coats*[84] in the context of being asked to determine whether intercessory prayer possessed the element of public benefit required for a valid charitable trust, namely, that "[h]ere is something which is manifestly not susceptible of proof". This would particularly be so where, as in these proceedings, the asserted advantage does not involve any discernible material or pecuniary gain for those upon whom benefits are being said to be conferred. In such cases, the validity of an impugned law might well depend upon no more than its policy merits. That the construction of s 51(xxiiiA) favoured by Hayne J avoids this possibility affords one basis upon which, in the Plaintiff's submission, it should be accepted as the doctrine of this Court. After all, as was previously said in the context of construing of s 51(xxiiiA), "it is not for the Court ... to pass upon the wisdom or the suitability of the particular scheme that the legislature has chosen to institute".[85]

124. Another basis for preferring the Plaintiff's construction is provided by the history of s 51(xxiiiA) and the provenance of its language. In the *BMA Case*, Dixon J referred to the "long history" of the word "benefits" "in the vocabulary of friendly and benefit societies", principally "as a general name for the payments in money and for the provision of medical attention, medicines and funeral arrangements made by such [societies] to or for their contributing members and their dependants in case of sickness or death." His Honour also noted the use of that term in various statutes concerned with what he termed "social services", including the *National Insurance Act 1946* (UK) (9 & 10 Geo VI Ch. 67) ("**the 1946 Insurance Act**").

125. In giving further consideration to that history, it is convenient to commence with the *Friendly Societies Act 1896* (UK) (59 & 60 Vict Ch 25), s 8 of which defined the term "friendly societies" to mean:

> "[s]ocieties ... for the purpose of providing by voluntary subscriptions of the members thereof, with or without the aid of donations for –
>
> (a) the relief or maintenance of the members, their husbands, wives, children, fathers, mothers, brothers, or sisters, nephews or nieces, or wards being orphans, during sickness or other infirmity, whether bodily or mental, in old age (which shall mean any age after fifty) or in widowhood, or for the relief or maintenance of the orphan children of members during minority; or
>
> (b) insuring money to he paid on the birth of a member's child, or on the death of a member, or for the funeral expenses of the husband, wife, or child of a member, or of the widow of a deceased member, or, as respects persons of the Jewish persuasion, for the payment of a sum of money during the period of confined mourning; or
>
> (c) the relief or maintenance of the members when on travel in search of employment, or when in distressed circumstances, or in case of shipwreck, or loss or damage of or to boats or nets; or
>
> (d) the endowment of members or nominees of members at any age; or

[84] [1949] AC 426 at 446.
[85] *Alexandra Private Geriatric Hospital Pty Ltd v The Commonwealth* (1987) 162 CLR 271 at 283.

(e) the insurance against fire, to any amount not exceeding fifteen pounds, of the tools or implements of the trade or calling of the members; or

(f) guaranteeing the performance of their duties by officers and servants of the society or any branch thereof."

126. Significantly, even though the various purposes enumerated in s 8 were not all described in terms of the provision of insurance, they uniformly contemplated the making of some payment or the provision of "relief or maintenance" to specific individuals – namely, members or their dependants – upon the occurrence of some contingency. This is not to say that the relationship between a friendly society and its members necessarily involved entry into an insurance contract – that is, a contract of speculation in which an insurer agrees, in consideration of money paid to the insurer by the assured, to indemnify the latter against loss resulting from the happening of specified events.[86] Nonetheless, the parallels between the benefits afforded by a friendly society and those enjoyed under such a contract should be apparent. In the Plaintiff's submission, those parallels call to mind the circumstance that the provision of indemnity under an insurance contract may take the form of a payment to the assured or the discharge, in whole or in part, of some liability owed by the assured to a third party.

127. Reference should at this point be made to the *National Insurance Act 1911* (UK) (1 & 2 Geo V Ch 55) ("**the 1911 Insurance Act**"), Part I of which established a system of national health insurance administered, in large part, by what were termed Approved Societies, which included friendly societies of the sort referred to by Dixon J. Section 8 of that statute identified the various benefits conferred by Part I as follows:

"(a) Medical treatment and attendance, including the provision of proper and sufficient medicines, and such medical and surgical appliances as may be prescribed by regulations to be made by the Insurance Commissioners (in this Act called 'medical benefit');

(b) Treatment in sanatoria or other institutions or otherwise when suffering from tuberculosis, or such as other diseases as the Local Government Board with the approval of the Treasury may appoint (in this Act called 'sanatorium benefit');

(c) Periodical payments whilst rendered incapable of work by some specific disease or by bodily or mental disablement, of which notice has been given, commencing from the fourth day after being so rendered incapable of work, and continuing for a period not exceeding twenty-six weeks (in this Act called 'sickness benefit');

(d) In the case of the disease or disablement continuing after the determination of the sickness benefit, periodical payments so long as so rendered incapable of work by the disease or disablement (in this Act called 'disablement benefit');

(e) Payment in the case of the confinement of the wife or, where the child is a posthumous child, of the widow or an insured person, or of any other woman who is an insured person, of a sum of thirty shillings (in this Act called 'maternity benefit')".

128. Pursuant to s 14, the provision of sickness, disablement and maternity benefits was the exclusive province of Approved Societies, whereas medical and sanatorium benefits were to be provided by Insurance Committees established in each county and county borough. The administration of these benefits was in turn to be funded "as to seven-ninths (or, in the case of

[86] *Prudential Insurance Co v Commissioner of Inland Revenue* [1904] 2 KB 658.

women, three-fourths) ... from contributions made by or in respect of the contributors by themselves or their employers, and as to the remaining two-ninths (or, in the case of women, one quarter) ... from moneys provided by Parliament" (s 3).

129. In relation to medical benefits, the 1911 Insurance Act contemplated that Insurance Committees would either:

(a) assume responsibility for the provision of medical services to insured persons, which necessarily involved negotiating and paying the remuneration of the practitioners who supplied such services; or

(b) in certain circumstances, making some contribution to the cost incurred by insured persons in obtaining the medical services themselves.

In either case, by way of a payment made *to* or *for* him or her, the recipient of the benefit was to be relieved, even if only partially, of any obligation to pay for the relevant services.

130. As previously noted, Dixon J in the *BMA Case* made passing mention of the circumstance that the word "benefit" had been employed in the 1946 Insurance Act to describe the range of social security measures adopted in that statute. It should further be observed that the Act had been passed in response to, and for the purpose of implementing, the various recommendations made by Sir William Beveridge in his Report on Social Insurance and Allied Services. And unlike its predecessor of 1911, the 1946 Insurance Act concentrated exclusively upon "benefits" provided by way of money payments; so much may be discerned by reading s 10 of the Act in conjunction with Schedule 2. The benefits in question included unemployment and sickness benefits, maternity benefits, widow's benefits, a guardian's allowance, retirement pensions and death grants, and were to be funded by contributions paid into a National Insurance Fund.

131. That Fund was placed under the control and management of the Minister for National Insurance, who was authorised pursuant to s 37 of the 1946 Insurance Act to make periodic payments out of the National Insurance Fund "in respect of the cost of any national health service hereafter established by Parliament".

132. The 1946 Insurance Act thus made provision for two different categories of payment from the National Insurance Fund: first, payments described as "benefits", made to individuals in certain circumstances and subject to various conditions; and secondly, contributions to the funding of what would become the National Health Service ("**the NHS**"), which contributions were directed, not towards the provision of medical services to a specific individual or beneficiary, but rather towards the provision of medical services generally. In other words, and relevantly for present purposes the Act distinguished between the provision of benefits and the making of payments to finance the provision of services.

133. As for developments in the antipodes, an appropriate starting point for analysis is afforded by the *Maternity Act 1912* (Cth). Section 4 of that statute provided for the payment, out of the Consolidated Revenue Fund, of a maternity allowance of five pounds to every woman who, after the commencement of the Act, gave birth to a child, either in Australia or on board a ship proceeding from one port in the Commonwealth or a Territory of the Commonwealth to another such port. In so providing, the *Maternity Allowance Act* represented the first foray by the Commonwealth Parliament into an area of social security which did not correspond neatly to the forms of pension specified in s 51(xxiii) of the *Constitution*. And as Professor Sackville noted,[87] there was, during the course of the debate on the Bill for this Act, some contention as to the Commonwealth's power to enact it, and in particular the reach of s 81 of the *Constitution*.

---

[87] Sackville, "Social Welfare in Australia: The Constitutional Framework" (1973) 5 *Federal Law Review* 248 at 250.

134. That debate was revisited in 1927 and 1928, during the course of a Royal Commission on Child Endowment or Family Allowances. One of the matters considered in the Commission's majority report was the extent of the Commonwealth's legislative power with regard to child endowment, in relation to which Sir Robert Garran is recorded as having expressed the opinion that:

> "under Section 96 of the Constitution, the Commonwealth could hand over moneys to the States 'earmarked' for the purpose of Child Endowment, just as it has done with regard to roads. He was also of opinion that under Section 81 of the Constitution, Child Endowment could be declared one of 'the purposes of the Commonwealth', and a Commonwealth scheme instituted. But in that event, the legislation of the Commonwealth on the subject would have no effect on State legislation of a similar kind. He thought that in order to carry out a scheme which would be Commonwealth-wide, the Commonwealth could proceed only by way of aid to the States, controlling all necessary details through agreements with the States ...
>
> On the question of the power of the Commonwealth Parliament to appropriate moneys (under Section 81) for purposes which it declares to be 'purposes of the Commonwealth,' Sir Robert said that he has always considered Section 81 as conferring 'an absolute power of appropriation for general purposes, and the Commonwealth Parliament has always acted on that supposition.' He cited a number of Acts such as the *Precious Metals Prospecting Act* 1926; the *Oil Agreement Act* 1920-23-26; the *Science and Industry Endowment Act* 1926; the Federal Aids Roads Act, and many others."

135. The supposition to which Sir Robert referred was subsequently rejected in the *Pharmaceutical Benefits Case*,[88] and as if in anticipation of what was decided in that case, Dixon KC, as he then was, is said in the Report to have "cited some Commonwealth Statutes of the kind referred to, including the *Maternity Allowance Act* 1912, and expressed the view ... that such appropriations are invalid".

136. Critically, the debate that played out during the Royal Commission focused largely upon the Commonwealth's attempts to spend directly for the purpose of providing individuals with allowances or endowments. This is to be distinguished from the mere provision of funding to third parties so that they in turn might engage in the business of delivering social services to unidentified individuals, with whom the Commonwealth does not transact. Given the tenor of Sir Robert Garran's evidence before the Royal Commission, it would appear that the availability of s 96 as a mechanism for funding the provision of social services by entities other than the Commonwealth was sufficiently recognised by 1928.

137. Following the publication of the Royal Commissioner's report and prior to the insertion of s 51(xxiiiA) into the *Constitution*, the Commonwealth enacted several pieces of legislation on the basis of the supposition described by Sir Robert Garran. A significant number of these concerned matters of social welfare, including:

(a) the *Medical Research Endowment Act 1937* (Cth);

(b) the *Child Endowment Act 1941* (Cth);

(c) the *National Fitness Act 1941* (Cth);

(d) the *Unemployment and Sickness Benefits Act 1944* (Cth);

(e) the *Education Act 1945* (Cth);

(f) the *Hospital Benefits Act 1945* (Cth), particularly s 4; and

---

[88] (1946) 71 CLR 237.

(g) the *Re-establishment and Employment Act 1945* (Cth), particularly Div 5 of Pt II and Parts III and IV.

138. Doubt was cast upon the validity of these enactments following the decision in the *Pharmaceutical Benefits Case*. As a consequence, the Chifley Government sought opinions on that issue from a number of eminent King's Counsel, whose views were such as to prompt the introduction into Parliament of the *Constitution Alteration (Social Services) Bill 1946*, and with it, the proposed insertion of a new s 51(xxiiiA) into the *Constitution*.[89] In his second reading speech on that Bill, the Hon H V Evatt said:

> "the only amendment to the Constitution which is urgently necessary as a result of the High Court's decision is an amendment to authorize the continuance of acts providing benefits in the nature of social services, and to authorize the Parliament in the future to confer *benefits of a similar character*. That is the object of this bill. I emphasize that the bill does not seek to extend the appropriation power in any other respect. The proposed alteration embodied in the bill is, therefore, limited to benefits of a social service character and, *in the main, to benefits of a type provided for by legislation already on the statute-book*" (emphasis added).

139. It follows that in construing s 51(xxiiiA), some regard should be had to the character of the social welfare benefits for which provision had been made in Commonwealth legislation prior to, or at the time of, the insertion of that placitum into the *Constitution*. So much also emerges from the pamphlet circulated for the purposes of the 1946 referendum, which set out the case in favour of the proposed amendment. That pamphlet relevantly stated:

> "You are asked to approve an alteration of the Australian Constitution in order to *confirm* the national Parliament's power to provide the various social services that are mentioned in the list at the top of this page.
>
> You probably know that *the Commonwealth is already providing most of these services*. It provides maternity allowances, widows' pensions, child endowment, unemployment, sickness and hospital benefits, and benefits to students. But because of a legal decision last year, *the Constitution now needs altering to make sure that this can continue*" (emphasis added).

140. For present purposes, it is significant that each of the Acts in relation to which the Chifley Government had sought the opinions of King's Counsel erected schemes pursuant to which the Commonwealth did more than merely to direct funding to providers of social services so as to defray the costs incurred by them in providing those services. Rather, the operation of each Act involved the Commonwealth, or an entity established by it, either:

(a) providing financial assistance directly to the intended recipient of the benefits; or

(b) substituting 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.

141. For example, the *Unemployment and Sickness Benefits Act 1944* (Cth) provided for the payment to individuals of unemployment and sickness benefits out of the National Welfare Fund, which had been established by the *National Welfare Fund Act 1943* (Cth) as a trust account comprising sums appropriated from the Consolidated Revenue Fund. In a like fashion, the *Education Act 1945* (Cth) established the Universities Commission, one of whose functions, as stated in s 14(c), was to provide financial assistance to students of universities and approved institutions.

142. A similar mode of operation is also disclosed by the *Hospital Benefits Act 1945* (Cth),

---

[89] Australia, House of Representatives, *Parliamentary Debates* (Hansard), 27 March 1946, p 648.

notwithstanding its apparent greater complexity. For the most part, that statute was framed as an exercise of power under s 96 of the *Constitution*; it contemplated the provision by the Commonwealth of financial assistance to the States in relation to the management and administration of public hospitals, on the condition that the States entered into, and complied with, heads of agreement in the terms set out in the Schedule to the Act. The agreements thus formed were described in s 3 as agreements "relating to the provision of hospital benefits", and provided that:

(a) where financial assistance was provided in relation to public wards in public hospitals (in an amount calculated by multiplying a so-called Commonwealth Hospital Benefit Rate for Public Wards by the number of occupied beds in public wards in the relevant financial year), the State was to charge no fee in respect of "qualified persons" occupying a bed in a public ward (cl 8); and

(b) where financial assistance was provided in relation to non-public wards in public hospitals (in an amount calculated by multiplying a so-called Commonwealth Hospital Benefit Rate for Non-Public Wards by the number of occupied beds in non-public wards in the relevant financial year), the fee charged by the State to each "qualified person" occupying a bed in a non-public ward was to be reduced by the Commonwealth Hospital Benefit Rate for Non-Public Wards (cl 9).

Thus, in so far as public hospitals were concerned, the hospital benefit conferred by the Act took the form of a subsidy, paid under the mechanism afforded by s 96 of the Constitution, which either wholly or partly relieved the payment obligations of patients occupying beds in hospitals, depending upon whether they were situated in a public or non-public ward.

143. As for private hospitals, s 4 provided:

> "The regulations may make provision for and in relation to payments by the Commonwealth of hospital benefits, at such rates and subject to such conditions as are prescribed, in respect of patients in private hospitals as defined by the regulation."

144. Again, the expression "hospital benefits" was employed to describe something more than the mere provision of funding to hospitals; it was instead taken to denote payments "in respect of patients" – that is, payments to or for those patients in relation to services provided to them. And in the Plaintiff's submission, it is only in the limited sense of a service, either provided by the Commonwealth itself or in respect of which the Commonwealth might be said to make a payment for an individual, that the provision of "benefits" within the meaning s 51(xxiiiA) can be taken to include the provision of services.

145. To say this is not in any way to depart from what was determined in *Alexandra Private Geriatric Hospital Pty Ltd v The Commonwealth*.[90] That case concerned the validity of various conditions imposed upon the ability of approved nursing homes to receive payments from the Commonwealth intended to subsidise the provision of geriatric care to individual patients. In its reasons, the Court observed that the "benefit" said to engage s 51(xxiiiA) could be understood in one of two ways: first, as comprising "the money paid to the proprietor of the nursing home"; and secondly, as consisting of "the accommodation, sustenance and care *to the extent that it is provided by the proprietor to the patient as the quid pro quo for the money payment made by the Commonwealth*" (emphasis added).[91] The words in italics indicate that it is not merely the provision of services by a party who receives Commonwealth funding which constitutes a benefit in relevant sense; it is instead the circumstance that the services are provided to a specific individual as the "quid pro quo" for the Commonwealth's largesse.

---

[90] (1987) 162 CLR 271.
[91] (1987) 162 CLR 271 at 281.

146. If that be right, then as was said of the Darling Heights Funding Agreement by Hayne J,[92] so must it also be said of the SUQ Funding Agreement:

> "in the present case, unlike the *Alexandra Hospital Case*, the chaplaincy services to be provided by SUQ can be described *only* as the provision of a service to students (and others) attending or associated with the school in question. There is not, in this case, 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."

147. This is borne out by the terms of the SUQ Funding Agreement, incorporating as it does the provisions of the Guidelines Revision 6. There is nothing in that agreement pursuant to which the Commonwealth can be said to be meeting, either wholly or in part, the cost of providing chaplaincy services to an identified or identifiable student.

148. Indeed, the SUQ Funding Agreement contemplates the provision of services to persons other than students. For example, as noted above, Section 1.5 of the Guidelines Revision 6 speaks of chaplaincy or student welfare as a service that "aims to assist school communities through the provision of help and care to support the personal and social wellbeing of students and the school community" [CSC, 146]. In a similar fashion, Section 3.1.1 includes among the key tasks of school chaplains or student welfare workers:

(a) the provision of support and appropriate referrals, not merely to students, but also to their families and to school staff; and

(b) the organising of "one-on-one or group sessions with students, parents, staff and other members of the school community as requested and required by the school community" [CSC, 150].

149. The suggestion that services funded under the NSCSWP are intended to benefit, not merely students, but also the school communities of which they are admittedly the most important members, finds reflection in item 407.013 of Part 4 of Schedule 1AA to the FMA Regulations. As has already been mentioned, that item contemplates the provision of assistance to school communities with a view to enhancing student welfare. In so doing, it suggests that the NSCSWP and the arrangements entered into for the purpose of implementing it are better to be understood as constituting an attempt "to assist schools to provide services associated with education which may be of some benefit to students".[93] Not only does this exceed what Hayne J in *Williams (No. 1)* perceived to be the limits of s 51(xxiiiA), it also fails to conform to the notion, advanced in the reasons of Kiefel J, that the exercise of power under that placitum requires the provision of benefits "to students as a class".[94]

150. Accordingly, however one might seek to limit the reach of s 32B of the FMA Act, there is no substance in the proposition that s 51(xxiiiA) of the *Constitution* lends validity to the purported authorisation of that agreement by the combination of:

(a) s 32B;

(b) item 9 of Schedule 1 to the Financial Framework Amendment Act; and

(c) Part 5AA of the FMA Regulations, when read in conjunction with item 407.013 of Part of Schedule 1AA.

Sections 51(xxxix) and 61 of the Constitution

151. It remains then to address the reliance placed by the Commonwealth Defendants upon

---

[92] *Williams (No. 1)* (2012) 248 CLR 156 at 279 [279].
[93] *Williams (No. 1)* (2012) 248 CLR 156 at 376 [573] per Kiefel J.
[94] (2012) 248 CLR 156 at 376 [573].

the combination of ss 51(xxxix) and 61 in contending in favour of the validity of s 32B, at least in so far as it purports to empower the Commonwealth to enter into arrangements with the likes of SUQ for the purposes of the NSCSWP. That reliance appears to proceed upon the premise that the operation of s 32B in this regard is incidental to the execution of that aspect of the executive power of the Commonwealth whose content is not informed by the express grants of legislative power. Acceptance of that proposition would involve a departure from what was said in *Williams (No. 1)* against any suggestion that funding the provision of chaplaincy services is either:

(a) an enterprise or activity "peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation"; or

(b) an ordinary and well-recognised function of the government of the Commonwealth.

152. Given what was submitted above concerning the Commonwealth Defendants' attempt to re-open *Williams (No. 1)*, there is simply no scope for so departing.

153. This is particularly because acceding to the position advanced on behalf of the Commonwealth Defendants would permit an unlimited incursion by both the legislative and executive branches of the Commonwealth government into "fields in which the Commonwealth and the States have concurrent competencies subject to the paramountcy of Commonwealth laws effected by s 109 of the *Constitution*".[95] So much should be apparent from the fact that Queensland has long had a policy of providing assistance in funding the delivery of chaplaincy services at schools throughout that State.

154. As for any suggestion that the administration of the NSCSWP should be seen as an ordinary and well-recognised function of the Commonwealth government, at least as at the date of entry into the SUQ Funding Agreement, it is sufficient to observe, as Gummow and Bell JJ did in *Williams (No. 1)*, that that proposition "assumed the determination of the issue on which the Special Case turns and should not be accepted".[96] Invalid acts do not become less invalid by dint of enthusiastic repetition.

Standing

The availability of a standing point to the Commonwealth Defendants

155. In answering the first of the questions stated in *Williams (No. 1)*, this Court concluded that the Plaintiff had standing, not merely to challenge the validity of the Darling Heights Funding Agreement, but also to impugn the lawfulness of the various payments made pursuant to it.[97] These included payments made to SUQ in the 2011-2012 financial year.

156. In these proceedings, the Commonwealth Defendants contest the Plaintiff's standing to challenge the lawfulness of payments subsequently made pursuant to the SUQ Funding Agreement, the first of which, as has previously been noted, occurred in January 2012. Given that those payments were not in issue in *Williams (No. 1)*, it is no part of the Plaintiff's case to suggest that the Commonwealth Defendants are precluded from so contesting by some estoppel arising in the earlier litigation.

157. Nonetheless, it would appear that the Commonwealth Defendants are attempting to re-litigate a question which was, as a matter of substance, decided in *Williams (No. 1)*, namely, the Plaintiff's standing to impugn specific instances of spending by the Commonwealth concerned with the provision of chaplaincy services at the School in the purported performance of an agreement with SUQ. That this litigation is concerned with instances of Commonwealth spending different from those considered in *Williams (No. 1)*

---

[95] *Williams (No. 1)* (2012) 248 CLR 156 at 216-217 [83].
[96] (2012) 248 CLR 156 at 234 [140]. See also at 353-355 [525]-[532] per Crennan J.
[97] (2012) 248 CLR 156 at 375.

does not, in the Plaintiff's submission, detract from what, at the level of principle, should be seen as "the identity between the relevant issues in the two proceedings".[98] That identity is all the more striking in light of the circumstance that the payments the subject of these proceedings commenced in the same financial year during which the Commonwealth made the last of the payments, the lawfulness of which was contested in *Williams (No. 1)*.

158. It is should also be emphasised, by reference to the questions stated in *Williams (No. 1)*, that the Court's conclusion concerning the Plaintiff's standing to challenge the lawfulness of any payments made pursuant to the Darling Heights Funding Agreement was essential to the final result in that case. After all, but for that conclusion, Question 5 could not have been answered in terms which contemplated the grant to the Plaintiff of declaratory relief reflecting the answer to Question 4, namely, that "[t]he making of the [relevant] payments was not supported by the executive power of the Commonwealth under s 61 of the *Constitution*". It should follow then that the Commonwealth Defendants' attempt to contest the sufficiency of the Plaintiff's standing in these proceedings involves an abuse of process of the sort decried in *Reichel v Magrath*.

159. Of course, it may be that the point taken by those Defendants in paragraphs 34 and 63 of their Amended Defence – namely, that the declaratory relief sought by the Plaintiff in relation to payments made by the Commonwealth would, if granted, yield no foreseeable result – was not raised in the course of argument in *Williams (No. 1)*. Certainly, the reasons of the Justices who heard those proceedings do not record any such submission having been advanced on behalf of the Commonwealth. Heydon J, who gave extended consideration to the question of standing, addressed what he perceived to be a lack of utility in some of the declarations sought by the Plaintiff, given the absence of any claim for the recovery of the money previously paid to SUQ.[99] However, this was in the context of deciding upon the Plaintiff's standing to challenge the drawing of money from the Consolidated Revenue Fund, as distinct from the lawfulness of the subsequent expenditure of those funds pursuant to the Darling Heights Funding Agreement.

160. Nonetheless, an attempt to re-contest an issue determined in earlier litigation is no less an abuse of process if that attempt proceeds upon an argument which, though not previously raised, was nonetheless "so relevant to the subject matter of the first action that it would have been unreasonable not to rely on it".[100] So much emerges from the reasons of Handley JA in *Rippon v Chilcotin Pty Ltd*.[101]

161. In the present context, given the absence in *Williams (No. 1)* of any claim that SUQ repay the money that it received under the Darling Heights Funding Agreement, it could well have been expected that the Commonwealth would question the utility of any declaratory relief sought by the Plaintiff in relation to those payments, and on that basis, perhaps even contest the Plaintiff's standing to seek such relief. Assuming, however, that no such point was taken in *Williams (No. 1)*, it would be unreasonable for the Commonwealth now to raise it in the course of an attempt to litigate a question concerning standing which differs from that considered in the earlier litigation only in relation to the specific payments whose lawfulness is being challenged.

162. Thus, whether or not an asserted lack of utility was invoked as a basis for contesting the Plaintiff's standing to seek declarations focusing upon specific items of Commonwealth expenditure in *Williams (No. 1)*, the Commonwealth Defendants' present reliance upon such an assertion involves an abuse of process.

---

[98] *State Bank of New South Wales Ltd v Stenhouse Ltd* (1997) Aust Torts Reports ¶81-423 at 64,089.
[99] (2012) 248 CLR 156 at 290 [323].
[100] *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589 at 602.
[101] (2001) 53 NSWLR 198 at 202-203 [22]-[24].

The sufficiency of the Plaintiff's standing

163. There is no dispute that:

(a) "[w]here the issue is whether federal jurisdiction has been invoked with respect to a 'matter', questions of 'standing' are subsumed within that issue";[102] and

(b) as Gleeson CJ and McHugh J remarked in *Abebe v Commonwealth*,[103] "[i]f there is no legal remedy for a 'wrong', there can be no 'matter'".

164. In making this latter observation, their Honours were not suggesting that it is sufficient to deny a claim the character of a "matter" that there are grounds for withholding the relief sought, even though the claim was brought on a basis known to the law, be it a breach of some duty otherwise enforceable by a Court or the taking of action in the absence of power to do so. Were this last suggestion correct, the existence of a "matter" would depend upon the success of the moving party's claim, a notion entirely at odds with their Honours' rejection of the proposition that "there can be no 'matter' unless the existence of a right, duty or liability is established".[104] Indeed, as their Honours proceeded to recognise, "[i]t is sufficient that the moving party claims that he or she has a legal remedy in the court where the proceedings have been commenced to enforce the right, duty or liability in question".[105]

165. If that be right, then the Commonwealth Defendants' attack upon the Plaintiff's standing to challenge the lawfulness of payments made under the SUQ Funding Agreement must fail. This is because it proceeds upon the erroneous premise that what has been described as a discretionary basis upon which to refuse the grant of declaratory relief[106] – namely, its perceived lack of utility in a given case – should now be regarded as marking the metes and bounds of the concept of a "matter".

166. It is true that in the course of discussing what may be regarded as the traditional grounds for refusing to grant declaratory relief, the plurality in *Ainsworth v Criminal Justice Commission*[107] spoke of the inherent power of superior courts to grant such relief as being "confined by the considerations which mark out the boundaries of the judicial power". However, while those considerations – most prominently, the nature of the judicial function, which involves the quelling of controversies[108] – may explain the reluctance of courts to make declarations that "will produce no foreseeable consequences for the parties",[109] it does not follow that the making of such declarations is beyond the remit of judicial power or involves a Court invested with federal jurisdiction adjudicating upon something other than a "matter". In other words, the plurality in *Ainsworth* was not describing the outer limits of judicial power for the purposes of Ch III of the *Constitution*. Instead, their Honours were explaining, by reference to the considerations that bear upon the boundaries of judicial power, the conceptual underpinnings for the various discretionary bases upon which declaratory relief might be refused. In that regard, it is telling that *Ainsworth* was an appeal concerning State, and not Federal, law.

167. Thus, to accept what is said on behalf of the Commonwealth Defendants on the question of standing would be to accede to the notion that when declaratory relief is sought in a Court invested with federal jurisdiction, the moving party's standing, and not merely his or

---

[102] *Croome v Tasmania* (1997) 191 CLR 119 at 132-133.
[103] (1999) 197 CLR 510 at 527 [31].
[104] (1999) 197 CLR 510 at 528 [32].
[105] (1999) 197 CLR 510 at 528 [32].
[106] R P Meagher, J D Heydon & M J Leeming (eds), *Equity: Doctrines and Remedies*, 4th ed (2002) at 633.
[107] (1992) 175 CLR 564 at 582.
[108] *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 at 458-459 [242].
[109] *Gardner v Dairy Industry Authority (NSW)* (1977) 52 ALJR 180 at 188.

her entitlement to relief, is dependent upon demonstrating the absence of any discretionary basis for withholding that relief. Given the observations of Gleeson CJ and McHugh J in *Abebe*, that proposition should be rejected.

168. Accordingly, even if the declarations sought by the Plaintiff concerning the lawfulness of various payments made under the SUQ Funding Agreement were without utility (which is not conceded), this would not deprive him of standing to agitate that question. That the Commonwealth, following the delivery of judgment in *Williams (No. 1)*, might have waived debts owing by SUQ does not detract from this.

Part VII: Applicable constitutional provisions, statutes and regulations

10 **169.** The applicable constitutional provisions are ss 51(xx), (xxiiiA), (xxxix), 53, 54 and 61 of the *Constitution*.

170. These are set out in the Schedule to these submissions, as are:

(a) s 32B of the FMA Act;

(b) item 9 of Schedule 1 to the Financial Framework Act;

(c) reg 16 of the FMA Regulations; and

(d) item 407.013 of Part 4 of Schedule 1AA to the FMA Regulations.

171. The Appropriations Acts and accompanying Portfolio Budget Statements relied on by the Commonwealth Defendants are reproduced or extracted at CSC, 339, 369, 443, 467, 555, 582.

20 ## Part VIII: Orders sought

172. The questions stated for the Full Court's opinion should be answered as follows:

1. (a) No.
   (b) No.
   (c) No.
2. Yes.
3. Unnecessary to answer.
4. No.
5. (a) Yes.
   (b) Yes.
30 6. Yes.
7. The entirety of the relief sought in the Amended Writ of Summons filed 17 December 2013.
8. The Defendants pay the Plaintiff's costs of Special Case and of the proceedings generally.

173. The answer sought to Question 7 is subject to any further amendment made, with leave, to the Amended Writ of Summons closer to the hearing date.

Part IX: Time estimate

174. The Plaintiff estimates that he will require 3 hours for the presentation of his oral argument.

Date: 28 February 2014

	Bret Walker		Gerald Ng
Phone	(02) 8257 2527	Phone	(02) 9233 4275
Fax	(02) 9221 7974	Fax	(02) 9221 5386
Email	maggie.dalton@stjames.net.au	Email	gng@selbornechambers.com.au

SCHEDULE

1. Section 51 of the *Constitution* relevantly provides:

> "The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to:
>
> ...
>
> (xx) foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth;
>
> ...
>
> (xxiiiA) the provision of maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services (but not so as to authorize any form of civil conscription), benefits to students and family allowances;
>
> ...
>
> (xxxix) matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth."

2. Sections 53 and 54 then state:

> "**53 Powers of the Houses in respect of legislation**
>
> Proposed laws appropriating revenue or moneys, or imposing taxation, shall not originate in the Senate. But a proposed law shall not be taken to appropriate revenue or moneys, or to impose taxation, by reason only of its containing provisions for the imposition or appropriation of fines or other pecuniary penalties, or for the demand or payment or appropriation of fees for licences, or fees for services under the proposed law.
>
> The Senate may not amend proposed laws imposing taxation, or proposed laws appropriating revenue or moneys for the ordinary annual services of the Government.
>
> The Senate may not amend any proposed law so as to increase any proposed charge or burden on the people.
>
> The Senate may at any stage return to the House of Representatives any proposed law which the Senate may not amend, requesting, by message, the omission or amendment of any items or provisions therein. And the House of Representatives may, if it thinks fit, make any of such omissions or amendments, with or without modifications.

Except as provided in this section, the Senate shall have equal power with the House of Representatives in respect of all proposed laws.

54 Appropriation Bills

The proposed law which appropriates revenue or moneys for the ordinary annual services of the Government shall deal only with such appropriation."

3. Finally, s 61 of the *Constitution* states:

> "The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth."

4. As for the relevant legislative provisions, s 32B of the FMA Act provides:

> "(1) If:
>
> (a) apart from this subsection, the Commonwealth does not have power to make, vary or administer:
>
> (i) an arrangement under which public money is, or may become, payable by the Commonwealth; or
>
> (ii) a grant of financial assistance to a State or Territory; or
>
> (iii) a grant of financial assistance to a person other than a State or Territory; and
>
> (b) the arrangement or grant, as the case may be:
>
> (i) is specified in the regulations; or
>
> (ii) is included in a class of arrangements or grants, as the case may be, specified in the regulations; or
>
> (iii) is for the purposes of a program specified in the regulations;
>
> the Commonwealth has power to make, vary or administer the arrangement or grant, as the case may be, subject to compliance with this Act, the regulations, Finance Minister's Orders, Special Instructions and any other law.
>
> (2) A power conferred on the Commonwealth by subsection (1) may be exercised on behalf of the Commonwealth by a Minister or a Chief Executive.
>
> Note 1: For delegation by a Minister, see section 32D.
>
> Note 2: For delegation by a Chief Executive, see section 53.
>
> (3) In this section:
>
> ***administer***:
>
> (a) in relation to an arrangement – includes give effect to; or
>
> (b) in relation a grant – includes make, vary or administer an arrangement that relates to the grant.

arrangement includes contract, agreement or deed.

make, in relation to an arrangement, includes enter into.

vary, in relation to an arrangement or grant, means:

(a) vary in accordance with the terms or conditions of the arrangement or grant; or

(b) vary with the consent of the non-Commonwealth party or parties to the arrangement or grant."

5. Item 9 of Schedule 1 to the Financial Framework Act purports to give retrospective effect to s 32B of the FMA Act, providing as follows:

"(1) This item applies to an arrangement made, or purportedly made, by the Commonwealth before the commencement of this item if:

(a) assuming that:

(i) section 32B of the [FMA Act] as amended by this Schedule; and

(ii) any regulations made for the purposes of subparagraph (1)(b)(i), (ii) or (iii) of the transitional period; and

(iii) the amendments made by Schedule 2 to this Act;

had been in force when the arrangement was made or purportedly made, the arrangement would have been authorised by subsection (1) of that section; and

(b) the arrangement was in force, purportedly in force, immediately before the commencement of this item.

For this purpose, it is immaterial whether the arrangement was the subject of a proceeding instituted in a court or tribunal before the commencement of this item.

(2) The arrangement has, and is taken to have had, effect, after the commencement of this item, as if it had been made under subsection 32B(1) of the [FMA Act] as amended by this Schedule.

(3) In this item:

arrangement includes contract, agreement or deed.

made, in relation to an arrangement, includes entered into.

transitional period means:

(a) the 60-period beginning at the commencement of this item; or

(b) if a longer period is specified in the regulations – that longer period.

(4) The Governor-General may make regulations for the purposes of paragraph (b) of the definition of ***transitional period*** in sub-item (3)."

6. Part 5AA of the FMA Regulations is headed "Supplementary powers to make commitments to spend public money etc." and consists of reg 16, which states:

"(1) For paragraph 32B(1)(b) of the Act:

(a) Part 1 of Schedule 1AA specifies:

(i) arrangements under which public money is, or may become, payable by the Commonwealth; and

(ii) classes of arrangements; and

(b) Part 2 of Schedule 1AA specifies:

(i) grants of financial assistance to a State or Territory; and

(ii) classes of grants; and

(c) Part 3 of Schedule 1AA specifies:

(i) grants of financial assistance to persons other than a State or Territory; and

(ii) classes of grants; and

(d) Part 4 of Schedule 1AA specifies programs.

(2) The specification of an arrangement, grant or program in Schedule 1AA is not affected by:

(a) a change in the name of the Department or authority specified as administering the arrangement, grant or program; or

(b) the transfer to another Department or authority of responsibility, in whole or in part, for the administration of the arrangement, grant or program."

7. Among the programs identified in Part 4 of Schedule 1AA is the following:

"407.013 National School Chaplaincy and Student Welfare Program (NSCSWP)

Objective: To assist school communities to support the wellbeing of their students, including by strengthening values, providing pastoral care and enhancing engagement with the broader community."