

**IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY**

No. S154 of 2013

BETWEEN:

RONALD WILLIAMS
Plaintiff

AND:

COMMONWEALTH OF AUSTRALIA
First Defendant

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AND:

MINISTER FOR EDUCATION
Second Defendant

AND:

SCRIPTURE UNION QUEENSLAND
Third Defendant

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**SUBMISSIONS IN REPLY ON BEHALF OF THE ATTORNEY-GENERAL
FOR THE STATE OF QUEENSLAND (INTERVENING)**

Date of document:

17 April 2014

Filed on behalf of:

Attorney-General for the State of Queensland

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I. CERTIFICATION

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

II. INTRODUCTION

2. On 10 April 2014, the Chief Justice granted leave to the Attorney-General for the State of Queensland to file submissions in reply to the submissions of the first and second defendants ('the Commonwealth defendants').

3. The Commonwealth defendants submit that leave should be granted to re-open *Williams v Commonwealth*.¹ They further submit that:

- (a) the Commonwealth's executive power to spend and contract does not require any statutory backing and is essentially unlimited as to subject matter;
- (b) alternatively, that the Commonwealth's executive power to spend and contract extends to all matters that are reasonably capable of being seen as of national benefit or concern; and
- (c) any requirement for legislation authorising spending and contracting would flow through to the State level.

4. The Attorney-General for Queensland has adopted the submissions of the Attorneys-General for New South Wales and Victoria for refusing to re-open *Williams*.²

5. On the assumption that leave is granted, however, the Attorney makes the submissions below.

(i) Commonwealth generally requires legislative authorisation for spending and contracting

6. In *Williams*, none of the judges accepted that the Commonwealth had a broad executive power to spend and contract on any subject matter without statutory authority. Four judges in *Williams* also held that, with some exceptions, the Commonwealth's executive power did not extend to contracting and spending on matters within the legislative powers of the Commonwealth without statutory authorisation.³

7. The Commonwealth defendants contend, however, that 'the historical conception' of executive power in the English and British constitutional tradition suggests that there was never any general limitation on the ability of the Executive to spend and contract without statutory authority. They contend that nothing in Australia's constitutional structure

¹ (2012) 248 CLR 156 ('*Williams*').

² See Annotated Submissions of the Attorney-General for Queensland, para 36, fn 37.

³ (2012) 248 CLR 156 at [4], [83] (French CJ), [139]-[154] (Gummow and Bell JJ), [535]-[544] (Crennan J).

requires such a limitation on executive power and, accordingly, no such limitation should be implied.⁴

8. These submissions proceed from the wrong premise. The question is whether the executive power in s 61 of the Constitution enables the Commonwealth to contract or spend on virtually any subject matter without statutory authority. That question must be answered primarily by reference to the text and structure of the Constitution, particularly the distribution of legislative powers between the Commonwealth and the States.⁵ That is because the Constitution did not merely adopt constitutional arrangements in the United Kingdom or any other nation; it created a new polity with features that were taken from different constitutional traditions.⁶
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9. It follows that the correct inquiry does not begin by asking whether the Executive in the United Kingdom, which has a unitary constitution, has a power to contract or spend without statutory authority and then determining if there is anything in the Commonwealth Constitution that would require a different answer. The correct starting point is to ask whether anything in the text and structure of the Constitution expressly provides or necessarily implies that the Commonwealth Executive has power to contract and spend without statutory authority regardless of subject matter.⁷ The answer is 'no'.
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10. First, an executive power to contract or spend without statutory authority and without limitation as to subject matter would be inconsistent with the federal nature of the Constitution. The Commonwealth is a polity of limited and defined powers,⁸ and the Commonwealth executive does not have a legal personality distinct from the legislative branch.⁹ These matters suggest that the executive power to contract and spend should not be interpreted as if it were practically unlimited as to subject matter.¹⁰
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11. The Commonwealth defendants' contention of the extent of their executive power is irreconcilable with the federal structure. On their reasoning, the Parliament cannot ordinarily legislate on activities that are outside its heads of legislative power. Yet the executive can contract and spend on such activities as much as it wishes (subject to an appropriation). Furthermore, once the executive contracts or spends in such an area, the Parliament can rely on the power in s 51(xxxix) of the Constitution to ensure that the

⁴ Commonwealth defendants' submissions, paras 120-137, 145. The Commonwealth defendants do not treat the distribution of powers between the Commonwealth and the States as one of the seven limitations on executive power identifiable from the Australian Constitutional structure.

⁵ *Victoria v Commonwealth* (1975) 134 CLR 338 ('AAP Case') at 396-397 (Mason J).

⁶ *Williams* (2012) 248 CLR 156 at [56] (French CJ).

⁷ *Commonwealth and Central Wool Committee v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 ('Wool Tops Case') at 453 (Higgins J). Compare *Re Ditfort; Ex parte Deputy Commissioner of Taxation* (1988) 19 FCR 347 at 369 (Gummow J); *Ruddock v Vadarlis* (2001) 110 FCR 491 at [179] (French J, as his Honour then was) (observing that one looks not at the content of the prerogative in Britain, but rather to s 61 of the Constitution).

⁸ *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 267-268; *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at [323] (Hayne and Kiefel JJ).

⁹ *Williams* (2012) 248 CLR 156 at [154] (Gummow and Bell JJ).

¹⁰ *Williams* (2012) 248 CLR 156 at [251] (Hayne J).

Commonwealth controls the terms and conditions on which money would be provided to recipients by the Commonwealth and indeed controls the application of the money.¹¹ Such conclusions mean that the executive power in effect expands the scope of Commonwealth legislative power into areas that would otherwise be left to the States. That outcome is inconsistent with the conception of the Commonwealth as a government of defined and limited powers.¹²

10 12. Secondly, there is nothing in s 61 or any other provision in the Constitution that expressly provides that the executive power of the Commonwealth extends to a power to contract and spend without statutory authority regardless of subject matter.

13. Thirdly, nothing in the Constitution necessarily implies that the Commonwealth's executive power extends so far. The content of the executive power in s 61 depends on the responsibilities given to the Commonwealth under the Constitution. As Mason J explained in the *Victoria v Commonwealth and Hayden* ('the AAP Case'):¹³

20 Although the ambit of the power is not otherwise defined by Ch. II it is evident that in scope it is not unlimited and that its content does not reach beyond the area of responsibilities allocated to the Commonwealth by the Constitution, *responsibilities which are ascertainable from the distribution of powers, more particularly the distribution of legislative powers, effected by the Constitution itself and the character and status of the Commonwealth as a national government*. The provisions of s.61 taken in conjunction with the federal character of the Constitution and the distribution of powers between the Commonwealth and the States make any other conclusion unacceptable.

30 14. The responsibilities of the Commonwealth under the Constitution, however, do not imply the existence of an executive power to contract and spend without statutory authority regardless of subject matter. By contrast, they do imply that the Executive can contract without statutory authority for the administration of government departments which are established under s 64¹⁴ or which were transferred to the Commonwealth from the States under s 69.¹⁵ Any other view would mean that the Executive, at the establishment of the Constitution, would have been incapable of contracting for goods and property needed to establish itself and ensure that it could operate.¹⁶ No corresponding necessity supports the broad view of executive power.

¹¹ *Pape* (2009) 238 CLR 1 at [342] (Hayne and Kiefel JJ).

¹² Compare *Williams* (2012) 248 CLR 156 at [37] (French CJ), [581] (Kiefel J).

¹³ (1975) 134 CLR 338 at 396-397 (emphasis added).

¹⁴ *Wool Tops Case* (1922) 31 CLR 421 at 432 (Knox CJ and Gavan Duffy J); *Williams* (2012) 248 CLR 156 at [34] (French CJ).

¹⁵ The Governor-General's powers and functions under s 70 of the Constitution would also support such an implication.

¹⁶ As Heydon J pointed out in *Williams* (2012) 248 CLR 156 at [386], the Federal Parliament did not pass any laws until six months after the establishment of the Commonwealth.

15. Fourthly, a related consequence of the Commonwealth defendants' broad view of the spending power would be to undermine the role of s 96 of the Constitution. That provision enables the Commonwealth Parliament to provide grants of financial assistance to States in areas that would otherwise be outside of the Commonwealth's legislative powers.¹⁷ Those grants, moreover, are not coercive; no State can be required to accept a grant.¹⁸ The lack of coercion is the reason that the *Melbourne Corporation* principle has thus far not been applied to s 96.¹⁹ In the *AAP Case*, Mason J observed that s 96 confirmed that the executive power is 'not unlimited and that there is a very large area of activity which lies outside the executive power of the Commonwealth but which may become the subject of conditions attached to grants under s 96'.²⁰
16. If the Commonwealth were correct, however, s 96 of the Constitution would be otiose.²¹ It would have no operation because the executive power would already extend to the spending of money on the States and, indeed, essentially any area that the Commonwealth wished. Furthermore, s 51(xxxix) and s 61 would enable the Commonwealth to make coercive laws requiring the States and others to obey the terms and conditions imposed on spending by the Commonwealth.²² Such laws would raise the application of the *Melbourne Corporation* principle in a way that s 96 hitherto has not.²³ Section 96 therefore indicates that the Commonwealth defendants' view of executive power is in error.
17. The Commonwealth defendants claim that s 96 cannot limit the executive power to spend or contract because its operation may be terminated by Parliament at any time after 10 years following the establishment of the Commonwealth. Parliament has not, however, terminated s 96's operation, so it must be taken into account when determining the scope of executive power. The further claim that the only function of s 96 was to put beyond doubt the Commonwealth's capacity to make legally enforceable conditions does not reconcile with the fact that Parliament may terminate the operation of s 96²⁴ and is not clearly supported by the Convention Debates.²⁵

¹⁷ *AAP Case* (1975) 134 CLR 338 at 357 (Barwick CJ); *Williams* (2012) 248 CLR 156 at [148] (Gummow and Bell JJ).

¹⁸ *Victoria v Commonwealth* (1957) 99 CLR 575 ('*Second Uniform Tax Case*') at 609-610 (Dixon CJ).

¹⁹ *Second Uniform Tax Case* (1957) 99 CLR 575 at 609-610 (Dixon CJ); *Williams* (2012) 248 CLR 156 at [246] (Hayne J), [501] (Crennan J).

²⁰ *AAP Case* (1975) 134 CLR 388 at 398 (Mason J).

²¹ *Pape* (2009) 238 CLR 1 at [569] (Heydon J); *Williams* (2012) 248 CLR 156 at [247] (Hayne J), [593] (Kiefel J).

²² *Williams* (2012) 248 CLR 156 at [248] (Hayne J).

²³ *Second Uniform Tax Case* (1957) 99 CLR 575 at 609-610 (Dixon CJ); *Williams* (2012) 248 CLR 156 at [246] (Hayne J), [501] (Crennan J).

²⁴ If, as Mason J suggested in the *AAP Case* (1975) 134 CLR 338 at 395, the only purpose of s 96 was to put beyond doubt the Commonwealth's ability to include legally enforceable conditions on grants, the ability to terminate the operation of s 96 after ten years would be difficult to explain.

²⁵ *Official Records of the Debates of the Australasian Federal Convention*, Melbourne, 17 February 1898, pp 1107-1108.

18. Fifthly, the Commonwealth's broad view of its executive power would also distort the relationship between the Executive and the Parliament.²⁶ It is true, as the Commonwealth claims, that Parliament could pre-emptively regulate the circumstances in which the Executive may contract and spend and may initiate legislation on any spending program.²⁷ It is also true that the Parliament may refuse to appropriate money for spending. But given that the Executive controls the lower House of Parliament, pre-emptive regulation of the executive power to spend is likely to be rare. Absent such pre-regulation, moreover, there is a real likelihood that Parliament may not even know the nature of the spending programs that the Executive formulates until after public money has been committed by contract.²⁸ Consequently, the role of the Parliament in such a case would be reduced to repudiating the contract or appropriating the funds. Such a limited function reflects weak parliamentary control over the Executive.²⁹ It is, however, the outcome of accepting the existence of an executive power to contract or spend without statutory authority and without limitation as to subject matter.
19. On these bases alone, the Commonwealth defendants' broad submission about executive power should be rejected.
20. **(b) No basis for Commonwealth's alternative formulation of executive power to spend or contract**
20. The Commonwealth submits, as an alternative argument, that the executive power extends to anything that is 'reasonably capable of being seen to be of national benefit or concern'.³⁰ It claims that such a formulation is the common genus underlying the validity of executive spending programs without statutory authority.³¹
21. These submissions should be rejected. The Commonwealth's formulation would greatly expand the category of activities in which the Commonwealth may engage because of its character and existence as a national government. Yet the need for such a category to be confined is well recognised. In the *AAP Case*, for example, Mason J accepted that the executive power extended to enterprises and activities 'peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the

²⁶ *Williams* (2012) 248 CLR 156 at [136] (Gummow and Bell JJ).

²⁷ Commonwealth defendants' submissions, para 139.

²⁸ It is well established that permissible purposes for appropriations can be very general and diffuse: *Pape* (2009) 238 CLR 1 at [296] (Hayne and Kiefel JJ). Indeed, expenditures in an Appropriation Act do not have to be tied to outcomes specified: *Combet v Commonwealth* (2005) 224 CLR 494. These facts would only exacerbate the difficulties with trying to control executive spending.

²⁹ *Williams* (2012) 248 CLR 156 at [136] (Gummow and Bell JJ). Compare the *Wool Tops Case* (1922) 31 CLR 421 at 450 (Isaacs J).

³⁰ Commonwealth defendants' submissions, para 152.

³¹ Commonwealth defendants' submissions, para 153.

nation'.³² That formulation is more confined to that which the Commonwealth has advanced. Nonetheless, his Honour added:³³

10 It would be inconsistent with the broad division of responsibilities between the Commonwealth and the States achieved by the distribution of legislative powers to concede to this aspect of the executive power a wide operation effecting a radical transformation in what has hitherto been thought to be the Commonwealth's area of responsibility under the Constitution, thereby enabling the Commonwealth to carry out within Australia programmes standing outside the acknowledged heads of legislative power merely because these programmes can be conveniently formulated and administered by the national government.

22. Other members of the Court have referred to this passage with approval or expressed sentiments to the same effect.³⁴

23. There are few topics that could not be 'reasonably capable of being seen as of national benefit or concern' if (as the Commonwealth defendants submit³⁵) the enumerated heads of power are regarded as informing, but not limiting, the scope of the executive power. Thus, although the Court has held that the Commonwealth has no power over the 'national economy',³⁶ the Commonwealth's formulation would make such a conclusion hard to understand. Similarly, if the Commonwealth could fund the National School Chaplaincy and Student Welfare Program on the basis that, among other things, it is a national program and 'the education of youth is capable of being regarded as the ultimate wellspring of national prosperity and success',³⁷ it would be difficult to see why the Commonwealth could not also legislate to fund any program that might be thought to affect economic competitiveness or, indeed, national prosperity. Such conclusions are impossible to reconcile with the federal structure and earlier authority.³⁸

30 **(c) No necessary effect on State executive power**

24. The Commonwealth submits that any requirement for statutory authority at the Commonwealth level would flow through to the State level unless an asymmetrical conception of executive power throughout the Federation were to be adopted.³⁹

³² *AAP Case* (1975) 134 CLR 338 at 397.

³³ (1975) 134 CLR 338 at 398. There are difficulties associated with any implication based on the character of the Commonwealth as a nation: see *Pape* (2009) 238 CLR 1 at [519], [542]-[544] (Heydon J). Those difficulties require that any such implication must be confined if it is to be employed at all.

³⁴ *AAP Case* (1975) 134 CLR 338 at 362 (Barwick CJ); *Pape* (2009) 238 CLR 1 at [127] (French CJ), [357] (Hayne and Kiefel J), [519] (Heydon J).

³⁵ Commonwealth defendants' submissions, paras 148-149.

³⁶ *AAP Case* (1975) 134 CLR 338 at 362 (Barwick CJ); *Pape* (2009) 238 CLR 1 at [127] (French CJ), [362]-[364] (Hayne and Kiefel JJ), [509], [522], [549] (Heydon J).

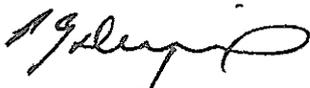
³⁷ Commonwealth defendants' submissions, para 154.

³⁸ See *Williams* (2012) 248 CLR 156 at [83] (French CJ), [146] (Gummow and Bell JJ), [240] (Hayne J), [498]-[507] (Crennan J), [594] (Kiefel J) (rejecting the claim that the 'nationhood' aspect of the executive power authorised the National School Chaplaincy Programme).

³⁹ Commonwealth defendants' submissions, para 161.

25. The States are not, however, in the same position as the Commonwealth. The federal considerations that necessarily limit the Commonwealth's executive power do not apply to the States. Section s 106 of the Constitution preserved the constitutions of the Australian colonies at the establishment of the Commonwealth. Those constitutions were not a hybrid of the American, Canadian and British constitutions; they were modelled after the unitary constitution of the United Kingdom and, subject to particular disabilities imposed by Imperial law, they could be amended as colonial legislatures thought fit.⁴⁰ The situation today is similar. Unlike the Commonwealth, which is limited to specific heads of legislative power, the States have legislative powers to make laws for the peace, order and good government except insofar as the Constitution or the *Australia Act 1986* (Cth) otherwise provide.⁴¹ By s 7(2) of the *Australia Act 1986* (Cth), all powers and functions of Her Majesty in respect of a State are exercisable only by the Governor of the State. It follows that the States are closer to the unitary constitution of the United Kingdom than the Commonwealth. In *Williams*, French CJ recognised this when he described the decision in *Bardolph* as occurring in a setting 'analogous to that of a unitary constitution'.⁴²
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26. Accordingly, there is no basis for assuming that any limitations on the Commonwealth Executive would necessarily flow through to the States.⁴³
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Dated: 17 April 2014



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⁴⁰ *McCawley v R* [1920] AC 691 at 714.

⁴¹ *Australia Act 1986* (Cth), s 2(2).

⁴² (2012) 248 CLR 156 at [79].

⁴³ In any event, it is doubtful that any such limitations would be consequential. At least one State has enacted legislation to overcome any limitations on its ability to spend and contract. The *Constitution of Queensland 2001* (Qld) provides that the State Executive has all the powers of an individual: s 51. It also provides that the State may engage in 'commercial activities', meaning commercial activities that are not the ordinary activities of government: ss 52-53.