IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S154 of 2013

BETWEEN: **RONALD WILLIAMS**
Plaintiff

AND: **COMMONWEALTH OF AUSTRALIA**
First Defendant

AND: **MINISTER FOR EDUCATION**
Second Defendant

AND: **SCRIPTURE UNION QUEENSLAND**
Third Defendant

ANNOTATED SUBMISSIONS ON BEHALF OF THE ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND (INTERVENING)

I. CERTIFICATION

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

II. BASIS OF INTERVENTION

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

III. WHY LEAVE TO INTERVENE SHOULD BE GRANTED

3. Not applicable.

IV. APPLICABLE LEGISLATION

4. The applicable legislation is identified in the plaintiff's submissions.

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Filed on behalf of: Attorney-General for the State of Queensland

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V. ARGUMENT

(a) Summary

5. The Attorney-General for the State of Queensland adopts the submissions of the plaintiff and the Attorneys-General for New South Wales, Victoria and South Australia[1] regarding the effect of *Appropriation Act (No.1) 2011-2012* (Cth) and later Appropriation Acts. For the reasons outlined in those submissions, those Acts did not provide any authority for entry into the funding agreement with Scripture Union Queensland ('SUQ') dated 21 December 2011 or the making of subsequent variations of that agreement.

6. The Attorney-General further submits that:

   (a) s 32B of the *Financial Management and Accountability Act 1997* (Cth) ('the FMA Act') validly authorises the making, variation and administration of arrangements if those actions fall within one or more heads of Commonwealth legislative power; but

   (b) s 32B, regulation 16 and item 407.013 of Part 4 of Schedule 1AA to the Financial Management Regulations ('the FMA Regulations') cannot be characterised as laws with respect to s 51(xx), 51(xxiiiA) or s 61 and 51(xxxix); and

   (c) the questions in the special case should be answered accordingly.

(b) Section 32B of the FMA is not wholly invalid

7. In simple terms, s 32B(1) of the FMA Act provides that if, apart from the subsection, the Commonwealth does not have the power to make, vary or administer arrangements or grants that are specified in the regulations, included in a specified class of arrangements or grants, or are for the purposes of a specified program, the Commonwealth has power to make, vary or administer the arrangement or grant.

8. The plaintiff submits that s 32B of the FMA Act is wholly invalid because it is not a law or it amounts to an impermissible delegation of Commonwealth legislative power.[2] In this connection, he submits that s 32B cannot be read down pursuant to s 15A of the *Acts Interpretation Act 1901* (Cth) ('the AIA') because there are different ways of construing it so as to bring it within power.[3]

9. New South Wales, Tasmania, Victoria and Western Australia advance similar arguments. All claim that because the scope of the power delegated to the Commonwealth is too wide or uncertain, it cannot be characterised as a law

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1 For convenience, the submissions will refer to the various Attorney-Generals' submissions by reference to their State.

2 Plaintiff's submissions, paras 37-43.

3 Plaintiff's submissions, paras 43-53.

with respect to any particular head of power.[4] New South Wales and Victoria also claim that there is no criterion in the terms or subject matter of the legislation that would permit s 32B to be read down.[5]

10. These submissions should be rejected.

11. First, although the literal words of s 32B of the FMA Act might suggest that it purports to apply to arrangements and grants that are clearly beyond the scope of Commonwealth legislative power to make, vary or administer, there is little difficulty in reading the provision down. It is well established that, under s 15 of the AIA, not only the terms of a law but 'the nature of the subject matter' can be used to read down a law that would otherwise be beyond power.[6] The subject matter of s 32B of the FMA Act concerns the making, variation and administration of arrangements and grants where those actions would otherwise be beyond Commonwealth power. So much is clear from the terms of s 32B(1)(a) itself. That being so, s 32B should be construed as authorising the making of regulations specifying arrangements and programs only where the making, variation or administration is authorised by one or more heads of Commonwealth legislative power. To do so does not require the Court to perform a task that is legislative rather than judicial.

12. *R v Hughes* ('*Hughes*')[7] supports these conclusions. The question in that case was whether the Commonwealth Director of Public Prosecutions could validly prosecute the accused for offences under the *Corporations Law* (WA). The answer turned ultimately on the construction of s 47(1) of the *Corporations Act 1989* (Cth), which provided:

> Regulations under section 73 may provide that prescribed authorities and officers of the Commonwealth have prescribed functions and powers that are expressed to be conferred on them by or under corresponding laws.

13. A regulation made under s 73 had purported to confer on the Commonwealth DPP the function of instituting and conducting the prosecution of persons under corresponding laws such as the *Corporations Act* (WA).[8] This brought into play the *Director of Public Prosecutions Act 1983* (Cth), about which Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ observed:[9]

> The DPP Act in a sense is supported by as many heads of power as from time to time have been exercised by the Parliament to create offences against Commonwealth laws. State law may create offences in

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4 New South Wales's submissions, paras 35-40; Tasmania's submissions, paras 14-38; Victoria's submissions, paras 31-34; Western Australia's submissions, paras 26-38.

5 New South Wales's submissions, paras 18-25; Victoria's submissions, paras 32-34.

6 *Pidoto v Victoria* (1943) 68 CLR 87 at 110-111 (Latham CJ).

7 (2000) 202 CLR 535.

8 This was r 3(1)(d) of the Corporations (Commonwealth Authorities and Officers) Regulations.

9 (2000) 202 CLR 535 at 555 [40].

> fields where it would have been competent for the Parliament of the Commonwealth to enter directly by its own offence-creating legislation. The power conferred by s 51(xx) with respect to foreign corporations and trading or financial corporations is an obvious example. In such a situation, a federal law which specifies that certain Commonwealth officers have powers and functions expressed to be conferred by the State law with respect to the prosecution of State offences is a law with respect to that head of federal legislative power.

14. Their Honours added that it was unnecessary to consider whether the offence provision could have been supported as a law under s 51(xx). That was because the particular offences with which Mr Hughes had been charged related to the making of investments in the United States; consequently, the Commonwealth Parliament could have enacted the offences under the trade and commerce power and the external affairs power.[10] Although the terms of the relevant offence provision in the *Corporations Law* (WA)[11] were not restricted to matters within the trade and commerce power and the external affairs power, s 15A of the AIA could be applied to read down a Commonwealth provision expressed in general terms, including a power to prosecute, so as to apply only 'where the particular prosecution is supported by a head of power'.[12] On this basis, Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ construed s 47(1) as being limited to functions and powers in respect of matters within the legislative power of the Commonwealth.

15. *Hughes* demonstrates that, for the purposes of applying s 15A of the AIA, a broad meaning is to be given to the concept of a provision's 'subject matter'.[13] The Court in effect construed s 47(1) of the *Corporations Act 1989* (Cth) as if it were intended to rely upon every available head of legislative power. Given the subject matter of s 32B of the FMA Act apparent from its terms, *Hughes* suggests that the provision can be read down in the manner suggested in paragraph 11 above. To the extent that the plaintiff and other interveners contend otherwise, their submissions should not be accepted.

16. Secondly, contrary to the submissions of New South Wales[14] and Western Australia,[15] Commonwealth laws may be valid notwithstanding that their connection with any particular head of power depends on a further step such as the making of regulations. *Hughes* again illustrates the point: s 47(1) of the *Corporations Act 1989* (Cth) allowed for prescribed authorities and officers of the Commonwealth to have prescribed functions and powers under corresponding laws. The heads of power, if any, supporting the conferral of the particular functions could only be determined after regulations purporting to prescribe

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10 (2000) 202 CLR 535 at 556 [42].
11 Section 1064.
12 (2000) 202 CLR 535 at 557 [43].
13 Any other view would be difficult to reconcile with the fact that s 47(1) of the *Corporations Act 1989* (Cth) was not limited to the conferral of functions and powers on the Commonwealth DPP.
14 New South Wales's submissions, para 38.
15 Western Australia's submissions, paras 32-38.

functions were made. Yet all members of the Court held that s 47 was valid. In the same way, the fact that s 32B requires specification of arrangements and grants does not deprive it of validity.

17. Thirdly, s 32B of the FMA Act, construed in the manner outlined in paragraph 11 above, does not amount to an impermissible delegation of legislative power.[16] The concept of an impermissible delegation finds support in *obiter dicta* in *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* ('*Dignan*') and some later cases.[17] In *Dignan*, Dixon J remarked:[18]

> There may be such a width or such an uncertainty of the subject matter to be handed over that the enactment attempting it is not a law with respect to any particular head or heads of legislative power.

18. In the same case, Evatt J remarked that the 'greater the extent of law-making power conferred, the less likely is it that the enactment [would] be a law with respect to any subject matter assigned to the Commonwealth Parliament'.[19] His Honour then pointed out that Parliament was 'not competent to "abdicate" its powers of legislation'.[20]

19. None of these *obiter dicta*, however, have invalidated any regulation-making power, and it is respectfully submitted that they should not apply here. Justice Dixon in *Dignan* did no more than indicate that in some unidentified circumstances uncertainty might prevent the enactment from being characterised as a law with respect to any particular head of power. His Honour did not, however, explain how one was to identify those circumstances or why a law that would otherwise be within the boundaries of federal legislative power would be regarded as not being with respect to a particular head of power.

20. In any event, here there is no relevant uncertainty. The FMA Regulations allow the executive to specify arrangements or grants for the purposes of s 32B of the FMA Act. If the specification allows the court to determine that the making, variation or administration of a particular arrangement is within power, then the regulation is authorised by the regulation-making power in s 65(1)(a) of the FMA Act. If the specification does not, then the regulation is not authorised. On either view, however, s 32B of the FMA Act cannot be described as so uncertain as not to be a law with respect to any head of power at all.

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16 Contrast New South Wales's submissions, paras 38-40; Tasmania's submissions, paras 26-38.

17 *Wishart v Fraser* (1941) 64 CLR 470 at 488 (McTiernan J); *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 257 (Fullagar J).

18 (1931) 46 CLR 73 at 101.

19 (1931) 46 CLR 73 at 120.

20 (1931) 46 CLR 73 at 121.

21. The remarks of Evatt J in *Dignan* concerning abdication are even more problematic. As Mason CJ, Dawson and McHugh JJ explained in *Capital Duplicators Pty Ltd v Australian Capital Territory*:[21]

> There are very considerable difficulties in the concept of an unconstitutional abdication of power by Parliament. So long as Parliament retains the power to repeal or amend the authority which it confers upon another body to make laws with respect to a head or heads of legislative power entrusted to the Parliament, it is not easy to see how the conferral of that authority amounts to an abdication of power.

22. Members of the Court have approved that passage on several occasions.[22]

23. Since the Commonwealth Parliament retains the ability to repeal or amend s 32B of the FMA Act, the claim that the provision constitutes an impermissible delegation should therefore be rejected.

24. Finally, contrary to the claims of the plaintiff,[23] s 32B of the FMA Act is a 'law'. Where s 32B applies, it confers a new authority to make an arrangement, to administer an arrangement and to vary a grant or an arrangement under which public money may become expendable. In short, it functions as a declaration of the Commonwealth's power to carry out those activities with respect to identified arrangements, grants and programs. If, as Latham CJ suggested in *Commonwealth v Grunseit*,[24] a law includes 'a declaration as to power, right or duty', s 32B of the FMA Act should be characterised as a law and not as something else.

25. Accordingly, s 32B of the FMA Act is not wholly invalid. The critical question is whether the operation of s 32B, in relation to regulation 16 and item 407.013 of Part 4 of Sch 1AA of the FMA Regulations, authorised the making and variation of the agreement with SUQ.

(c) Purported authorisation of the SUQ Funding Agreement invalid

26. Item 407.013 of Part 4 of Sch 1AA of the FMA Regulations provides:

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21 (1992) 177 CLR 248 at 265.

22 *Gould v Brown* (1998) 193 CLR 346 at 486-487 [286] (Kirby J); *Hughes* (2000) 202 CLR 535 at 574-575 [94] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *Byrnes v The Queen* (1999) 199 CLR 1 at 10-11 [4] (Gaudron, McHugh, Gummow and Callinan JJ). See also *Permanent Trustee Australia Ltd v Commissioner of State Revenue (Vic)* (2004) 220 CLR 388 at 420-421 [77]-[78] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ).

23 Plaintiff's submissions, paras 38-41.

24 *Commonwealth v Grunseit* (1943) 67 CLR 58 at 82 (Latham CJ), approved in *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 512-513 [102] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ). See also *Plaintiff M79-2012 v Minister for Immigration and Citizenship* (2013) 87 ALJR 682 at 700 [88] (Hayne J).

407.013 National School Chaplaincy and Student Welfare Program (NSCSWP)

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

27. In determining whether item 407.013 authorised the making and variation of the agreement with SUQ, it is necessary to bear in mind that Part 4 of Sch 1AA of the FMA Regulations is intended to do no more than specify a program for the purposes of s 32B. Once that program is specified, then by s 32B(1)(b)(iii), the Commonwealth is granted power to make, vary or administer an arrangement for the purposes of the program, provided that the Commonwealth would have legislative power to carry out those activities. That follows from the construction outlined in paragraph 11 above.

28. If, however, s 32B of the FMA Act, when read with relevant item in Part 4 of Sch 1AA of the FMA Regulations, cannot be characterised as a law with respect to any head of power, then there would be no authority to make, vary or administer that program.

29. In this case, the Commonwealth relies on three distinct sources of legislative power to support the making and variation of the agreement with SUQ: s 51(xx), s 51(xxiiiA), and s 61 and s 51(xxxix).

30. None of the heads of legislative power, however, would authorise the making and variation of the agreement with SUQ.

31. First, s 51(xx) of the Constitution would not authorise the making or variation of the agreement under s 32B of the FMA Act and item 407.013 because the provisions cannot be characterised as laws with respect to constitutional corporations. It is well established that the characterisation of a law depends on the rights, powers, liabilities, duties and privileges which the law creates.[25] Item 407.013 nowhere mentions the activities, functions or relations of trading or financial corporations. For that reason alone, it is difficult to see how item 407.013, read with s 32B of the FMA Act, could be characterised as a law with respect to s 51(xx) of the Constitution.

32. In any event, the NSCSWP specified in item 407.013 is not limited to constitutional corporations. While version 6 of the Guidelines states that a Funding Recipient must be a legal entity that is incorporated under Commonwealth or State law,[26] and while Funding Recipients must meet minimum standards, including governance structures,[27] the Guidelines do not require a Funding Recipient to be a trading or financial corporation within the

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25 *Grain Pool of WA v Commonwealth* (2000) 202 CLR 479 at [16] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

26 SCB Core 147-148.

27 SCB Core 164-165.

meaning of s 51(xx). On the contrary, such Funding Recipients can be non-government schools or school community organisations such as a school governing body or Parents and Citizens' Association.[28] Whether the Commonwealth contracts with a trading corporation under the NSCSWP is therefore happenstance. That factor also makes it difficult to see how s 32B of the FMA Act and item 407.013 could be characterised as laws under s 51(xx) of the Constitution.[29]

33. Secondly, s 51(xxiiiA) of the Constitution would not authorise the making and variation of the agreement with SUQ because s 32B of the FMA Act and item 407.013 cannot be characterised as laws with respect to the provision of 'benefits to students'. As Hayne J and Kiefel J each explained in *Williams*, the word 'benefits' in the term 'benefits to students' does not mean anything that is of advantage to students.[30] The word 'benefits' in s 51(xxiiiA) instead carries the narrower meaning of 'a payment to or for an individual for provision of relief against the consequences of identified events or circumstances: sickness, unemployment, hospital treatment, pharmaceutical needs or being a student'.[31]

34. That narrower meaning is supported not only by the text of s 51(xxiiiA) but also by consideration of the results of adopting the broader view of 'benefit'. Such a view would entail that the power to make laws with respect to the provision of benefits to students would be 'radically different from the other elements of legislative power given by s 51(xxiiiA)', such as maternity allowances, widows' pensions, child endowment, and unemployment, pharmaceutical, sickness and hospital benefits.[32] More specifically, it would entail that the power to make laws with respect to the provision of 'benefits to students' would approach a general power to make laws with respect to education;[33] and it would raise the question of why the power for the provision of 'sickness and hospital benefits' did not render the power for the provision of 'medical...services' superfluous.[34] These contextual considerations support giving 'benefits' in s 51(xxiiiA) the narrower meaning in paragraph 33 above.[35]

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28 SCB Core 148.

29 If (contrary to the submissions above) the character of SUQ were thought to support the characterisation of s 32B of the FMA Act and item 407.013 as laws with respect to s 51(xx), the Attorney-General would submit that SUQ is not a trading corporation. SUQ obtains the great bulk of its funding from donations and government grants, and its objects are religious, not commercial: see SCB Core 106-107, SCB Vol. 1 68. If necessary, the Court should re-open *R v Federal Court of Australia; Ex Parte Australian National Football League* (1979) 143 CLR 190 and *State Superannuation Board (Vic) v Trade Practices Commission* (1982) 150 CLR 282, which hold that a corporation is a trading corporation if a substantial or sufficiently significant part of its activities are trading activities.

30 (2012) 248 CLR 156 at 279 [280]-[281] (Hayne J), 367 [572]-[573] (Kiefel J).

31 (2012) 248 CLR 156 at 279 [282] (Hayne J).

32 (2012) 248 CLR 156 at 279 [281] (Hayne J).

33 (2012) 248 CLR 156 at 279 [281] (Hayne J).

34 (2012) 248 CLR 156 at 280 [284] (Hayne J).

35 The historical materials do not clearly indicate that 'benefits to students' was intended to have a wider meaning. It is true that s 14 of the *Education Act 1945* (Cth), an Act that predated the insertion of s 51(xxiiiA) of the Constitution, established a Universities Commission with various functions. One was to arrange 'for the training in Universities or similar institutions, for the

35. Once it is accepted that 'benefits' has the narrower meaning indicated above, it is impossible to characterise s 32B of the FMA Act and item 407.013 as laws with respect to benefits to students. The NSCSWP goes well beyond offering a payment in relief against the consequences of being a student. Indeed, it is not even limited to students. Item 407.03 refers to the objective of the NSCSWP as assisting 'school communities to support the wellbeing of their students, including by strengthening values, providing pastoral care and enhancing engagement with the broader community'. Version 6 of the Guidelines is framed in similar terms.[36] These descriptions make it clear that the chaplaincy services are designed to offer a benefit, in the widest sense, to students, staff and other members of school communities. Accordingly, s 32B of the FMA Act and item 407.013 cannot be characterised as laws under s 51(xxiiiA) of the Constitution.

36. Thirdly, s 32B of the FMA Act and item 407.013 are not supported by s 61 and s 51(xxxix) of the Constitution. Any suggestion that they are is contrary to the decision in *Williams*, which held that the National School Chaplaincy Program was not authorised by s 61.[37]

37. It follows that the Commonwealth cannot rely upon s 32B of the FMA Act and item 407.013 to authorise the making and variation of the agreement with SUQ.

38. The questions in the special case should be answered accordingly.

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purpose of facilitating their re-establishment of persons who are discharged members of the Forces within the meaning of the *Re-establishment and Employment Act 1945*'. Another function was to 'assist other persons to obtain training in Universities and similar institutions'. These do not demonstrate, however, that anything that might be of advantage to students would have fallen within the term 'benefits to students' in s 51(xxiiiA). Nor do they demonstrate that a program such as the NSCSWP, which is designed to support the 'wellbeing' of students in a variety of ways, including by strengthening values, would be valid under s 51(xxiiiA).

36 SCB Core 145.

37 The majority rejected the broad submission that the Commonwealth's executive power necessarily extended to spending public money that had been lawfully appropriated: (2012) 248 CLR 156 at [83] (French CJ), [138]-[159] (Gummow and Bell JJ), [238]-[252] (Hayne J), [497]-[534] (Crennan J), [577]-[595] (Kiefel J). The majority also rejected any suggestion that the National School Chaplaincy Program could be supported by the peculiar responsibilities of the Commonwealth as a national government: see at [83] (French CJ), [146] (Gummow J), [240] (Hayne J), [498]-[507] (Crennan J), [594] (Kiefel J).
For the reasons outlined in the submissions of New South Wales and Victoria, in particular, leave to re-open *Williams* should be refused: see New South Wales's submissions, paras 50-55; Victoria's submissions, paras 7-8.

VII. ESTIMATE OF TIME REQUIRED FOR ORAL ARGUMENT

39. The Attorney-General estimates that 20 minutes should be sufficient to present his oral argument.

Dated: 19 March 2014

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