IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S154 of 2013

BETWEEN

RONALD WILLIAMS
Plaintiff

AND

COMMONWEALTH OF AUSTRALIA
First Defendant

MINISTER FOR EDUCATION
Second Defendant

SCRIPTURE UNION QUEENSLAND
Third Defendant

SUBMISSIONS OF THE ATTORNEY-GENERAL OF TASMANIA, INTERVENING

PART I: CERTIFICATION

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

PART II: BASIS OF INTERVENTION

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

Date of Document: 14 March 2014
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PART III: WHY LEAVE TO INTERVENE SHOULD BE GRANTED

3. Not Applicable

PART IV: APPLICABLE CONSTITUTIONAL AND LEGISLATIVE PROVISIONS

4. The applicable Constitutional and legislative provisions are identified in Part VII of the Plaintiff's Submissions.

PART V: SUBMISSIONS

The Effect of the Pleaded Appropriation Acts

5. By subparagraph 30 b of their Amended Defence [CSC 50] the First and Second Defendants ("the Commonwealth Parties") plead that the *Appropriation Act (No 1) 2011-2012* provided statutory authority for the SUQ Funding Agreement.[1]

6. By paragraph 1 of his Amended Reply [CSC 85] the Plaintiff pleads that that the Commonwealth Parties are "estopped or otherwise precluded from relying upon the matters pleaded in subparagraph 30b..."

7. It may be doubted whether an *Anshun*-type[2] estoppel can arise in litigation involving the *Constitution* or its interpretation. Such estoppels reflect the general public interest in the finality of litigation. However, it is also clearly in the public interest to know "...what in truth the Constitution provides. [so that the] area of constitutional law is pre-eminently an area where the paramount consideration is the maintenance of the Constitution itself."[3]

8. The determination of the matters pleaded in subparagraph 30b of the Amended Defence of the Commonwealth Parties is evidently intended to invite reconsideration of the correctness of

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[1] By which is presumably meant, lawful authority to enter into and incur expenditure pursuant to the SUQ Funding Agreement.

[2] *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589

[3] *Queensland v The Commonwealth* (1977) 139 CLR 585, per Barwick CJ at 593. And see too Gibbs J at 597 and Stephen J at 602-603.

fundamental aspects of the decisions of this Court in both *Pape*[4] and *Williams No. 1*.[5] Specifically, it would appear that the Commonwealth Parties contend that the *Appropriation Act (No 1) 2011-2012* provided lawful authority to the Executive Government of the Commonwealth to enter into the SUQ Funding Agreement and to spend moneys in its performance. Although the Court found it unnecessary to answer that question in *Williams No. 1* in relation to earlier Appropriation Acts,[6] it seems clear that, had it been necessary to do so, French CJ[7], Gummow & Bell JJ[8], Hayne J[9], Crennan J[10] and Kiefel J[11] would each have answered the question in the negative.

9. Even if the language of sections 7 and 8 of the *Appropriation Act (No 1) 2011-2012* could be construed as authorising the application or expenditure of the sums which it appropriates[12] such a construction faces at least two significant obstacles. The first is s 54 of the *Constitution*. The *Appropriation Act (No 1) 2011-2012* being a "law which appropriates revenue or moneys for the ordinary annual services of the Government[13] shall deal only with such appropriation." In this regard, the Attorney-General of Tasmania respectfully adopts the submissions of the Plaintiff at paragraphs [25]-[36].

10. The second obstacle is the decision in *Pape* which requires that the authority of the Executive Government to spend moneys which have been appropriated by the Parliament must be found either in the executive power or in legislation enacted under a head of power in ss 51, 52 or 122 of the *Constitution*.[14]

11. There is no reason to doubt the correctness of the decisions in *Pape* and *Williams No. 1* and therefore, no occasion to reopen either.

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[4] *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1.
[5] *Williams v The Commonwealth* (2012) 248 CLR 156.
[6] (2012) 248 CLR 156 at 375
[7] At 179 [2]; 193 [39]
[8] At 218 [90]; 230 [131]; 238 [157]
[9] At 248 [191]; 261 [222]-[224]; 267 [241 & ff]; 270 [251]; 271 [252]
[10] At 341 [478] & [480]; 354 [531]
[11] At 361-362 [558]-[559]
[12] As to which see the observations of Hayne J in *Williams No. 1* at 262 - 265 [226] - [233]
[13] See the long title to the Act itself
[14] *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 55 [111]-[112] per French CJ; at 113 [320] per Hayne and Kiefel JJ; at 211 [602] per Heydon J

12. The Attorney-General of Tasmania submits that the answer to each of Questions 1 and 4 of the Special Case should be "No".

13. If, contrary to what has been submitted, *Williams No. 1* were to be re-opened, the Attorney-General of Tasmania would adopt the submissions made by the Attorney-General of Victoria to the effect that no hypothetical law authorising the entry into the SUG Funding Agreement, or the making of payments to SUQ pursuant to that agreement, would find support in either s 51(xx) or s 51(xxiiiA) of the *Constitution*.

The Validity of s 32B of the FMA Act etc.

Delegation of Legislative Power

14. The delegation of legislative power to the Executive is an exception to the separation of powers doctrine referred to in *R v Kirby; Ex parte Boilermakers' Society of Australia* ("*Boilermakers' case*") (1956) 94 CLR 254.

15. It is well-settled that an authority of subordinate law-making may be invested in the Executive (*Roche v Kronheimer* (1921) 29 CLR 329)[15].

16. Gavan Duffy CJ and Starke J stated in *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* at 84: "[a]s Higgins J said in *Baxter v Ah Way*, "the Federal Parliament has, within its ambit, full power to frame its laws in any fashion, using any agent, any agency, any machinery that in its wisdom it thinks fit, for the peace, order, and good government" of the Commonwealth. And the decisions of this Court have been uniformly to the same effect". See also Dixon J's statement at 102 that "the Constitution does not forbid the statutory authorization of the Executive to make a law".

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[15] See also *Baxter v Ah Way* (1909) 8 CLR 626; *Welsbach Light Co of Australasia Ltd v The Commonwealth (1916) 22 CLR 268; Nott Bros &Co Ltd v Barkley* (1926) 36 CLR 20; *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73; *Crowe v Commonwealth* (1935) 54 CLR 69; *Wishart v Fraser* (1941) 64 CLR 470; *Poole v Wah Min Chan* (1947) 75 CLR 218.

17. Nevertheless, the power to delegate the legislative power of the Commonwealth is not unfettered.

Heads of Power

18. The delegation of legislative power must refer to a head of Commonwealth legislative power[16] . Thus, if the Court concludes that s 32B of the *Financial Management and Accountability Act 1997* ("the FMA Act") is not supported by any such head of power, then in order to defend the validity of s 32B, the Commonwealth Parties will need to persuade the Court that the well-established authority of *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* was incorrect.

19. As was recognised by Dixon and Evatt JJ in *Dignan*[17], all Commonwealth laws must be 'with respect to' one of the enumerated heads of legislative power. Or, as Higgins J suggested in *Baxter* v *Ah Way* (at 646), the Federal Parliament's power to frame its laws is limited by what lies properly "within its ambit".

20. With regard to s 32B, no effort has been made to ensure that the terms of the provision or indeed the FMA Act more generally, identifies any one or more of the enumerated heads of Commonwealth legislative power. (Although the FMA Act may generally be supported by s 51(xxxvi) and/or s 51(xxxix) of the Constitution[18].) That is a matter of some importance because, as was recognised by Evatt J in *Dignan*[19], a provision in a statute conferring the power to make regulations "ordinarily ... will ... retain the character of a law with respect to the subject matter dealt with in the statute."[20]

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[16] *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* at 120-1.
[17] At 101, 119, 121
[18] See Gummow, Crennan & Bell JJ in *Pape* at 77 [195] and Hayne & Kiefel JJ in *Pape* at 105 [295]
[19] At 121
[20] This passage was referred to by the majority in *NSW v The Commonwealth* ("The Work Choices Case") (2006) 229 CLR 1 at 181 [418]. In that case the Court found the regulation-making power was supported by the same heads of legislative power as supported the other provisions of the new Act.(at [418])

21. The difficulty with regard to s 32B is being able to determine the character of the FMA Act as being one which provides a legitimate source of a general power to spend and to enter contracts and agreements and to then identify a scheme contained in the Act by which the extent or limits of the regulation-making power may be determined.

22. The long title to the FMA Act indicates that it is "an Act to provide for the proper use and management of public money, public property and other Commonwealth resources, and for related purposes". That title and the scheme of the Act itself do not, it is submitted, provide a sufficient indication of the intended "ambit" of the regulation-making power against which the validity of that power and its exercise may be judged.

23. As the majority[21] said in the *Work Choices Case* [22], "[t]he extent of the power is marked out by inquiring whether any particular regulation ... can be said to have a rational connection with the regime established by the...Act". In addressing the AWU's submission[23] that there was no stipulated ambit of the regulation-making power because the legislation said no more than that "prohibited content is whatever the Executive Government says should not be contained in a workplace agreement", the majority rejected the submission for a number of stated reasons essentially related to the nature of the legislation in that case[24]. However, the majority went on to say that the submission would nevertheless fail because the ambit of the regulation-making power would be identical with the ambit of the prescription contemplated - that is that the regulations prescribe all matters "necessary or convenient to be prescribed for carrying out or giving effect to this Act"[25]. Reference was then made[26] to *Morton v Union Steamship Co of New Zealand Ltd* (1951) 83 CLR 402 at 410 where Dixon, McTiernan, Williams, Webb, Fullagar and Kitto JJ said "the ambit of the power must be ascertained by the character of the statute and the nature of the provisions it contains".

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[21] Gleeson CJ, Gummow, Hayne, Heydon & Crennan JJ
[22] Work Choices at 181 [416]
[23] At 178 [407]
[24] At 178-180 [408]-[414]
[25] At 180 [415]
[26] At 180 [415]

24. Reference may also be made to Evatt J's judgment in *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* where His Honour stated that "a regulation will not bind as a Commonwealth law unless both it and the statute conferring power to regulate are laws with respect to a subject matter enumerated in s 51 or 52. As a rule, no doubt, the regulation will answer the required description, if the statute conferring power to regulate is valid, and the regulation is not inconsistent with such statute"[27].

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25. The Attorney-General of Tasmania therefore submits that s 32B of the FMA is not a law with respect to any enumerated head of power and, accordingly, both it and the provisions of the *Financial Management and Accountability Regulations 1997* ("the Regulations") which rely upon it are invalid.

Too wide and uncertain

20 26. Assuming that, contrary to what has been submitted, a head of legislative power is identified to support the regulation-making power, the Attorney-General of Tasmania joins with the Plaintiff in submitting that the power is expressed in terms which are so broad and uncertain so as to give rise to invalidity.

27. According to *Dignan*, a law will be invalid in so far as it seeks to confer a power which is too wide or uncertain. In that case, Dixon J suggested that a qualification to the view that Parliament may delegate legislative power to the Executive is that there may be
30 such a width or uncertainty of the subject matter confided to the Executive that the enactment would not be a law with respect to any of the Constitutional heads of legislative power[28]. His Honour said (at 101):

> "I therefore retain the opinion which I expressed in the earlier case that *Roche v Kronheimer* did decide that a statute conferring upon the Executive a power to legislate upon some matter contained within one of the subjects of the legislative power of the Parliament is a law with respect to that subject, and that the
40 distribution of legislative, executive and judicial powers in the

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[27] At 121

[28] at 101; see also Sir Harry Gibbs "The Separation of Powers – A Comparison" (1987) 17 Fed. Law Review 151 at 155.

> Constitution does not operate to restrain the power of the Parliament to make such a law. This does not mean that a law confiding authority to the Executive will be valid, however extensive or vague the subject matter may be, if it does not fall outside the boundaries of Federal power. 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. Nor does it mean that the distribution of powers can supply no considerations of weight affecting the validity of an Act creating a legislative authority".

28. Reference was made to this passage in *Wishart v Fraser*[29] by McTiernan J who then went on to say that: "the uncertainty or width of the subject matter with respect to which the Executive is given power to make regulations may prevent the law attempting to confer such power being a law with respect to any subject within the legislative powers of Parliament"[30]. (The provision under consideration in that case did not fail for vagueness because it clearly defined the field within which the Parliament empowered the executive to make regulations - namely defence.)

29. Section 32B of the FMA is so broad in its terms that it cannot, it is submitted, be said to be a law with respect to any head or heads of legislative power.

30. In particular, by enacting s 32B, Parliament seeks to confer power upon the Executive to do something which the Parliament has failed to properly define (despite the fact that Parliament itself has set the terms of the regulations by amendment).

31. Furthermore, in enacting s 32B, Parliament has attempted to impermissibly confer power upon the Executive to define the scope of the law. The scope of the law should be apparent from the terms of the Act itself.

32. Thus, in considering whether a particular specified arrangement or grant is a competent exercise of the regulation-making power of the Governor-General, it is apparent that there is no test or standard to apply.

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[29] (1941) 64 CLR 470

[30] At 488.

33. The lack of guidance is such that the Governor-General (in effect the Executive) is faced with the difficulty of not knowing whether or not Parliament has provided the authority to specify a particular grant or arrangement. Apparently, the discretion of the Executive in this regard is intended to be set at large and not anchored to any particular head of Commonwealth legislative power.

34. This is not a case such as *Wishart v Fraser* where the delegation of powers to the Executive, although expressed in broad and general terms, was nevertheless referable to an identifiable head of power (in that case, the defence power). Section 32B does not in any way appear to be linked to a particular head or heads of power.

35. The content of the power is, in essence, left to the Executive to define through the making of regulations. The exercise of the power therefore (and, impermissibly, it is submitted) defines the power.

36. In addition, the actual terms of the Regulations (and, in particular, the schedules) are so lacking in fundamental detail that it is difficult to know whether proper legislative sanction can be given to the exercise of the delegated legislative power. That is, if the Houses of Parliament are unable to ascertain the nature of a particular program and are unable to determine, on the face of the regulations, whether or not the program is a matter which falls within the legislative competence of the Parliament, there is a significant difficulty in the notion that the exercise of the delegated legislative power can be properly scrutinised and supervised by Parliament.

37. For the reason advanced in the Plaintiff's Submissions at paragraphs 64 -66, s 32B, it is submitted that s 32B of the FMA cannot be "read down" so as to be construed as operating "...only with respect to matters falling within the ambit of the legislative power of the Commonwealth..." (See amended Defence of the Commonwealth Parties, paragraph 57b. [**CSC 56**])

38. The Attorney-General of Tasmania submits that the answer to Question 2 of the Special Case should be "Yes" and that it is therefore unnecessary to answer Question 3.

Relationship Between Ch I & Ch II

39. The width and uncertainty of the power which s 32B of the FMA Act purports to delegate to the Executive would (if it were valid) not only distort the relationship between the legislative and executive branches of the Commonwealth but would also have the capacity to disrupt the distribution of legislative power between the Commonwealth and the States.

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40. First, as has been noted, if it were open to the Parliament to validly delegate authority to spend public moneys in terms which are so vague or uncertain as to preclude identification of the purpose of the expenditure, the capacity of the Parliament, and more especially, of the Senate, to effectively scrutinise such expenditure, would be displaced.[31] Moreover, to adapt what was said by Hayne and Keifel JJ in *Pape*[32], the language of s 32B and of the Regulations does not readily yield criteria which can be applied as a measure of constitutional validity.

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41. Secondly, s 32B would, if valid, enable the Executive to by-pass s 96 of the *Constitution* and thus the Parliament thereby permitting the intrusion by the Commonwealth Executive into matters assigned by the Constitution to the States.

The Role of the Senate

42. Section 53 of the *Constitution* expressly declares that except as
30 provided in that section, the Senate shall have equal power with the House of Representatives in respect of all proposed laws. But the exceptions which are to be found in s 53 were not uncontroversial.

43. At the 1891 *Constitutional Convention* Sir Henry Parkes moved a number of resolutions intended to "...establish and secure an enduring foundation for the structure of a federal government...".[33] Among them was a resolution that,

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[31] This is not to overlook the fact that the Senate assented to s 32B

[32] At 111 [316]

[33] Official Report of the National Australasian Convention Debates, Sydney, 1891, p23

> "Subject to [certain stated] and other necessary provisions, this Convention approves of the framing of a federal Constitution, which shall establish,-
> (1.) A parliament, to consist of a senate and a house of representatives, the former consisting of an equal number of members from each province, to be elected by a system which shall provide for the retirement of one third of the members every years, (*sic*) so securing to the body itself a perpetual existence combined with definite responsibility to the electors, the latter to be elected by districts formed on a population basis, **and to possess the sole power of originating and amending all bills appropriating revenue or imposing taxation.** ". (emphasis added)

44. For Sir Samuel Griffith these proposed limitations on the powers of the Senate were "quite inconsistent with the independent existence of the senate as representing the separate states."[34] Towards the end of a remarkably percipient address in which he referred to the form of the proposed constitution and "how it will affect the relationship of the executive to the parliament-that everything has to receive the assent of the majority of the people and the assent of the majority of the states...", Sir Samuel said;

> "I take it that the least you can give to the house representing the states as states, is an absolute power of veto upon anything that the majority of the states think ought not to be adopted."[35]

45. In the event, Sir Samuel Griffith's view did not win the day but what is clear is that the delegates to the conventions, understood that while the principles of "responsible government" required that the House of Representatives - in which Executive Governments are formed - must or should have control over the initiation of "money bills", the principles of a "truly federal government"[36] required that in *every* other respect the Senate should have equal legislative power with the House of Representatives.

46. As was demonstrated in the reasons of those justices who comprised the majority in *Williams No. 1*, a Commonwealth Executive with power to deal with matters of Commonwealth legislative competence [*a fortiori*, matters beyond Commonwealth

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[34] Official Report of the National Australasian Convention Debates, Sydney, 1891, p 32
[35] loc. cit.
[36] *Studies in Australian Constitutional Law*, Inglis Clark, 1901 at 12

legislative competence] is in tension with the federal conception which informed the function of the Senate as a necessary organ of Commonwealth legislative power"[37]. It would "undermine the basal assumption of legislative predominance inherited from the United Kingdom and so would distort the relationship between Ch I and Ch II of the Constitution"[38] and would disrupt "the equipoise between executive power under s 61 [of the *Constitution*] and the powers of the Parliament."[39]

47. Put more plainly, if the Executive Government of the Commonwealth can, in the exercise of the executive power of the Commonwealth, do anything about which the Parliament of the Commonwealth might make (but has not made) a valid law, the role of the Parliament – and more especially, the role of the Senate is diminished.

48. And if the Executive Government of the Commonwealth can, in the exercise of the executive power of the Commonwealth do things which are beyond even the scope of the legislative power of the Parliament of the Commonwealth, the distribution of legislative power between the Commonwealth and the States which is effected by the *Constitution* could become largely irrelevant.[40]

Section 96 – The "Grants Power"

49. In *Williams No. 1*, Gummow and Bell JJ referred[41] to the following passage from the reasons for decision of Barwick CJ in *Victoria v The Commonwealth & Hayden* (The AAP case) "respect[ing] the significance of s 96 in the federal structure",

> "Section 96, included in the Constitution to enable moneys expended in grants to States to be debited to the Consolidated Revenue Fund as money appropriated for a purpose of the Commonwealth, as interpreted by this Court, has enabled the Commonwealth to intrude in point of policy and perhaps of administration into areas outside Commonwealth legislative

[37] *Williams v The Commonwealth* (2012) 248 CLR 156 per French CJ at 205 [60].
[38] At 232- 233 [134]-[137] per Gummow & Bell JJ
[39] At 346 [496] per Crennan J
[40] See the passage from the judgment of Barwick CJ in *Victoria v The Commonwealth & Hayden* (1975) 134 CLR 338 at 357-358 set out below
[41] *Williams No. 1* at 235 [148]

competence. No doubt, in a real sense, the basis on which grants to the claimant States have been quantified by the Grants Commission has further expanded the effect of the use of s. 96. But a grant under s. 96 with its attached conditions cannot be forced upon a State: the State must accept it with its conditions. Thus, although in point of economic fact, a State on occasions may have little option, these intrusions by the Commonwealth into areas of State power which action under s.96 enables, wear consensual aspect. Commonwealth expenditure of the Consolidated Revenue Fund to service a purpose which it is not constitutionally lawful for the Commonwealth to pursue, is quite a different matter. If allowed, it not only alters what may be called the financial federalism of the Constitution but it permits the Commonwealth effectively to interfere, without the consent of the State, in matters covered by the residue of governmental power assigned by the Constitution to the State."

50. Earlier on in their joint reasons for decision Gummow and Bell JJ made reference to "considerations of federalism stimulated by the by-passing by the Executive of s 96".[42]

51. It is apparent that despite s 96 being something of a "constitutional misfit"[43] their Honours viewed the section, "as interpreted by this Court", permitting the Commonwealth to provide financial assistance to the States *but* subject to the approval of the Parliament *and* the agreement of the State or States concerned, as giving rise to a negative implication which is inconsistent with a general executive power to grant money.

52. Put another way, there would be little or no work for s 96 to do if the Executive Government were able to grant financial assistance to the States - or to anyone else it chose - without resort to the Parliament (other than to obtain an appropriation).[44]

53. In *Williams No. 1*, Hayne J, in the course of considering a submission by the Commonwealth that the power to spend money was a "power vested by this Constitution ...in the

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[42] *Williams No. 1* at 234 [143]. See also at 348 [503] per Crennan J.

[43] See *Towards a Theory for Section 96 Part I*, Saunders, Melbourne University law Review, Vol 16, p. 1

[44] Indeed, it appears that such limited support as there was for a provision similar to s 96 only arose after the view that "there was some power implied in the Constitution to give such aid" came to be doubted. See Official Report of the National Australasian Convention Debates, Melbourne, 1898 at p 1108 &ff. See especially Sir John Forrest at p 1121

Government of the Commonwealth" within the meaning of s 51(xxxix) of the *Constitution* said;

> "...the understanding of the operation of s 51(xxxix) in relation to Commonwealth expenditure that is under consideration would not only give s 96 of the *Constitution* a place in the constitutional framework very different from the place it has hitherto been understood to occupy but also render it otiose."[45]

54. After referring to observations made by Dixon CJ in the *Second Uniform Tax Case*[46] Hayne J continued (references omitted):

> "Two points of immediate relevance emerge from this understanding of s 96. First, it is an understanding that is not consistent with reading s 51(xxxix) as supporting any and every law that provides for or otherwise controls the expenditure of money lawfully appropriated from the Consolidated Revenue Fund regardless of the purposes for which or circumstances in which the expenditure is to be made. It is an understanding of s 96 that is not consistent with the view of the intersection between s 51(xxxix) and the executive power to spend... because it would leave s 96 no work to do at all.....
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> All the work done by s 96 could be done by laws made under s 51(xxxix). Section 96 would be superfluous. Yet as Mason J observed of s 96 in the *AAP Case*:
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> > "its presence confirms what is otherwise deducible from the *Constitution*, that is, 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."
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> And although Mason J made these observations in a context where it was assumed that the power to spend is found in s 81, it is nonetheless apposite to recognise that Barwick CJ and Gibbs J in the *AAP Case*, and Starke J in *Attorney-General (Vic) v The Commonwealth (Pharmaceutical Benefits Case)*, also saw s 96 as limiting the scope of that power."[47]

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[45] *Williams No. 1* at 267 [243]
[46] *Victoria v The Commonwealth* (1957) 99 CLR 575
[47] At 269 [247]

55. His Honour went on to explain[48] that whereas nothing in s 96 would enable the making of a coercive law, a law made under s 51(xxxix) as incidental to a power to spend money could be coercive and so "obliterate" the consensual aspect of s 96 referred to by Barwick CJ in the *AAP Case* (see above). Observations to similar effect were also made by Crennan[49] and Kiefel J.[50]

56. It is submitted that each the foregoing considerations indicate the invalidity of s 32B of the FMA Act.

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57. The Attorney-General of Tasmania submits that the answer to each of Questions 2 and 6 of the Special Case should be "Yes".

PART VI: ESTIMATE OF TIME FOR ORAL ARGUMENT

58. Tasmania estimates that it will require not more than 30 minutes for presentation of oral argument.

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Dated 14 March 2014

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[48] At 270 [248]
[49] At 347 [501
[50] At 373 [592] -[593]