1 **IN THE HIGH COURT OF AUSTRALIA** **No. S307 of 2010**
**SYDNEY REGISTRY**

BETWEEN:

**RONALD WILLIAMS**

Plaintiff

AND:

10 **COMMONWEALTH OF AUSTRALIA**

First Defendant

AND:

**MINISTER FOR SCHOOL EDUCATION, CHILDHOOD AND YOUTH**

Second Defendant

AND:

20 **MINISTER FOR FINANCE AND DEREGULATION**

Third Defendant

AND:

**SCRIPTURE UNION QUEENSLAND**

Fourth Defendant



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## WRITTEN SUBMISSIONS OF THE ATTORNEY-GENERAL FOR QUEENSLAND (INTERVENING)

### PART I: SUITABILITY FOR PUBLICATION

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

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## PART II: BASIS OF INTERVENTION

2. The Attorney-General for Queensland intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth).

## PART III: WHY LEAVE TO INTERVENE SHOULD BE GRANTED

3. Not applicable.

## PART IV: APPLICABLE LEGISLATION

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4. The legislation applicable to the determination of this matter is set out in the submissions of the Plaintiff.

## PART V: SUBMISSIONS

5. The Attorney-General adopts the following:

   (a) the submissions of the Attorney-General for Western Australia ('Western Australia') regarding the Commonwealth's inability to enter into the Darling Heights Agreement ('the Agreement') on the assumption that s 51(xx) and s 51(xxiiiA) of the Constitution would not apply; and

20 (b) the submissions of the Commonwealth regarding the interpretation of the Appropriations Acts.

6. In summary, however, the Attorney-General makes these additional submissions:

   (a) the plaintiff lacks standing to challenge the Commonwealth's capacity to enter into the Agreement, to claim that funds were not appropriated for the National School Chaplain Program ('the NSCP') and to claim that s 116 of the Constitution was infringed;

   (b) the executive power in s 61 of the Constitution, read together with s 51(xxiiiA), authorised the Commonwealth to enter into the Agreement and expend the funds appropriated for the NSCP;

30 (c) the NSCP does not infringe s 116 of the Constitution; and

   (c) accordingly, the Plaintiff's challenge should be dismissed without the Court considering the scope of the corporations power in s 51(xx) of the Constitution.

### Standing

7. In *Australian Conservation Foundation v Commonwealth*, Gibbs J said:[1]

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1 (1980) 146 CLR 494 at 530-531.

> [A]n interest, for present purposes, does not mean a mere intellectual or emotional concern. A person is not interested...unless he is likely to gain some advantage, other than the satisfaction of righting a wrong, upholding a principle or winning a contest, if his action succeeds or to suffer some disadvantage, other than a sense of grievance or a debt for costs, if his action fails. A belief, however strongly felt, that the law generally, or a particular law, should be observed, or that conduct of a particular kind should be prevented, does not suffice to give its possessor locus standi. If that were not so, the rule requiring special interest would be meaningless.

8. In *Onus v Alcoa*, Brennan J explained the requirement of standing in this way:[2]

> A plaintiff must show that he has been specially affected, that is, in comparison with the public at large he has been affected to a substantially greater degree or in a significantly different manner. It is not necessary to show that the plaintiff is uniquely affected; there may be others whose interests may be affected in like manner.

9. While there is some flexibility in applying this rule and the 'nature and subject matter of the litigation will dictate what amounts to a special interest',[3] the requirement has never been doubted.

10. The Plaintiff submits that the Commonwealth and Scripture Union have accepted his standing to challenge the ability of the Commonwealth to enter into the Agreement and that they do not cavil with his standing to call in aid s 116 of the Constitution.[4] He further submits that he has a special interest in seeking declaratory relief relating to the interpretation of the appropriation Acts and the expenditure of money under them.[5]

11. It is respectfully submitted that the Court should not accept the concessions of the Commonwealth and Scripture Union as to standing. This Court has never been bound to accept concessions of parties as to constitutional issues. In *Coleman v Power*, for instance, several judges indicated a willingness to examine the correctness of a concession that a provision of the *Vagrants, Gaming and Other Offences Act 1931* (Qld) burdened the implied freedom of political communication.[6] In *Croome v Tasmania*, moreover, Brennan CJ, Dawson and Toohey JJ briefly considered whether Tasmania's concession as to standing was 'rightly made' and found that it was.[7] As issues of 'standing' are subsumed within the concept of 'matter'[8] and the latter enliven the Court's

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2 (1981) 149 CLR 28 at 74.

3 *Shop Distributive and Allied Employees Association v Minister for Industrial Affairs (SA)* (1995) 183 CLR 552 at 558 (Brennan, Dawson, Toohey, Gaudron and McHugh JJ).

4 Plaintiff's Amended Submissions, para 16.

5 Plaintiff's Amended Submissions, paras 39-42.

6 (2004) 220 CLR 1 at [231]-[232] (Kirby J), [298] (Callinan J), [318] (Heydon J).

7 (1997) 191 CLR 119 at 127.

8 *Croome v Tasmania* (1997) 191 CLR 119 at 132-133 (Gaudron, McHugh and Gummow JJ); *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 262 (Gaudron, Gummow and Kirby JJ); *Truth About Motorways Pty Limited v Macquarie Infrastructure Investment Management Limited* (2000) 200 CLR 591 at 611 [45] (Gaudron J).

jurisdiction, a concession made by the parties as to standing should not be determinative.

12. The decision in *Pape v Federal Commissioner of Taxation* ('*Pape*')[9] is not authority to the contrary. The concession by the defendants in that case reflected the obvious: Mr Pape had an interest, exceeding that of other members of the public, in obtaining declaratory relief to establish that he was not legally entitled to a payment under Commonwealth law. Indeed, it was difficult to imagine who else might have had a special interest in challenging the payment to him.

13. The interest of the Plaintiff here is harder to identify. He is not a party to the Agreement, which was entered into almost two years before any of his children were enrolled in the Darling Heights primary school. None of his children have ever participated in the NSCP and they have no obligation to participate in it. Although the Plaintiff claims that the NSCP is a program that 'now affects his children at the School',[10] his freedom of action, and that of his children, is not affected by the NSCP. In addition, the Plaintiff has never alleged that he wishes to be a counsellor or a mentor to other children at the Darling Heights primary school and that the Agreement is an obstacle to him because it imposes a religious observance.

14. In these circumstances, the Plaintiff's interest in the relief that he seeks—with respect to the entry into the Agreement, the interpretation of the Appropriation Acts and s 116 of the Constitution—is properly seen as no more than 'the satisfaction of righting a wrong, upholding a principle or winning a contest'.[11] It cannot be equated with the special interests recognised in cases such as *Pape*,[12] *Onus v Alcoa*,[13] *Croome v Tasmania*[14] or *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd.*[15]

15. Because the Plaintiff lacks standing to obtain any of the relief that he seeks, there is no 'matter'. His challenge should therefore be dismissed.

**The legislative power contained in s.51(xxiiiA) – 'benefits to students'**

16. Even if the Plaintiff had standing to obtain the relief that he seeks, his challenge to the Agreement should be dismissed on the ground that the Commonwealth was authorised to enter into the Agreement by the executive power in s 61 of the Constitution, when read with s 51(xxiiiA).

17. Section 51(xxiiiA) provides the Commonwealth Parliament with power to make laws with respect to the following:

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9 (2009) 238 CLR 1.
10 Plaintiff's Amended Submissions, para 42.
11 *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 494 at 530-531.
12 (2009) 238 CLR 1.
13 (1981) 149 CLR 28.
14 (1997) 191 CLR 119.
15 (1994) CLR 247.

(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.

18. No party disputes that if the Commonwealth could legislate with respect to the provision of chaplaincy services under the NSCP, it could enter into the Agreement and expend the funds.[16]

19. The Plaintiff, supported by Western Australia,[17] submits that the power in s 51(xxiiiA) would not support entry into the Agreement because the Commonwealth is providing financial assistance to an entity that in turn provides a specified service to students.[18]

20. Western Australia also submits that the structure of s 51(xxiiiA) is such that the Commonwealth cannot provide educational services such as chaplaincy services;[19] and, in any event, the chaplaincy services here cannot be characterised as student benefits because they are provided to others in the school community.[20]

21. None of these submissions should be accepted.

22. The authorities on s 51(xxiiiA) relevantly support three propositions:

    (a) 'benefits' within s 51(xxiiiA) are not limited to financial payments but can include goods and services;[21]

    (b) s 51(xxiiiA) only authorises laws with the respect to the provision of benefits by the Commonwealth, not the States or other bodies;[22] but

    (c) a Commonwealth law nonetheless is authorised by s 51(xxiiiA) if it funds a body to provide a benefit that the Commonwealth itself could provide directly.

23. The final proposition is illustrated by *Alexandra Private Geriatric Hospital Pty Ltd v Commonwealth* ('*Alexandra Private Hospital*').[23] In that case, the Court rejected an argument that under s 51(xxiiiA) the Commonwealth could not fund and regulate nursing home proprietors. In holding that the legislation was valid

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16 See, for example, Plaintiff's Amended Submissions, para 28.
17 Western Australia's Submissions, paras 49-52.
18 Plaintiff's Amended Submissions, para 31.
19 Western Australia's Submissions, paras 47-48.
20 Western Australia's Submissions, paras 49-52.
21 See *Federal Council of the British Medical Association in Australia v Commonwealth* (1949) 79 CLR 201 at 279 (McTiernan J); *Alexandra Private Geriatric Hospital Pty Ltd v Commonwealth* (1987) 162 CLR 271 at 280 (Mason ACJ, Wilson, Brennan, Deane and Dawson JJ).
22 *Federal Council of the British Medical Association in Australia v Commonwealth* (1949) 79 CLR 201 at 260 (emphasis added). See also (1949) 79 CLR 201 at 243 (Latham CJ), 254 (Rich J), 279 (McTiernan J), 292 (Webb J); *Alexandra Private Geriatric Hospital Pty Ltd v Commonwealth* (1987) 162 CLR 271 at 279 (Mason ACJ, Wilson, Brennan, Deane and Dawson JJ).
23 (1987) 162 CLR 271.

because it was incidental to the provision of hospital and sickness benefits, Mason ACJ and Wilson, Brennan, Deane and Dawson JJ said:[24]

> If it be accepted...that the Parliament could legislate for the establishment of Commonwealth hospitals to provide nursing home care directly to patients in need of such care, there can be no objection to it adopting what Smithers J [in *Howells v Nagrad Nominees* (1982) 66 FLR 169, at p 177] described as "a private enterprise approach to the problem" by inviting proprietors of private nursing homes voluntarily to undertake to provide the necessary services in return for a government subsidy.

24. *Alexandra Private Hospital* suggests that authority to enter the Agreement under s 61 of the Constitution will turn on whether the chaplaincy services are properly characterised as 'benefits to students' that the Commonwealth can provide under s 51(xxiiiA). If the answer is 'yes', there can be no objection to the Commonwealth entering into a contract with another entity to provide the benefits to students.

25. It is submitted that, subject to any constitutional prohibitions such as those in s 116 of the Constitution, s 51(xxiiiA) would authorise the Commonwealth to provide the services of student chaplains to students directly. Chaplains assist students by providing them, among other things, with counselling and pastoral support. The services which they provide benefit a student as much as the child care services or counselling services that Western Australia concedes that may be within power.[25]

26. There is no textual justification for the contention that s 51(xxiiiA) does not authorise the provision of educational services, including chaplaincy services, by the Commonwealth. It is true, as Western Australia points out, that the words of s 51(xxiiiA) must be read in context and that the phrase 'benefits to students' contemplates that the power will be exercised to provide benefits to existing students.[26] But it does not follow that s 51(xxiiiA) carries the implication that the Commonwealth is prohibited from providing any educational service to existing students even if that service would otherwise be characterised as a benefit to students. The words of s 51(xxiiiA) suggest no such limitation or prohibition.

27. Nor does that contention have historical support. If Western Australia's contention be correct, the Commonwealth could never provide training of any kind to students. Yet that view would be difficult to reconcile with the existence of s 14 of the *Education Act 1945* (Cth), an Act that predated the insertion of s 51(xxiiiA) of the Constitution. Section 14 established a Universities Commission with various functions. One was to arrange 'for the training in Universities or similar institutions, for the purpose of facilitating their re-establishment of persons who are discharged members of the Forces within the meaning of the *Re-establishment and Employment Act 1945*'. Another function was to 'assist other persons to obtain training in Universities and similar

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24 (1987) 162 CLR 271 at 282.

25 Western Australia's Submissions, paras 51, 55.

26 Western Australia's Submissions, para 46(e).

institutions'. These functions suggest that the training of certain persons enrolled in educational institutions would have been one of the benefits contemplated by s 51(xxiiiA). The suggested dichotomy between laws providing for educational services and laws providing benefits to students is therefore difficult to sustain.

28. Furthermore, the fact that the chaplains may assist other members of the school community does not mean that the entry into the Agreement would not be authorised by s 51(xxiiiA) and s 61 of the Constitution. The focus of the Agreement at all times is the provision of chaplaincy services to students; the benefits to other members of the school community, such as parents involved in family breakdowns, are merely incidental. The Agreement should be characterised accordingly.

29. For these reasons, the Plaintiff's challenge to the Commonwealth's capacity to enter into the Agreement and to expend money for the NSCP should be rejected.

**Section 116 of the Constitution**

30. Section 116 of the Constitution provides:

> The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

31. The Plaintiff submits that s 116 has been infringed because of the Eligibility Criteria amount to the imposition of a religious test.

32. These submissions should be rejected. They run contrary to the ordinary and natural meaning of s 116 and find no support in any authority of this Court or the United States Supreme Court. They are also difficult to support on the facts.

33. First, s 116 in terms only applies if there is a religious test required as a qualification for 'any office...under the Commonwealth'. A chaplain employed by Scripture Union is not an office holder of any kind.[27] The Commonwealth neither appoints the chaplain to a position nor confers powers upon him or her pursuant to statute. The Commonwealth does not control the particular services that are provided by the chaplain: that is determined between the school and Scripture Union. Indeed, the Commonwealth does not even have a legal relationship with the chaplain.[28] To suggest that the chaplain is the holder of an office under the Commonwealth is to ignore these points.

34. Secondly, the word 'under' in s 116 does not lead to any different view. The last clause of s 116 was taken almost verbatim from Article VI of the United States Constitution. That Article relevantly provides:

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27 See the definition of 'office' approved by Isaacs and Rich JJ in *R v Boston* (1923) 33 CLR 386 at 402.

28 Special Case, para 64.

> The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

35. There is no authority in the United States suggesting that the employee of a party to a contract, a person over whom the United States has no direct control and with whom it has no legal relationship, is someone who is the holder of an 'office'. On the contrary, the authorities on the term 'office' in other parts of the United States Constitution[29] and in State constitutions have long treated an 'office' as defined by delegated sovereign authority. In 1822, for instance, the Supreme Judicial Court of Maine considered whether legislators were barred from being appointed to a 'civil Office under the Authority of the United States'. The Court said:[30]

> [T]he term "office" implies a delegation of a portion of the sovereign power to, and possession of it by the person filling the office;—and the exercise of such power within legal limits, constitutes the correct discharge of the duties of such office. The power thus delegated and possessed, may be a portion belonging sometimes to one of the three great departments, and sometimes to another; still it is a legal power, which may be rightfully exercised, and in its effects it will bind the rights of others...

36. In 1890, a leading American treatise defined a 'public office' in these terms:[31]

> A public office is the right, authority and duty, created and conferred by law, by which for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of government, to be exercised by him for the benefit of the public. The individual so invested is a public officer.

37. School chaplains under the NSCP are not in any sense officers within the meaning of the American authorities.

38. Thirdly, in any event, there can be no 'religious test' imposed as a qualification for a school chaplaincy when the NSCP provides funding for an equivalent secular pastoral care workers in accordance with government policy.[32]

39. Accordingly, there is no basis for claiming that the NSCP infringed s 116 of the Constitution.

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29 The relevant part is Article 2, clause 2, section 2. This provides that the President 'shall nominate, and, by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments'.

30 *Opinion of the Justices*, 3 Greenl. (Me.) (1822) 481 at 482.

31 Floyd R Mechem, *A Treatise on the Law of Public Offices and Officers*, 1890, § 1, at pp 1-2.

32 Amended Special Case, paras 34A – 34C.

**Conclusion**

40. The Plaintiff's claims should be dismissed. It is unnecessary for this Court to consider the Commonwealth and Scripture Union's submissions concerning the corporations power under s 51(xx) of the Constitution and entry into the Agreement.

41. The Attorney-General, however, reserves his right to contest certain propositions in the Commonwealth's written submissions concerning the scope of the corporations power if the matter arises in oral argument.

Dated: Twentieth day of July 2011.

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