HIGH COURT OF AUSTRALIA

FRENCH CJ,
HAYNE, CRENNAN, KIEFEL, BELL AND KEANE JJ

RONALD WILLIAMS PLAINTIFF

AND

COMMONWEALTH OF AUSTRALIA & ORS DEFENDANTS

Williams v Commonwealth of Australia
[2014] HCA 23
19 June 2014
S154/2013

ORDER

The questions in the amended special case dated 1 May 2014 be answered as follows:

Question 1

Was the SUQ Funding Agreement:

(a) *as made, and as varied by the First to Fourth Variation Deeds, authorised by* Appropriation Act (No 1) 2011-2012 *(Cth)?*

(b) *as varied by the Fifth to Tenth Variation Deeds, authorised by* Appropriation Act (No 1) 2012-2013 *(Cth)?*

(c) *as varied by the Eleventh to Fourteenth Variation Deeds, authorised by* Appropriation Act (No 1) 2013-2014 *(Cth)?*

Answer

Unnecessary to answer.

Question 2

If not, are:

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

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

(c) *item 9 of Schedule 1 to the* Financial Framework Legislation Amendment Act (No 3) 2012 *(**the Financial Framework Amendment Act**);*

wholly invalid?

Answer

In their operation with respect to the SUQ Funding Agreement (being the Funding Agreement dated 21 December 2011 between the Commonwealth and Scripture Union Queensland, the third defendant, as varied from time to time up to and including a Fourteenth Variation Deed dated 23 January 2014) and with respect to the payments purportedly made under that Funding Agreement in January 2012, June 2012, January 2013 and February 2014, none of s 32B of the Financial Management and Accountability Act *1997 (Cth), Pt 5AA and Sched 1AA of the Financial Management and Accountability Regulations 1997 (Cth) or item 9 of Sched 1 to the* Financial Framework Legislation Amendment Act (No 3) *2012 (Cth) is a valid law of the Commonwealth.*

Question 3

If not, is the SUQ Funding Agreement, as varied by the First to Fourteenth Variation Deeds, authorised by:

(a) *s 32B of the FMA Act; and*

(b) *Part 5AA of, and item 407.013 of Schedule 1AA to, the FMA Regulations; and*

(c) *where applicable, Item 9 of Schedule 1 to the Financial Framework Amendment Act?*

Answer

No.

Question 4

Was the Commonwealth's entry into, and expenditure of monies under, the SUQ Funding Agreement, as varied by the First to Fourteenth Variation Deeds, supported by the executive power of the Commonwealth?

Answer

No.

Question 5

Does the Plaintiff have standing to challenge the making of:

(a) the January 2012 Payment; and

(b) the June 2012 Payment?

Answer

In the circumstances of this case, and to the extent necessary for the determination of this matter, yes.

Question 6

Was the making of the January 2013 Payment and the February 2014 Payment and, to the extent that the answer to question 5 is "Yes", the January 2012 Payment and the June 2012 Payment, unlawful because it was not authorised by statute and was beyond the executive power of the Commonwealth?

Answer

Yes.

Question 7

What, if any, of the relief sought in the Writ of Summons should the Plaintiff be granted?

Answer

The Justice disposing of the proceeding should grant the plaintiff such relief and make such costs orders as appear appropriate in light of the answers given to these questions.

Question 8

What orders should be made in relation to the costs of this Special Case and of the proceedings generally?

Answer

The defendants should pay the plaintiff's costs of the special case. The costs of the proceeding are otherwise in the discretion of the single Justice who makes final orders disposing of the proceeding.

Representation

B W Walker SC with G E S Ng for the plaintiff (instructed by Horowitz & Bilinsky)

J T Gleeson SC, Solicitor-General of the Commonwealth and S P Donaghue QC with G M Aitken and N J Owens for the first and second defendants (instructed by Australian Government Solicitor)

D F Jackson QC with J A Thomson SC and E M Heenan for the third defendant (instructed by Norton Rose Fulbright Australia)

Interveners

M G Sexton SC, Solicitor-General for the State of New South Wales and J K Kirk SC with A M Mitchelmore for the Attorney-General for the State of New South Wales, intervening (instructed by Crown Solicitor (NSW))

G L Sealy SC, Solicitor-General of the State of Tasmania with S K Kay for the Attorney-General of the State of Tasmania, intervening (instructed by Director of Public Prosecutions (Tas))

M G Hinton QC, Solicitor-General for the State of South Australia with C Jacobi and D F O'Leary for the Attorney-General for the State of South Australia, intervening (instructed by Crown Solicitor (SA))

S G E McLeish SC, Solicitor-General for the State of Victoria with N M Wood for the Attorney-General for the State of Victoria, intervening (instructed by Victorian Government Solicitor)

G R Donaldson SC, Solicitor-General for the State of Western Australia with F B Seaward for the Attorney-General for the State of Western Australia, intervening (instructed by State Solicitor (WA))

P J Dunning QC, Solicitor-General of the State of Queensland with G J D del Villar for the Attorney-General of the State of Queensland, intervening (instructed by Crown Law (Qld))

CATCHWORDS

Williams v Commonwealth of Australia

Constitutional law (Cth) – Powers of Commonwealth Parliament – Commonwealth entered into funding agreement with private service provider for provision of chaplaincy services at state school – Funding agreement made under National School Chaplaincy and Student Welfare Program – Commonwealth paid money under funding agreement – Section 32B of *Financial Management and Accountability Act* 1997 (Cth) empowered Commonwealth to make, vary or administer arrangements, for purposes of specified programs, under which public money payable by Commonwealth – National School Chaplaincy and Student Welfare Program specified program for purposes of s 32B – Whether s 32B in its relevant operation supported by s 51(xx), (xxiiiA) or (xxxix) of Constitution.

Constitutional law (Cth) – Executive power of Commonwealth – Executive power to spend and contract – Whether entry into and expenditure under funding agreement supported by executive power of Commonwealth.

Constitutional law (Cth) – Reopening of previous decisions.

Words and phrases – "appropriation", "benefits to students", "executive power of the Commonwealth".

Constitution, ss 51(xx), 51(xxiiiA), 51(xxxix), 61.
Acts Interpretation Act 1901 (Cth), s 15A.
Financial Framework Legislation Amendment Act (No 3) 2012 (Cth), Sched 1, item 9.
Financial Management and Accountability Act 1997 (Cth), s 32B.
Financial Management and Accountability Regulations 1997 (Cth), Pt 5AA, Sched 1AA.

1 FRENCH CJ, HAYNE, KIEFEL, BELL AND KEANE JJ. In 2012, this Court held[1] that an agreement the Commonwealth had made to pay money for provision of chaplaincy services in schools, and the payments the Commonwealth had made under that agreement, were not supported by the executive power of the Commonwealth under s 61 of the Constitution. Soon after the Court published its decision, the Parliament enacted legislation evidently intended to provide legislative authority to make not only the agreement and payments which had been held to have been invalidly made, but also many other agreements and arrangements for the outlay of public money and the payments made or to be made under those agreements or arrangements.

2 Is the remedial legislation valid?

3 These reasons will show that the remedial legislation is not valid in its relevant operation.

The earlier litigation

4 In December 2010, Ronald Williams brought a proceeding in this Court, against the Commonwealth and others, challenging the payment of money by the Commonwealth to Scripture Union Queensland ("SUQ") for SUQ to provide chaplaincy services at the state school Mr Williams' four children attended in Queensland.

5 Mr Williams failed[2] in one branch of his argument – that the payments were prohibited by s 116 of the Constitution – but succeeded in his claims that the funding agreement made between SUQ and the Commonwealth, and the payments made under that agreement, were not supported by the executive power of the Commonwealth. Accordingly, in June 2012, this Court answered questions stated by the parties to *Williams (No 1)* in the form of a special case by rejecting the claim based on s 116, but otherwise in the sense sought by Mr Williams.

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

2 *Williams (No 1)* (2012) 248 CLR 156 at 182 [9] per French CJ, 222-223 [107]-[110] per Gummow and Bell JJ, 240 [168] per Hayne J, 333-335 [442]-[448] per Heydon J, 341 [476] per Crennan J, 374 [597] per Kiefel J.

6 Within days of the Court ordering that the questions stated in the special case in *Williams (No 1)* should be answered in this way, the Parliament enacted the *Financial Framework Legislation Amendment Act (No 3)* 2012 (Cth) ("the FFLA Act"). The FFLA Act amended the *Financial Management and Accountability Act* 1997 (Cth) ("the FMA Act") and the Financial Management and Accountability Regulations 1997 (Cth) ("the FMA Regulations") in ways evidently intended to provide legislative support not only for the making of agreements and payments of the kind which were in issue in *Williams (No 1)* but also for the making of many other arrangements and grants.

This litigation

7 Mr Williams has brought a fresh proceeding in this Court against the Commonwealth, the relevant Minister and SUQ, challenging the validity of certain provisions of the FMA Act and FMA Regulations (inserted by the FFLA Act). He challenges the validity of those provisions both generally, and in their particular operation with respect to the payment of money by the Commonwealth to SUQ, in accordance with a funding agreement made with SUQ, for SUQ to provide chaplaincy services at the state school Mr Williams' four children continue to attend.

8 The funding agreement need not be described in any detail. It has been varied several times, but nothing turns on the details of those variations. Both the agreement and the payments made under it are said to be made under the "National School Chaplaincy and Student Welfare Program". That expression is found in Portfolio Budget Statements in support of the relevant Commonwealth department's[3] budget presented to both Houses of the Parliament in connection with the Bills for what would later become the relevant Appropriation Acts. The National School Chaplaincy and Student Welfare Program was one of many administered items[4] the subject of the relevant Appropriation Acts. Section 8 of each of those Appropriation Acts permitted application of the appropriated sum

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3 The name of the relevant department has been changed several times. It is not necessary to describe those changes.

4 A detailed description of the current form and content of Appropriation Acts, including, in particular, the distinction drawn in those Acts between "administered items" and "departmental items", is given in *Combet v The Commonwealth* (2005) 224 CLR 494 at 564-567 [121]-[133] per Gummow, Hayne, Callinan and Heydon JJ; [2005] HCA 61. It need not be repeated in these reasons.

"for expenditure for the purpose of contributing to achieving" an outcome for the relevant Commonwealth department.

9 From time to time the relevant Commonwealth department has issued guidelines "setting out requirements for the administration and delivery" of the National School Chaplaincy and Student Welfare Program. Again, it is not necessary to set out any part of these guidelines.

10 For the moment, it is sufficient to refer to so much of the FMA Act and FMA Regulations as bears upon the agreement and payments which Mr Williams challenges in this proceeding as "the impugned provisions".

11 The Commonwealth and the Minister ("the Commonwealth parties"), and SUQ, sought to meet Mr Williams' fresh challenge by defending the validity of the impugned provisions, in their relevant operation, as laws with respect to the provision of benefits to students, within s 51(xxiiiA) of the Constitution. These reasons will show that the impugned provisions are not laws of that character.

12 SUQ further submitted that, because published guidelines for the National School Chaplaincy and Student Welfare Program provide that a "Funding Recipient" is "[a] legal entity (an organisation incorporated under Commonwealth or state legislation)", and because funding agreements require the provision of services for reward, the impugned provisions, in their relevant operation, are laws with respect to trading or financial corporations within s 51(xx) of the Constitution. Again, these reasons will show that the impugned provisions are not laws of that character. In their relevant operation, the impugned provisions are not valid laws of the Commonwealth.

13 In addition to submitting that the impugned provisions are laws supported by s 51(xxiiiA), the Commonwealth parties sought to advance several arguments which, if accepted, would support the making of the agreement and payments regardless of whether the impugned provisions, in their relevant operation, are laws supported by s 51(xxiiiA). Mr Williams submitted that the Commonwealth parties are precluded from advancing, or should not be permitted to advance, these arguments. As these reasons will later show, some of the arguments have been advanced by the Commonwealth more than once in litigation in this Court. Some were advanced in *Williams (No 1)*. They are arguments which have not hitherto been accepted by the Court. Their repetition does not demonstrate their validity. They are arguments which should not now be accepted. It is not necessary to decide whether, or to what extent, the Commonwealth or the Minister may, or should be permitted to, advance these additional arguments.

14 As in *Williams (No 1)*, the parties have agreed to state questions in the form of a special case for the opinion of the Full Court. Consideration of the questions may usefully begin by identifying the impugned provisions more fully and then referring in more detail to this Court's decisions in *Pape v Federal Commissioner of Taxation*[5] and *Williams (No 1)*. As will later be explained, the decisions in those cases provide the foundations for the decision in this case. The Commonwealth parties sought to reopen the decision in *Williams (No 1)*. They did not seek to reopen *Pape*.

The impugned provisions

15 The FFLA Act inserted a new Division (Div 3B) into Pt 4 of the FMA Act. The new Division (ss 32B-32E) is entitled "Supplementary powers to make commitments to spend public money etc". The central provision of the new Division, s 32B, provides:

> "(1) If:
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> (a) apart from this subsection, the Commonwealth does not have power to make, vary or administer:
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> (i) an arrangement under which public money is, or may become, payable by the Commonwealth; or
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> (ii) a grant of financial assistance to a State or Territory; or
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> (iii) a grant of financial assistance to a person other than a State or Territory; and
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> (b) the arrangement or grant, as the case may be:
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> (i) is specified in the regulations; or
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> (ii) is included in a class of arrangements or grants, as the case may be, specified in the regulations; or
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> (iii) is for the purposes of a program specified in the regulations;

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5 (2009) 238 CLR 1; [2009] HCA 23.

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 to 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."

16 In addition, the FFLA Act inserted a new Part (Pt 5AA) and a new Schedule (Sched 1AA) into the FMA Regulations. Part 5AA of the FMA Regulations is entitled "Supplementary powers to make commitments to spend public money etc"; Sched 1AA is entitled "Arrangements, grants and programs". Regulation 16(1)(d) of the FMA Regulations (inserted by the FFLA Act) provides that, for s 32B(1)(b)(iii) of the FMA Act, Pt 4 of Sched 1AA specifies "programs". One of the "programs" identified in Pt 4 of Sched 1AA (in item 407.013), under the rubric of the Department of Education, Employment and Workplace Relations, is:

"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".

It will be recalled that the Portfolio Budget Statements relating to the relevant Appropriation Acts also referred to the National School Chaplaincy and Student Welfare Program. The description given of the program in the Portfolio Budget Statements was generally similar to the statement of objective set out in item 407.013.

17 The FFLA Act made transitional provisions in respect of what it called "pre-commencement arrangements". Item 9 of Sched 1 to the FFLA Act provided that:

"(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 *Financial Management and Accountability Act 1997* as amended by this Schedule; and

(ii) any regulations made for the purposes of subparagraph (1)(b)(i), (ii) or (iii) of that section within 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, or 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 *Financial Management and Accountability Act 1997* 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-day 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 subitem (3)."

18 If the impugned provisions are valid in their operation with respect to the National School Chaplaincy and Student Welfare Program, item 9 of Sched 1 to the FFLA Act is evidently intended to make good the deficiency in authority to make the funding agreement and payments which was found in *Williams (No 1)*.

19 Consideration of the validity of the impugned provisions must begin from an understanding of what this Court decided in *Pape* and in *Williams (No 1)*.

Pape

20 In *Pape*, all members of the Court concluded[6] that ss 81 and 83 of the Constitution do not confer a substantive spending power. All members of the

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6 (2009) 238 CLR 1 at 55 [111] per French CJ, 73 [178], 82-83 [210] per Gummow, Crennan and Bell JJ, 113 [320] per Hayne and Kiefel JJ, 212-213 [606]-[607] per Heydon J.

Court agreed[7] that the power to spend appropriated moneys must be found elsewhere in the Constitution or in statutes made under it. The majority of the Court held[8] that the determination of the Executive Government that there was a need for an immediate fiscal stimulus to the national economy enlivened legislative power under s 51(xxxix) to enact the impugned law as a law incidental to that exercise of the executive power. But the division of opinion about this more particular issue should not be permitted to obscure the importance of the conclusions about location of the power to spend. It is those conclusions which underpinned the decision in *Williams (No 1)*.

Williams (No 1)

21 The answers which the Court gave to the questions stated in *Williams (No 1)* have already been identified. It is necessary, however, to say something more about the course of argument in *Williams (No 1)* and the decision itself.

22 First, the Commonwealth parties in *Williams (No 1)* submitted that s 44(1) of the FMA Act provided legislative authority both for the Commonwealth making the agreement with SUQ to pay SUQ to provide chaplaincy services and for the Commonwealth making the payments provided for by that agreement. The Commonwealth parties in *Williams (No 1)* pointed to no other legislative support for the Commonwealth making the agreement, the several variations to that agreement or the payments for which the agreement provided. Six members of the Court rejected[9] the submission relying on s 44(1); the seventh member of the Court, Heydon J, found[10] it unnecessary to express any opinion about it.

23 Second, the Commonwealth parties in *Williams (No 1)* did not submit that making the funding agreement in issue, or the payments for which it provided, was supported by those aspects of executive power which might be referred to

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7 (2009) 238 CLR 1 at 55 [111] per French CJ, 73 [178] per Gummow, Crennan and Bell JJ, 113 [320] per Hayne and Kiefel JJ, 211 [601], 212 [604] per Heydon J.

8 (2009) 238 CLR 1 at 23 [8], 63-64 [133]-[134] per French CJ, 89-92 [232]-[243] per Gummow, Crennan and Bell JJ.

9 (2012) 248 CLR 156 at 210 [71] per French CJ, 222 [103] per Gummow and Bell JJ, 273 [260] per Hayne J, 358-359 [545]-[547] per Crennan J, 374 [596] per Kiefel J.

10 (2012) 248 CLR 156 at 321 [407].

loosely as the Executive's power to deal with or respond to a national emergency (considered in *Pape*) or other matters of the kind commonly grouped under the heading "nationhood".

24 Third, six members of the Court held[11] that the agreement providing for payments to SUQ was invalid, because it was beyond the executive power of the Commonwealth under s 61 of the Constitution, and that the making of the relevant payments by the Commonwealth to SUQ under that agreement was not supported by the executive power of the Commonwealth under s 61. Consistent with what had been held in *Pape*, six members of the Court held that there was no authority in the Constitution or in statutes made under it to spend the moneys appropriated for the purposes of what was then called the National School Chaplaincy Program.

25 No doubt, as the Solicitor-General of the Commonwealth pointed out in the course of the argument of this case, differences can be identified in the reasons given in *Williams (No 1)* for the conclusions reached in that case. But of more immediate relevance than the differences in reasoning which can be identified in *Williams (No 1)* are the premises which underpinned the decision. Those premises were established in *Pape*. They are, first, that the appropriation of moneys in accordance with the requirements of ss 81 and 83 of the Constitution does not itself confer a substantive spending power and, second, that the power to spend appropriated moneys must be found elsewhere in the Constitution or in statutes made under it.

26 It is convenient to deal at once with the question of Mr Williams' standing.

Standing

27 Question 5 asks whether Mr Williams has standing to challenge the making of the particular payments to SUQ which he challenges.

28 The Commonwealth parties accepted that the question should be resolved in Mr Williams' favour, and SUQ made no submission to the contrary. This being the position of the parties, question 5 should be answered "In the circumstances of this case, and to the extent necessary for the determination of this matter, yes".

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11 (2012) 248 CLR 156 at 179-180 [4], 216-217 [83] per French CJ, 233 [138] per Gummow and Bell JJ, 281 [289]-[290] per Hayne J, 359 [548] per Crennan J, 374 [597] per Kiefel J.

29 It is necessary to explain why, despite there being no dispute about the issue, the answer should be qualified in this way. There are two reasons. First, the Commonwealth parties conceded the question of standing "in light of the position taken by the [State Attorneys-General as] interveners" to support Mr Williams' submissions that the impugned payments were not validly made.

30 Second, it is not necessary to determine whether, as Mr Williams and some of the interveners submitted, s 32B of the FMA Act is wholly invalid because it constitutes an impermissible delegation of legislative power[12]. Because it is not necessary to decide that wider question, it is not necessary to decide whether Mr Williams would have standing to challenge the validity of other arrangements purportedly authorised by s 32B for the payment of money in respect of matters which do not affect him or his children.

31 These considerations require that the answer be qualified in the manner indicated.

Validity of the impugned provisions

32 Question 2 asks whether s 32B of the FMA Act, Pt 5AA and Sched 1AA of the FMA Regulations and item 9 of Sched 1 to the FFLA Act are wholly invalid. For the reasons which follow, question 2 should be answered:

> "In their operation with respect to the SUQ Funding Agreement (being the Funding Agreement dated 21 December 2011 between the Commonwealth and Scripture Union Queensland, the third defendant, as varied from time to time up to and including a Fourteenth Variation Deed dated 23 January 2014) and with respect to the payments purportedly made under that Funding Agreement in January 2012, June 2012, January 2013 and February 2014, none of s 32B of the *Financial Management and Accountability Act* 1997 (Cth), Pt 5AA and Sched 1AA of the Financial Management and Accountability Regulations 1997 (Cth) or item 9 of Sched 1 to the *Financial Framework Legislation Amendment Act (No 3)* 2012 (Cth) is a valid law of the Commonwealth."

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12 cf *Roche v Kronheimer* (1921) 29 CLR 329; [1921] HCA 25; *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73 at 101 per Dixon J, 119-120 per Evatt J; [1931] HCA 34.

33 In order to explain why question 2 should be given an answer limited in the manner indicated, it is necessary to begin from some uncontroversial and obvious principles.

34 The validity of the impugned provisions cannot be determined without understanding their legal operation. And that requires consideration of the proper construction of the provisions, particularly s 32B of the FMA Act.

35 The FMA Act provides for the administration of public money: money in the custody or under the control of the Commonwealth or of a person acting for or on behalf of the Commonwealth[13]. Division 3B of Pt 4 of the FMA Act (and s 32B in particular) provides power to make commitments to spend public money. The Parliament's legislative power to enact the FMA Act derives[14] from every head of legislative power which supports the Commonwealth, or a person acting for or on behalf of the Commonwealth, being entitled to have custody or control of money or being entitled to make a payment of public money. Section 32B deals particularly with the power to make a commitment to make one or more payments of public money. And again, the Parliament's legislative power to grant the authority to make a commitment to pay public money is founded in every head of legislative power which supports the making of the payments with which s 32B deals.

36 It may be that, taken literally, s 32B would have a very wide field of actual and potential application. It would be possible, for example, to read s 32B(1) as extending to cases where the Parliament does not have *constitutional* power to authorise the making, varying or administration of arrangements or grants. But ordinary principles of statutory construction require rejection of such a reading of those words. And, more generally, consistent with the requirements of s 15A of the *Acts Interpretation Act* 1901 (Cth)[15], s 32B should be read as providing power to the Commonwealth to make, vary or administer arrangements

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13 s 5, definition of "public money".

14 cf *R v Hughes* (2000) 202 CLR 535 at 555 [40] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ; [2000] HCA 22.

15 "Every Act shall be read and construed subject to the Constitution, and so as not to exceed the legislative power of the Commonwealth, to the intent that where any enactment thereof would, but for this section, have been construed as being in excess of that power, it shall nevertheless be a valid enactment to the extent to which it is not in excess of that power."

or grants only where it is within the power of the Parliament to authorise the making, variation or administration of those arrangements or grants. To read the provision in that way is to read it within constitutional power. To read it as having a wider operation might take the provision beyond either constitutional power or the meaning and operation which its words can fairly bear, or beyond both constitutional power and the fair reading of its text. But if, as Mr Williams' arguments based on *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan*[16] suggested, s 32B does present some wider questions of construction and validity, they are not questions which are reached in this case and they should not be considered[17]. Rather, it is enough to consider whether, in their operation with respect to the agreement about and payments for provision of chaplaincy services, s 32B and the other impugned provisions are supported by a head of legislative power.

37 As already noted, the Commonwealth parties and SUQ each sought to support the impugned provisions, in their relevant operation, as laws with respect to the provision of benefits to students within s 51(xxiiiA). It is that issue to which these reasons now turn.

Benefits to students?

38 The impugned provisions seek to authorise the making of agreements about and payments for the provision of services which are to be available to students. The "objective" set out in item 407.013 in Pt 4 of Sched 1AA to the FMA Regulations refers to assisting "school communities to support the wellbeing of their students".

39 Some of the argument proceeded on the footing that the services provided under the program would be available not only to students but also to members of the relevant "school community". This aspect of the argument depended upon identifying the content of the relevant program by reference to the guidelines for "administration and delivery" of the program published by the relevant Commonwealth department. The funding agreement made with SUQ required compliance with those guidelines, as varied from time to time.

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16 (1931) 46 CLR 73.

17 See, for example, *Lambert v Weichelt* (1954) 28 ALJ 282 at 283 per Dixon CJ; *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at 437 [355] per Crennan J; [2009] HCA 2; *ICM Agriculture Pty Ltd v The Commonwealth* (2009) 240 CLR 140 at 199 [141] per Hayne, Kiefel and Bell JJ; [2009] HCA 51.

40 How and why reference could properly be made to those guidelines in order to identify the content of the program specified in item 407.013 was never satisfactorily explained by any of the parties or interveners. And the Commonwealth parties suggested that reference could be made to the guidelines as varied from time to time.

41 It is by no means obvious that the guidelines, whether as they stood at the time of enactment of the relevant provisions, or as they stood from time to time, are documents which can properly be taken into account in either construing the relevant legislative provisions or determining their validity. It is not necessary, however, to pursue those issues to their conclusion. It is enough to say that, if the program, properly understood, permitted the provision of services not only to students but also to the wider "school community", this broader understanding of its content would appear to point away from characterising the program as providing benefits to students.

42 It is, therefore, not necessary to explore who is or may be a member of a "school community". Rather, it is enough to observe that all students *may* use the chaplaincy services provided at a school. For the purposes of argument, it may be accepted that some students would derive advantage from using the services and, in that sense, *should* do so. But no student and no member of the school community *must* do so. All may; perhaps some should; none must.

43 As has just been noted, it may be assumed that provision of chaplaincy services at a school will help some students. Provision of those services will be of benefit to them. It will be of "benefit" to them in the sense of providing them with an advantage or a good[18]. But the word "benefits", where twice appearing in s 51(xxiiiA), is used[19] more precisely than as a general reference to (any and every kind of) advantage or good. The meaning of the word "benefits" accepted by the majority in *British Medical Association v The Commonwealth* ("the *BMA Case*")[20] was that expressed by McTiernan J: "material aid given pursuant to a scheme to provide for human wants ... under legislation designed to promote

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18 cf *The Oxford English Dictionary*, 2nd ed (1989), vol II at 111, "benefit", sense 3a.

19 *Williams (No 1)* (2012) 248 CLR 156 at 279-280 [280]-[285], 366-367 [570]-[573]. See also *British Medical Association v The Commonwealth* (1949) 79 CLR 201 at 260 per Dixon J; [1949] HCA 44.

20 (1949) 79 CLR 201 at 279. See at 246 per Latham CJ, 286-287 per Williams J, 292 per Webb J.

social welfare or security". And that material aid may be provided in various ways. McTiernan J referred[21] to the provision of benefits in the form of "a pecuniary aid, service, attendance or commodity".

44 In *Alexandra Private Geriatric Hospital Pty Ltd v The Commonwealth* ("the *Alexandra Hospital Case*")[22] all five members of the Court accepted that "the concept intended by the use in [s 51(xxiiiA)] of the word 'benefits' is not confined to a grant of money or some other commodity" and that the concept "may encompass the provision of a service or services". The Court treated this conclusion as supported, even required, by the decision in the *BMA Case*. And it was on this footing that the Court decided in the *Alexandra Hospital Case* that the payment of money to the proprietor of an approved nursing home, in respect of each qualified nursing home patient, for each day on which the patient received nursing home care in that nursing home, was provision of a "sickness and hospital benefit". As the Court pointed out[23], the benefit could be identified either as the money paid to the nursing home proprietor or as the services provided by the proprietor to the patient as the quid pro quo for the money payment made by the Commonwealth. But each description reflected the central fact that the intended ultimate beneficiary of the benefit was a particular patient: the identified patient in respect of whom a particular payment was made.

45 It would not be right to attempt to state some comprehensive definition of what may be "benefits", whether "benefits to students" or any of the several other forms of benefits identified in s 51(xxiiiA). Nothing in these reasons should be understood as attempting that task. It is enough, for the purposes of this case, to observe that the constitutional expression "benefits to students" cannot be construed piecemeal. That is, the expression is not to be approached as if it presented separate questions about whether there is a "benefit" and whether that "benefit" is provided to or for "students".

46 Section 51(xxiiiA) uses the word "benefits" in several different collocations. It uses the word to refer[24] to the provision of aid to or for

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21 (1949) 79 CLR 201 at 279.

22 (1987) 162 CLR 271 at 280 per Mason ACJ, Wilson, Brennan, Deane and Dawson JJ; [1987] HCA 6.

23 (1987) 162 CLR 271 at 281.

24 cf *BMA Case* (1949) 79 CLR 201 at 260 per Dixon J.

individuals for human wants arising as a consequence of the several occasions identified: being unemployed, needing pharmaceutical items such as drugs or medical appliances, being sick, needing the services of a hospital, or, as is relevant to this case, being a student. The benefits are occasioned by and directed to the identified circumstances. In the usual case, the assistance will be a form of material aid to relieve against consequences associated with the identified circumstances. Provision of the benefit will relieve the person to whom it is provided from a cost which that person would otherwise incur. In the case of unemployment and sickness benefits, the aid will relieve against the costs of living when the individual's capacity to work is not or cannot be used. That aid may take the form of payment of money or provision of other material aid against the needs brought on by unemployment or sickness. Pharmaceutical and hospital benefits provide aid for or by the provision of the goods and services identified. And in the case of benefits to students, the relief would be material aid provided against the human wants which the student has by reason of being a student.

47 Providing at a school the services of a chaplain or welfare worker for the objective described in item 407.013 in Pt 4 of Sched 1AA to the FMA Regulations is not provision of "benefits" of the kind described by McTiernan J in the *BMA Case* or by the Court in the *Alexandra Hospital Case*. Providing those services does not provide material aid to provide for the human wants of students. It does not provide material aid in the form of any service rendered or to be rendered to or for any identified or identifiable student. There is no payment of money by the Commonwealth for or on behalf of any identified or identifiable student. And the service which is provided is *not* directed to the consequences of being a student. There is no more than the payment of an amount (in this case to an intermediary) to be applied in payment of the wages of a person to "support the wellbeing" of a particular group of children: those who attend an identified school. And the only description of how the "support" is to be given is that it includes "strengthening values, providing pastoral care and enhancing engagement with the broader community". These are desirable ends. But seeking to achieve them in the course of the school day does not give the payments which are made the quality of being benefits to students.

48 Providing money to pay persons to provide such services at a school is not to provide benefits which are directed to the consequences of being a student. It is not a provision of benefits to students within the meaning of s 51(xxiiiA).

Trading and financial corporations?

49 SUQ's reliance on s 51(xx) may be dealt with shortly. The impugned provisions seek to provide authority for the Commonwealth to make agreements and payments. For the purposes of considering the argument, it may be assumed that the opposite party to an agreement made for the purposes of the National School Chaplaincy and Student Welfare Program and the recipient of payments made under that program can be, even *must* be, a trading or financial corporation.

50 A law which gives the Commonwealth the authority to make an agreement or payment of that kind is not a law with respect to trading or financial corporations. The law makes no provision regulating or permitting any act by or on behalf of any corporation. The corporation's capacity to make the agreement and receive and apply the payments is not provided by the impugned provisions. Unlike the law considered in *New South Wales v The Commonwealth* (*Work Choices Case*)[25], the law is not one authorising or regulating the activities, functions, relationships or business of constitutional corporations generally or any particular constitutional corporation; it is not one regulating the conduct of those through whom a constitutional corporation acts or those whose conduct is capable of affecting its activities, functions, relationships or business.

51 It is not necessary to consider whether SUQ is a trading or financial corporation. In particular, it is not necessary to decide whether, as SUQ submitted, the corporation was properly classified as a trading or financial corporation simply because it made agreements with the Commonwealth which obliged it to provide services in return for payment. This question, and larger questions left open in the *Work Choices Case* about the meaning of "trading or financial corporations formed within the limits of the Commonwealth", are not reached in this case and should not be examined.

Appropriation Acts as legislative authority to spend?

52 Commonwealth Appropriation and Supply Acts over many years provided[26] that the Treasurer was "authorized and empowered to issue *and apply*" the moneys identified in the Act (emphasis added). And s 8 of each of the

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25 (2006) 229 CLR 1; [2006] HCA 52.

26 *Williams (No 1)* (2012) 248 CLR 156 at 264 [231].

Appropriation Acts[27] relevant to this case provided that amounts specified in administered items "for an outcome for an Agency may be *applied* for expenditure for the purpose of contributing to achieving that outcome" (emphasis added). In each of the years for which the relevant Appropriation Acts provided, the National School Chaplaincy and Student Welfare Program[28] was an administered item for an outcome for the relevant department.

53 In *Williams (No 1)* the Commonwealth parties did not submit that provisions of this kind in the applicable Appropriation Acts provided statutory authority for making the agreement or payments in issue in that case. But in this proceeding, the Commonwealth parties submitted that the Appropriation Acts for the years 2011-2012, 2012-2013 and 2013-2014 authorised the making of the funding agreement (as it was in force in each of those years) by providing that the amounts appropriated by those Appropriation Acts may be applied to the outcome identified as the National School Chaplaincy and Student Welfare Program. Question 1 in the special case asks whether the funding agreement was authorised by those Acts.

54 Mr Williams submitted that the Commonwealth parties were precluded from relying on this argument in this proceeding because the argument had been open and was not advanced in the earlier proceeding. The Commonwealth parties responded by submitting[29] that doctrines of preclusion could not, or should not, be applied in this way in constitutional litigation and by further submitting that, because different payments (and different Appropriation Acts) were at issue in the two proceedings, the doctrines, if otherwise applicable, were not engaged.

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27 *Appropriation Act (No 1)* 2011-2012 (Cth), *Appropriation Act (No 1)* 2012-2013 (Cth) and *Appropriation Act (No 1)* 2013-2014 (Cth).

28 In the earliest of the years in issue, the reference was to the National School Chaplaincy Program. Nothing turns on this fact and it is convenient to refer only to the National School Chaplaincy and Student Welfare Program.

29 See, for example, *Queensland v The Commonwealth* (1977) 139 CLR 585 at 597 per Gibbs J, 605 per Stephen J; [1977] HCA 60; *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 590 [156] per Gummow and Hayne JJ; [1999] HCA 27; *Re Macks; Ex parte Saint* (2000) 204 CLR 158 at 238 [224] per Gummow J; [2000] HCA 62; cf *The State of Victoria v The Commonwealth* ("the *Second Uniform Tax Case*") (1957) 99 CLR 575 at 654 per Fullagar J; [1957] HCA 54.

55 It is not necessary to examine or decide the validity of these arguments. Their decision should await[30] a case in which it is necessary to deal with them. *If* the Appropriation Acts relied on by the Commonwealth parties are to be construed as providing statutory authority to make either the funding agreement or any of the payments in issue in this proceeding, the same questions about the validity of the relevant provisions (in that operation) are presented as arise in relation to the other statutory provisions said to support the making of the relevant payments and agreement. The conclusions reached about the validity of the impugned provisions of the FMA Act, the FMA Regulations and the FFLA Act would apply equally to the Appropriation Acts if they otherwise provided authority for the making of the agreement and payments in issue in this case.

56 Question 1 should be answered "Unnecessary to answer".

Reopening *Williams (No 1)*

57 The conclusion that the impugned provisions are not laws supported by either s 51(xxiiiA) or s 51(xx) determines the outcome of the litigation unless one or more of the several arguments advanced by the Commonwealth parties about the ambit of the Executive's power to spend is made out. The Commonwealth parties advanced their arguments under the cloak of an application to reopen the decision in *Williams (No 1)*.

58 The Commonwealth parties put[31] four main reasons for what they described as "a compelling case" to reopen the decision in *Williams (No 1)*.

59 First, they submitted that "the principle identified in [*Williams (No 1)*] was not carefully worked out in a significant succession of cases" and "constituted a radical departure from what had previously been assumed by all parties to be the orthodox legal position". Second, they submitted that the course taken in the hearing in *Williams (No 1)* resulted in the Court not receiving "sufficient argument, or sufficient material by way of constitutional fact, on what became

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30 See, for example, *Lambert v Weichelt* (1954) 28 ALJ 282 at 283 per Dixon CJ; *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at 437 [355] per Crennan J; *ICM Agriculture Pty Ltd v The Commonwealth* (2009) 240 CLR 140 at 199 [141] per Hayne, Kiefel and Bell JJ.

31 cf *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 at 438-439 per Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ; [1989] HCA 5.

the ultimate issue". (The material was said to include "evidence of how the Senate in fact functions in and about the appropriation process" and "evidence of consultation with the States in relation to" the National School Chaplaincy Program.) Third, they submitted that "the reasons of the four Justices constituting the majority in [*Williams (No 1)*] do not contain a single answer" to when and why Commonwealth spending requires authorising legislation or whether the requirement for authorising legislation operates "solely at Commonwealth level or at both Commonwealth and State levels". And fourth, they submitted that the decision in *Williams (No 1)* "led to considerable inconvenience with no significant corresponding benefits".

60 As has been explained, the decision in *Williams (No 1)* depended upon premises established in *Pape*, and the Commonwealth parties did not seek to reopen *Pape*. In these circumstances, there may be room for debate about the extent to which the Commonwealth parties were right to characterise *Williams (No 1)* as establishing a new principle. But, even if it is right to say that *Williams (No 1)* did not apply principles "carefully worked out in a significant succession of cases", demonstrating this to be so would not show that the decision should be reopened. Rather, it would show only that the decision was not one which the Court should be especially reluctant to reopen. It would provide no necessary reason to reopen what has been so recently decided by six Justices.

61 Although the Commonwealth parties submitted, in effect, that the course of argument in *Williams (No 1)* was unsatisfactory, they stopped well short of submitting that the decision was given in ignorance of any relevant legal argument or decision or that there was any want of procedural fairness. And neither of those submissions was open. The Commonwealth parties in *Williams (No 1)* were given a complete opportunity to advance their arguments against the challenge which Mr Williams then mounted and the Commonwealth parties do not now point to any principle of law or decision which was not before the Court and able to be canvassed fully in the course of argument in *Williams (No 1)*.

62 The Commonwealth parties did submit that not all relevant constitutional facts were established in the hearing of *Williams (No 1)*. It is greatly to be doubted that the matters to which they point (Senate practice and inter-governmental consultations about the particular program) are relevant constitutional facts. If they are, it was well open to the Commonwealth parties to have sought to bring them to attention, and rely on them, during argument in *Williams (No 1)*. They did not.

63 The submissions that there were deficiencies in the way in which *Williams (No 1)* was argued should be rejected.

64 The argument that *Williams (No 1)* should be reopened because it did not give a single and comprehensive answer to when and why Commonwealth spending needs statutory authorisation and did not decide what powers the Executive Governments of the States have to spend or contract should also be rejected. *Williams (No 1)* decided the issues which were tendered for decision in the case. The decision may not provide the Commonwealth with an answer to every question that may be asked about Commonwealth expenditure powers. And the decision does not consider any question about State expenditure powers: no such question was put in issue in that proceeding or in this. How or why these observations point to a need to reopen *Williams (No 1)* was not, and could not be, explained.

65 Finally, then, there was the assertion of "considerable inconvenience with no significant corresponding benefits". What was meant in this context by the references to "inconvenience" and "corresponding benefits" would require a deal of elaboration in order to reveal how they bear upon the resolution of an important question of constitutional law. Examination of the proposition reveals no greater content than that the Commonwealth parties wish that the decision in *Williams (No 1)* had been different and seek a further opportunity to persuade the Court to their view. The only inconvenience identified was the need to enact the impugned provisions. These are not reasons enough to permit reopening.

66 The application to reopen the decision in *Williams (No 1)* should be refused.

67 Refusal of that application entails rejection of so much of the arguments advanced on behalf of the Commonwealth parties as sought to revisit the question about the Executive's power to spend money in performance of a funding agreement of the kind in issue in this proceeding. It is important, however, to record the arguments which were advanced by the Commonwealth parties and to identify why those arguments have been rightly rejected.

Executive power revisited

68 The Commonwealth parties identified the central holding in *Williams (No 1)* as being "that many, but not all, instances of executive spending and contracting require legislative authorisation". They submitted that this holding was wrong and that there were only seven limitations on the Executive's power to spend and contract. Those limitations can be identified shortly as follows. First,

the Executive may not "stray into an area reserved for legislative power". Second, an exercise of executive power cannot fetter the exercise of legislative power and cannot dispense with the operation of the law. Third, there can be no withdrawal of money from the Consolidated Revenue Fund without parliamentary authority in the form of appropriation legislation. Fourth, s 51 of the Constitution "provides every power necessary for the Parliament to prohibit or control the activity of the Executive in spending". Fifth, through collective and individual ministerial responsibility to the Parliament, the Parliament "exercises substantial control over spending". Sixth, the Constitution assumes the separate existence and continued organisation of the States. Seventh, State laws of general application apply to spending and contracting by the Commonwealth without legislative authority.

69 Although cast as an acknowledgment of what may be accepted to be important limitations on the power of the Executive to spend and contract, this argument was, in substance, no more than a repetition of what were referred to as the "broad basis" submissions which the Commonwealth parties advanced[32] in *Williams (No 1)* and which six Justices rejected[33].

A proposed limitation on the power to spend and contract

70 Notably absent from the list of seven limitations proffered by the Commonwealth parties was any limitation by reference to the areas in which (in the sense of subjects for or about which) the Commonwealth may spend or contract. *If* such a limitation was considered necessary, the Commonwealth parties submitted that the limitation should be framed as follows:

> "[E]xecutive power to contract and spend under s 61 of the Constitution extends to *all* those matters that are *reasonably capable* of being *seen* as of national benefit or concern; that is, *all* those matters that befit the national government of the federation, *as discerned from the text and structure of the Constitution*." (emphasis added)

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32 (2012) 248 CLR 156 at 167.

33 (2012) 248 CLR 156 at 186-187 [26]-[27], 191-193 [35]-[38] per French CJ, 236-239 [150]-[159] per Gummow and Bell JJ, 270-271 [251]-[253] per Hayne J, 343-344 [488], 355 [534] per Crennan J, 373-374 [595] per Kiefel J.

This limitation was said to be "the corollary embedded in s 61 of the Constitution to the 'purposes of the Commonwealth' referred to in s 81 (in the specific context of spending)".

71 So expressed, the proposition is one of great width. It may go so far as to permit the expenditure of public money for any national program which the Parliament reasonably considered to be of benefit to the nation. It is hard to think of any program requiring the expenditure of public money appropriated by the Parliament which the Parliament would not consider to be of benefit to the nation. In effect, then, the submission is one which, if accepted, may commit to the Parliament the judgment of what is and what is not within the spending power of the Commonwealth, even if, as the Commonwealth parties submitted, the question could be litigated in this Court. It is but another way of putting the Commonwealth's oft-repeated[34] submission that the Executive has unlimited power to spend appropriated moneys for the purposes identified by the appropriation.

72 The reference to discerning what are the matters "that befit the national government of the federation" from "the text and structure of the Constitution" appears to propose a test narrower than "*all* those matters that are *reasonably capable* of being *seen* as of national benefit or concern". It is not useful, however, to stay to attempt to resolve any internal inconsistency in the submission of the Commonwealth parties. Rather, it is more productive to identify the way in which it was sought to apply the submission in this case.

73 The Commonwealth parties submitted that, if the breadth of the executive power to spend and contract is limited, the provision of chaplains in schools is within the executive power of the Commonwealth because it "is reasonably capable of being seen as a matter of national benefit or concern". The

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34 See, for example, *Victoria v The Commonwealth and Hayden* ("the *AAP Case*") (1975) 134 CLR 338 at 342-343; [1975] HCA 52; *Pape* (2009) 238 CLR 1 at 10; *Williams (No 1)* (2012) 248 CLR 156 at 167. See also *Attorney-General (Vict) v The Commonwealth* ("the *Pharmaceutical Benefits Case*") (1945) 71 CLR 237 at 242-243; [1945] HCA 30; *Brown v West* (1990) 169 CLR 195 at 197; [1990] HCA 7; *Combet v The Commonwealth* (2005) 224 CLR 494 at 510-512; Deakin, "Channel of Communication with Imperial Government: Position of Consuls: Executive Power of Commonwealth", in Brazil and Mitchell (eds), *Opinions of Attorneys-General of the Commonwealth of Australia, Volume 1: 1901-14*, (1981) 129 at 130-131.

Commonwealth parties developed this submission by reference to several considerations. Only one of them need be specially noticed. The Commonwealth parties submitted that the chaplaincy program was of national benefit or concern because the States had been consulted about and had supported the extension of the chaplaincy program considered in *Williams (No 1)*. And the Solicitor-General of the Commonwealth began his oral submissions in this matter by referring to consultation documents which he submitted showed that the States supported the chaplaincy program.

74 Consultation between the Commonwealth and States coupled with silent, even expressed, acquiescence by the States does not supply otherwise absent constitutional power to the Commonwealth. The Constitution contains several provisions by which the States and the Commonwealth may join in achieving common ends. It is enough to mention only s 51(xxxvii) (about referral of powers) and s 96 (about grants on condition). Neither of those provisions was engaged in relation to the matters the subject of this case. The consultations to which reference was made in argument do not support the Commonwealth parties' submissions.

75 But there are more fundamental defects in the argument of the Commonwealth parties about the breadth of the Executive's power to spend and contract.

An assumption underpinning the Commonwealth parties' argument

76 The Commonwealth parties submitted that the content of the executive power to spend and contract should be determined in two steps. It was said to be necessary to "commence with an understanding of executive power at common law". The task was then described as being to identify "the precise source of any *limitation* on Commonwealth executive power" (emphasis added).

77 The identification of those limitations proceeded from a false assumption about the ambit of the Commonwealth's executive power.

78 The Commonwealth parties submitted that determining the content of executive power (but not the limitations on its exercise) should proceed from only two premises. First, "a polity must possess all the powers that it needs in order to function as a polity". Second, "the executive power is all that power of a polity that is not legislative or judicial power". Both of those premises may be accepted. But the conclusion the Commonwealth parties sought to draw from those premises about the content of Commonwealth executive power does not follow unless there is a third premise for the argument: that the executive power

of the Commonwealth should be assumed to be no less than the executive power of the British Executive. This third premise is false.

79 What the submissions called "executive power at common law" was executive power as exercised in Britain[35]. Thus the assumption from which the second inquiry (about "limitations") proceeded was that, *absent* some "limitation", the executive power of the Commonwealth is the *same* as British executive power. But why the executive power of the new federal entity created by the Constitution should be assumed to have the same ambit, or be exercised in the same way and same circumstances, as the power exercised by the Executive of a unitary state having no written constitution was not demonstrated. To make an assumption of that kind, as the arguments of the Commonwealth parties did, begs the question for decision.

80 The history of British constitutional practice is important to a proper understanding of the executive power of the Commonwealth. That history illuminates such matters as why ss 53-56 of the Constitution make the provisions they do about the powers of the Houses of the Parliament in respect of legislation, appropriation bills, tax bills and recommendation of money votes. It illuminates ss 81-83 and their provisions about the Consolidated Revenue Fund, expenditure charged on the Consolidated Revenue Fund and appropriation. But it says nothing at all about any of the other provisions of Ch IV of the Constitution, such as ss 84 and 85 (about transfer of officers and property), ss 86-91 (about customs, excise and bounties), s 92 (about trade, commerce and intercourse among the States), or ss 93-96 (about payments to States). And questions about the ambit of the Executive's power to spend must be decided in light of *all* of the relevant provisions of the Constitution, not just those which derive from British constitutional practice.

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35 The extent of this power may remain controversial. See, for example, *R (Hooper) v Secretary of State for Work and Pensions* [2005] 1 WLR 1681 at 1695-1696 [46]-[47] per Lord Hoffmann; [2006] 1 All ER 487 at 506-507; *R (New London College Ltd) v Secretary of State for the Home Department* [2013] 1 WLR 2358 at 2371 [28] per Lord Sumption JSC (Lord Clarke of Stone-cum-Ebony and Lord Reed JJSC and Lord Hope of Craighead agreeing); [2013] 4 All ER 195 at 210-211; cf Maitland, "The Crown as Corporation", (1901) 17 *Law Quarterly Review* 131; Harris, "The 'Third Source' of Authority for Government Action Revisited", (2007) 123 *Law Quarterly Review* 225; Howell, "What the Crown May Do", (2010) 15 *Judicial Review* 36. It is neither necessary nor appropriate to enter upon that subject.

81 Consideration of the executive power of the Commonwealth will be assisted by reference to British constitutional history. But the determination of the ambit of the executive power of the Commonwealth cannot begin from a premise that the ambit of that executive power must be the same as the ambit of British executive power.

82 It may be assumed that, as the Commonwealth parties submitted, "what might be described as the inherent or traditional limits on executive power, as they emerged from the historical relationship between Parliament [*at Westminster*] and the Executive, have not hitherto been treated [in Australia or, for that matter, in Britain] as the source of any general limitation on the ability of the Executive to spend and contract without legislative authority". But it by no means follows from this observation that the Commonwealth can be assumed to have an executive power to spend and contract which is the same as the power of the British Executive.

83 This assumption, which underpinned the arguments advanced by the Commonwealth parties about executive power, denies the "basal consideration"[36] that the Constitution effects a distribution of powers and functions between the Commonwealth and the States. The polity which, as the Commonwealth parties rightly submitted, must "possess all the powers that it needs in order to function as a polity" is the central polity of a federation in which independent governments exist in the one area and exercise powers in different fields of action carefully defined by law[37]. It is not a polity organised and operating under a unitary system or under a flexible constitution where the Parliament is supreme. The assumption underpinning the Commonwealth parties' submissions about executive power is not right and should be rejected.

84 Finally, reference must be made to the Commonwealth parties' arguments based on the express incidental power in s 51(xxxix).

Section 51(xxxix)

85 For the most part, the submissions which the Commonwealth parties made about s 51(xxxix) depended upon the success of other arguments they advanced but which have been rejected. Thus the Commonwealth parties submitted that, in

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36 *Pharmaceutical Benefits Case* (1945) 71 CLR 237 at 271-272 per Dixon J.

37 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 267-268; [1956] HCA 10.

so far as the Appropriation Acts provided authority to spend appropriated moneys, the Appropriation Acts were supported by s 51(xxxix) as laws incidental to the power to appropriate. They further submitted that s 32B of the FMA Act was supported by the incidental power as a law incidental to the power to appropriate or the executive power under s 61 to spend and contract.

86 Both of those arguments must be rejected. To hold that the Parliament may make a law authorising the expenditure of any moneys lawfully appropriated in accordance with ss 81 and 83, no matter what the purpose of the expenditure may be, would treat outlay of the moneys as incidental to their ear-marking. But that would be to hold, contrary to *Pape*, that any and every appropriation of public moneys in accordance with ss 81 and 83 brings the expenditure of those moneys within the power of the Commonwealth.

87 Likewise, to hold that s 32B of the FMA Act is a law with respect to a matter incidental to the execution of the executive power of the Commonwealth (to spend and contract) presupposes what both *Pape* and *Williams (No 1)* deny: that the executive power of the Commonwealth extends to any and every form of expenditure of public moneys and the making of any agreement providing for the expenditure of those moneys.

Conclusion and orders

88 For these reasons, the questions stated in the form of a special case should be answered as follows.

89 Question 1, which asks whether the SUQ funding agreement is supported by the Appropriation Acts, should be answered: "Unnecessary to answer."

90 Question 2, which asks whether the impugned provisions are wholly invalid, should be answered in the manner indicated earlier in these reasons:

> "In their operation with respect to the SUQ Funding Agreement (being the Funding Agreement dated 21 December 2011 between the Commonwealth and Scripture Union Queensland, the third defendant, as varied from time to time up to and including a Fourteenth Variation Deed dated 23 January 2014) and with respect to the payments purportedly made under that Funding Agreement in January 2012, June 2012, January 2013 and February 2014, none of s 32B of the *Financial Management and Accountability Act* 1997 (Cth), Pt 5AA and Sched 1AA of the Financial Management and Accountability Regulations 1997 (Cth) or item 9 of

Sched 1 to the *Financial Framework Legislation Amendment Act (No 3)* 2012 (Cth) is a valid law of the Commonwealth."

91 Question 3, which asks whether the SUQ funding agreement is supported by the impugned provisions, should be answered: "No."

92 Question 4, which asks whether the Commonwealth's entry into, and expenditure of moneys under, the SUQ funding agreement was supported by the executive power of the Commonwealth, should be answered: "No."

93 Question 5, about standing, should be answered in the manner indicated earlier in these reasons: "In the circumstances of this case, and to the extent necessary for the determination of this matter, yes."

94 It follows from the answers which should be given to questions 2, 3 and 4 that question 6, which asks whether the making of the payments identified in the question was unlawful, should be answered: "Yes."

95 What relief should now be given in the proceeding should be a matter for a single Justice to determine. Question 7, which asks about relief, should be answered: "The Justice disposing of the proceeding should grant the plaintiff such relief and make such costs orders as appear appropriate in light of the answers given to these questions."

96 Question 8 asks about the costs of the special case and the proceeding generally. Having succeeded, Mr Williams should have his costs of the special case. What further orders for costs should be made in finally disposing of the proceeding should again be a matter for a single Justice to determine.

97 Who should be liable to pay Mr Williams' costs? SUQ submitted that, if Mr Williams succeeded, "there should be no order for costs made against SUQ as it has acted in good faith in reliance upon the validity of the Commonwealth's legislation". But, SUQ having chosen to play an active part in defence of the validity of the impugned provisions, there is no reason why it should not be ordered, with the Commonwealth parties, to pay Mr Williams his costs of the special case. How liability for satisfying that order might be adjusted between the defendants should be a matter for those parties to determine.

98 Question 8 should be answered: "The defendants should pay the plaintiff's costs of the special case. The costs of the proceeding are otherwise in the discretion of the single Justice who makes final orders disposing of the proceeding."

99 CRENNAN J. Subject to a reservation set out below, I agree with the joint reasons for judgment and with the answers proposed to the questions stated in the form of a special case. The reservation is confined to Mr Williams' challenge to the validity of the impugned provisions on the basis that those provisions are not properly characterised as laws which fall within the powers of the Commonwealth for "the provision of ... benefits to students" within s 51(xxiiiA) of the Constitution. For convenience, the same definitions which are employed in the joint reasons are used in these reasons.

100 The objectives of the National School Chaplaincy and Student Welfare Program are described in constituent documents in terms of assisting school communities by supporting "the wellbeing of their students, including by strengthening values, providing pastoral care and enhancing engagement with the broader community". Whilst those concepts, including "pastoral care", are not defined comprehensively in the constituent documents, attention was given in submissions to services which might be provided to students by student welfare workers or student counsellors, and it may be assumed, without deciding, that such services would fall within the concept of "pastoral care".

101 In dealing with Mr Williams' submissions on the scope of s 51(xxiiiA), it is not necessary for this Court to express any views about the wisdom of governments providing services to school communities and students which support the wellbeing of students, including pastoral care, or about whether the provision of such services is a worthy object for the expenditure of public moneys. The Court's task is limited to determining whether the National School Chaplaincy and Student Welfare Program is sufficiently connected[38] to s 51(xxiiiA), which was relied upon by the Commonwealth parties as a relevant head of power to support validity.

102 It is enough for the purposes of upholding Mr Williams' challenge to validity to find that the impugned provisions do not fall within s 51(xxiiiA) because they do not institute a scheme for the provision of government assistance to, or for, persons – in this case, students – as prescribed and identifiable beneficiaries.

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38 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 373 [104] per Gummow J; [2005] HCA 44, citing *O'Sullivan v Noarlunga Meat Ltd* (1954) 92 CLR 565 at 594; [1954] HCA 29.

103 Sir William Beveridge's Report *Social Insurance and Allied Services*[39], mentioned by Dixon J in the *BMA Case*[40], considered the harmonisation of various social security systems to tackle threats to society described as want, ignorance, disease, squalor and idleness. Two requirements for effective social security advanced in the Report were universality and comprehensiveness. There was a spate of social security legislation in Australia in 1944 and 1945, which included the *Pharmaceutical Benefits Act* 1944 (Cth)[41]. The inclusion of s 51(xxiiiA) in the Constitution, following a referendum, was a response to this Court's decision concerning that Act[42]. In the second reading speech for the Constitution Alteration (Social Services) Bill 1946[43] and in the explanations of the meaning of "benefits" in s 51(xxiiiA) in the *BMA Case*[44], reference is made to enlarged conceptions of social security. In particular, the explanation of the meaning of a "benefit" given by McTiernan J in the *BMA Case*[45], approved in the *Alexandra Hospital Case*[46] – "material aid given pursuant to a scheme to provide for human wants" – shows that the word "benefit" has a specific meaning when used in social security legislation.

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39 Beveridge, *Social Insurance and Allied Services: Report*, (1942) Cmd 6404.

40 (1949) 79 CLR 201 at 259; [1949] HCA 44.

41 See also *Unemployment and Sickness Benefits Act* 1944 (Cth), *Maternity Allowance Act* 1944 (Cth) (amending *Maternity Allowance Act* 1912 (Cth)), *Widows' Pensions Act* 1944 (Cth) (amending *Widows' Pensions Act* 1942 (Cth)), *Child Endowment Act* 1945 (Cth) (amending *Child Endowment Act* 1941 (Cth)), *Education Act* 1945 (Cth), *Hospital Benefits Act* 1945 (Cth), *Invalid and Old-age Pensions Act* 1945 (Cth) (amending *Invalid and Old-age Pensions Act* 1908 (Cth)), *National Welfare Fund Act* 1945 (Cth) (amending *National Welfare Fund Act* 1943 (Cth)), *Social Services Contribution Act* 1945 (Cth) and *Widows' Pensions Act* 1945 (Cth) (amending *Widows' Pensions Act* 1942 (Cth)).

42 *Attorney-General (Vict) v The Commonwealth* (1945) 71 CLR 237; [1945] HCA 30.

43 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 27 March 1946 at 646-649.

44 (1949) 79 CLR 201 at 246 per Latham CJ, 260 per Dixon J, 279 per McTiernan J, 286-287 per Williams J.

45 (1949) 79 CLR 201 at 279.

46 (1987) 162 CLR 271 at 280; [1987] HCA 6.

104 Speaking in the singular, a "benefit" in social security legislation is government assistance to which a person is entitled, whether the assistance is provided in the form of money[47], or in the form of goods[48] or services[49], the provision of which is underwritten by the State. Irrespective of the manner of delivery of government assistance in social security legislation, and notwithstanding any prescription of beneficiaries as a class, entitlement to a social security benefit is a personal entitlement of individual human beings. Such an entitlement is predicated invariably upon there being prescribed, hence identifiable, persons as beneficiaries[50]. This is readily explicable. As was recognised in the *BMA Case*, government schemes for social security may involve not simply the expenditure of public moneys, but also personal contributions and insurance[51].

105 The meaning of "benefits" in s 51(xxiiiA), explained in the *BMA Case*, was informed by, but not confined to, "benefits" provided by benefit (or friendly) societies, which, in return for regular payments of small sums, provided financial assistance to contributors – persons of limited means – or their dependants, in times of old age, sickness or death[52]. In a similar vein, there was little resistance from Convention delegates to empowering the Commonwealth to provide pensions for "the invalid and aged poor"[53], found in s 51(xxiii) of the Constitution. This was because the contemplated beneficiaries were persons of the "labouring classes", who were often itinerant throughout the colonies[54]. In the absence of invalid and old-age pensions, such persons ran the risk of "becoming destitute in their declining years through no fault of their own"[55].

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47 For example, "widows' pensions".

48 For example, pharmaceuticals.

49 For example, medical services.

50 *Alexandra Hospital Case* (1987) 162 CLR 271 at 280-282.

51 (1949) 79 CLR 201 at 259-261 per Dixon J.

52 (1949) 79 CLR 201 at 259 per Dixon J, 279 per McTiernan J.

53 *Official Record of the Debates of the Australasian Federal Convention*, (Sydney), 22 September 1897 at 1085.

54 *Official Record of the Debates of the Australasian Federal Convention*, (Sydney), 22 September 1897 at 1086.

55 *Official Record of the Debates of the Australasian Federal Convention*, (Sydney), 22 September 1897 at 1086.

Nowadays, there is a well-understood concept – the Welfare State – in which the State undertakes responsibility to provide government assistance, ie benefits, to which persons are entitled, even from cradle to grave. Sir William Beveridge's Report foreshadowed as much.

106 That s 51(xxiiiA) is a plenary power which should be given a wide and liberal interpretation was accepted in the *BMA Case*[56] and illustrated in the *Alexandra Hospital Case*[57]. It is accepted by Mr Williams that the provision of services may fall within the scope of the power.

107 The Commonwealth parties' submission that the grant of power in s 51(xxiiiA) should be construed with all the generality which the words used admit[58] must be accepted, as must their submission that the grant of power is not to be constrained by historical conceptions of social security legislation as at 1946. Further, the text of s 51(xxiiiA) does not confine "benefits" which are services to those services involving a payment by, or a cost to, persons who are prescribed beneficiaries. Before social conditions were ameliorated by social security legislation, known regimes for the provision of free medical services, for example, included (and even blended) charity, insurance, and services the "costs" of which were underwritten in the private sector[59]. It can be accepted, as the Commonwealth parties urge[60], that "benefits" under s 51(xxiiiA) are not confined to forms of government assistance provided by way of a service for which a person otherwise must pay. However, the Commonwealth parties' submission that the *BMA Case* and the *Alexandra Hospital Case* support a reading of "benefits" in s 51(xxiiiA) to include services provided to undifferentiated persons – recipients or beneficiaries who cannot be identified as entitled to some benefit – whether the services are provided in a group setting or individually, must be rejected.

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56 (1949) 79 CLR 201 at 279-280 per McTiernan J, 286 per Williams J; see also at 246-247 per Latham CJ.

57 (1987) 162 CLR 271 at 279-282.

58 *R v Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways Pty Ltd* (1964) 113 CLR 207 at 225-226; [1964] HCA 15; *Grain Pool of Western Australia v The Commonwealth* (2000) 202 CLR 479 at 492 [16]; [2000] HCA 14; *Work Choices Case* (2006) 229 CLR 1 at 103 [142] per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ; [2006] HCA 52.

59 See generally Perkin, *The Rise of Professional Society*, (1989).

60 Relying on *Williams (No 1)* (2012) 248 CLR 156 at 329 [429] per Heydon J; [2012] HCA 23.

108 The explanation of the meaning of the term "benefits" in the *BMA Case*, to which reference has already been made, is sufficient to rebut the suggestion that "benefits" can include assistance to an undifferentiated group, rather than to persons prescribed as being entitled to them. Furthermore, in the *BMA Case*, it was obvious to Latham CJ that responsible Parliaments, providing "benefits" out of public moneys, are likely to include in relevant legislation a method of administration as a precaution against fraud by "recipients" of such benefits[61]. Similarly, in the *Alexandra Hospital Case*, this Court recognised that sickness and hospital benefits legislation can include a scheme to ensure that the provision of such benefits would be effective to meet the needs of the "real beneficiary" (patients, not service providers), and capable of being held "within reasonable budgetary limits", irrespective of the means adopted by government to provide benefits to persons as prescribed beneficiaries[62].

109 Each of the 11 grants of power in s 51(xxiiiA), whether described by reference to "allowances", "pensions", "child endowment", "benefits" or "services", involves an entitlement of persons to money, goods or services provided, or underwritten, by the federal government. The empowering of the federal government to provide enumerated social security benefits under s 51(xxiiiA) does not require that such be provided by way of direct financial assistance to the persons who are the prescribed beneficiaries. However, indirect assistance, for example to students, such as subsidies paid to universities, must relate to education services provided to real or actual persons as prescribed recipients or beneficiaries entitled to those education services[63].

110 The National School Chaplaincy and Student Welfare Program does not institute a scheme for the provision of government assistance by way of the

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61 (1949) 79 CLR 201 at 245-246; see also at 279-280 per McTiernan J.

62 (1987) 162 CLR 271 at 282.

63 See, for example, s 14 of the *Education Act* 1945 (Cth), which provided that the function of the Universities Commission established under the Act was to include:

> "(a) to arrange, as prescribed, 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;
>
> (b) in prescribed cases or classes of cases, to assist other persons to obtain training in Universities or similar institutions;
>
> (c) to provide, as prescribed, financial assistance to students at Universities and approved institutions".

provision of services to, or for, persons who have a personal entitlement to a benefit. Under the scheme, no student is required to be identified by the providers of "Chaplaincy and Student Welfare" as a prescribed recipient or beneficiary entitled to a social security benefit. Payments made to SUQ (or other providers) out of public moneys are not made in respect of government assistance to persons with a personal entitlement to some benefit. Accordingly, the National School Chaplaincy and Student Welfare Program is not a scheme for the provision of "benefits" within the meaning of s 51(xxiiiA).

111 Mr Williams' challenge to validity being upheld on that basis, and Question 2 in the special case being answered as set out in the joint reasons, it is unnecessary to conclude, or to imply, that the services of student welfare workers or student counsellors could not be the subject of a federal government scheme for "the provision of ... benefits to students", within the scope of s 51(xxiiiA).