ANNOTATED

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY **No. S154 of 2013**

BETWEEN

RONALD WILLIAMS
Plaintiff

10

AND

COMMONWEALTH OF AUSTRALIA
First Defendant

MINISTER FOR EDUCATION
Second Defendant

SCRIPTURE UNION QUEENSLAND
20 Third Defendant

PLAINTIFF'S SUBMISSIONS IN REPLY

Date of Document: 17 April 2014

Filed on behalf of Plaintiff by
Horowitz & Bilinsky
Level 1, 229-231 Macquarie Street
Sydney NSW 2000

DX 1050 SYDNEY
Tel: 02 9233 1777
Fax: 02 9223 3165
Reference: Claudius Bilinsky

Part I: Publication of Submissions

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

Part II: Plaintiff's Argument in Reply

No power to enact a general expenditure law

2. As SUQ concedes (in its submissions ("**SUQS**") at [51]), French CJ accepted in *Pape*[1] that "the power to appropriate is a necessary incident of the power to make laws with respect to a subject matter and is implied by the grant of that power". The plurality in that case also recognised that in determining the validity of any expenditure said to be supported by an appropriation, questions of constitutional fact might arise.[2] It is implicit in this that there is no unbounded power to appropriate that stands removed from the other heads of Commonwealth legislative power. If there were, no question of constitutional fact could ever arise with respect to an appropriation. There is accordingly no general power to appropriate, to which a power to authorise expenditure is incidental.

3. It does not detract from this to suggest that "an appropriation law concerns the relationship between the Commonwealth Parliament and Executive in relation to financial matters, and does not regulate the rights, duties or obligations of citizens" (SUQS [25]). To assert, on the basis of that proposition, the existence of an independent and unlimited power to appropriate is, quite impermissibly, to read the word "law" in ss 51 and 52 of the *Constitution* to mean "laws other than those concerning the relationship between Parliament and the Queen".

4. There is therefore no substance in the assumption that underpins SUQ's argument concerning the Commonwealth's power to enact what are termed general expenditure laws, namely, that the scope of the Commonwealth's power to authorise spending is dependent upon the ambit of its power to appropriate from the Consolidated Revenue Fund. On the contrary, it is the width of the Commonwealth's power to spend or to authorise spending, as reflected in the reach of its legislative and executive power, which sets of the range of purposes for which appropriations may be made.

The excessive breadth of s 32B of the FMA Act

5. Unlike SUQ, the Commonwealth does not suggest that s 32B of the FMA Act is a general expenditure law, let alone that it could validly operate as such. Instead, its submission is that because the operation of s 32B hinges upon the existence of regulations, its scope is circumscribed by those limits that attend the exercise of legislative power involved in the making of regulations. Nonetheless, the regulations contemplated by that provision do not create any rights or liabilities. Nor do they confer any power. They are instead entirely dependent upon s 32B for their legal consequence. Given then that the first step in assessing a law's validity is to identify its character "by reference to the rights, powers, liabilities, duties and privileges which it creates",[3] there is an incongruity in the suggestion that engagement of s 32B is dependent upon the validity of regulations which, on their own, have no juridical consequence and thus do not readily lend themselves to the process of characterisation. Simply put, it is inapt to speak of the validity of regulations that, of themselves, have no legal operation; rather, the relevant question is whether the statutory provision for the purposes of which the regulations were made can validly endow those regulations with the legal consequence that it purports to endow.

6. Consequently, if s 32B is to be construed as operating only upon regulations that identify grants of financial assistance or programs touching upon matters falling within the ambit of Commonwealth legislative power, it is only because the word "regulations" in that provision is so read down. And if that be right, then one must ask why it is the word "regulations" that should be read down, and not the term "arrangements", particularly in the various ways postulated in the

---

[1] (2009) 238 CLR 1 at 55 [111]. See *Northern Suburbs General Cemetery Reserve Trust* (1993) 176 CLR 555 at 601 per McHugh J.

[2] (2009) 238 CLR 1 at 78 [197].

[3] *Commonwealth v Tasmania* (1983) 158 CLR 1 at 152; *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 at 368-369.

Plaintiff's submissions in chief. That s 32B indicates no answer to that question suffices to demonstrate its unsuitability as a candidate for reading down.

***A distortion of the relationship between Ch I and Ch II of the* Constitution**

7. Because item 407.013 of Part 4 of Schedule 1AA to the FMA Regulations is entirely dependent upon s 32B for its legal consequences, if s 32B were wholly invalid, item 407.013 would, at the very least, be inoperative, notwithstanding that it was inserted into the FMA Regulations by an Act of Parliament. The Commonwealth seeks to avoid this outcome by asserting that ss 32B and 65 of the FMA Act may be read down so that the former applies only to regulations made by enactment of the Financial Framework Amendment Act. There is, however, no mention of this latter statute in s 32B, and therefore nothing in that provision that would, in conformity with what was said in *Pidoto v Victoria*,[4] offer any basis for adopting the contents of that statute as a standard or criterion for reading down.

8. Moreover, the position advanced by the Commonwealth would involve, not merely reading down s 65, but adding words to it. That provision confers upon the Governor-General the power to make regulations either prescribing matters "required or permitted by [the FMA Act] to be prescribed", or necessary or convenient to be prescribed for carrying out or giving effect to that statute. If s 32B is to be construed as operating only upon those regulations promulgated in the Financial Framework Amendment Act, the words "except for the purposes of s 32B" would have to be inserted into s 65. And that, on any view, would be a legislative exercise.

9. Consequently, if the Plaintiff were correct in his contention that it is beyond the legislative competence of the Commonwealth Parliament, having regard to the position of the Senate, to empower the Executive to spend "in blank", s 32B would be wholly invalid, and item 407.013 inoperative. The circumstance that that item was included in regulations promulgated by Parliament thus affords no answer to the Plaintiff's argument.

10. Nor does the Commonwealth's attempted "Brandeis brief" (at CS [37]-[40]) on the extent to which the Senate monitors the activities of the Commonwealth Executive as a matter of current practice. Significantly, this branch of the Commonwealth's argument assumes that *Williams (No. 1)* was correct – that is, that even despite the appropriation process in its present incarnation and the practices relied on by the Commonwealth, the position of the Senate requires rejection of the proposition that the Executive may, in every instance, expend public funds without legislative authorisation. If that be right, then those same practices would offer little, if any, assistance to the Commonwealth in resisting the submission that the position of the Senate would preclude any attempt, by legislation, at denying that chamber any involvement in the process of authorising the specific purposes for which the Commonwealth is empowered to spend.

11. After all, the question in this case is not whether the Senate sufficiently monitors estimates of expenditure by means of, say, the committee system. It is instead whether, assuming the requirement for legislative authorisation of expenditure, a requirement founded, in part, on the position of the Senate, and having regard to the text and structure of the *Constitution*, which was adopted prior to the development of the practices relied on by the Commonwealth, it is permissible for Parliament to authorise spending by the Executive "in blank".

12. The Plaintiff's submission is that this question should be answered in the negative. Indeed, it may well be, given the remarks of the plurality in *Pape*,[5] that any statute purporting to authorise spending must identify the purposes of the proposed expenditure with sufficient precision to provide a textual basis for the determination of issues of constitutional fact relevant to the validity of that expenditure. So much should have been apparent from the Plaintiff's submissions in chief at [70]-[73]. It is thus incorrect to say, as the Commonwealth does at CS [43], that the Plaintiff failed to

[4] (1943) 68 CLR 87 at 111.
[5] (2009) 238 CLR 1 at 78 [197].

identify the level of engagement of the Senate that would, on his case, be required so as validly to authorise the expenditure of public funds.

13. Something now should be said concerning SUQ's submission that s 32B does not permit any bypassing of the Senate because it authorises only those arrangements entered into for the purposes of programs identified in the PBSs that are placed before the Senate in its deliberations over each Appropriation Bill (No. 1). Underpinning that argument is an assumption that an Appropriation Act (No. 1) appropriates money for the purposes only of the programs identified in a PBS, and therefore that "[o]nly expenditure upon such [programs] would [involve] the execution of the appropriation law" (SUQS [71]).

14. There are, however, two difficulties with this. First, the argument proceeds upon the premise that s 32B is valid as a general expenditure law enacted in the exercise of a legislative power incidental to the Commonwealth's free-standing power to appropriate. For the reasons already given, that premise should be rejected. And secondly, one needs only to read s 8 of the 2012-2013 Appropriation Act to see that the assumption does not hold true [CSC, 450]. Subsection (1) of that provision links each amount appropriated by way of an administered item to the outcome opposite which it appears in Schedule 1 to the Act. Subsection (2) then links the programs identified in each PBS to the outcomes in Schedule 1. Crucially, there is nothing in the Act to suggest that the outcomes stated in Schedule 1 are to be achieved only by means of the programs described in the PBSs. There is therefore no basis for concluding that the reach of s 32B of the FMA Act is confined only to those programs.

15. This last proposition similarly demonstrates the flaw in the Commonwealth's reliance upon the Senate's scrutiny of PBSs as a rejoinder to the Plaintiff's case (CS [37]). So long as the Executive may achieve the outcomes stated in an odd-numbered appropriation act by the adoption of programs not identified in either a PBS or a Portfolio Additional Estimates Statement, the authorisation of the Executive to spend "in blank" would deny the Senate the opportunity to apply any prior scrutiny to that program. The problem described in the Plaintiff's submissions in chief at [74]-[78] – namely, the possibility that the Executive might be able to dispense entirely with seeking the approval of the Senate in initiating a spending program – would thus persist.

***Section 51(xxiiiA) of the* Constitution**

16. It one thing to say that for a law to be supported by that part of s 51(xxiiiA) of the *Constitution* presently in issue, it need only have a connection with that head of power which is not "insubstantial, tenuous or distant". It is another, however, to assert, as the Commonwealth does at CS [66], that it is sufficient that there be a not "insubstantial, tenuous or distant" connection between the service, the provision of which is contemplated by the law, and the needs of students. This last proposition incorrectly confuses the requisite nexus between a valid law and a head of Commonwealth legislative power with the nexus between a benefit and a student suggested by the proper construction of the phrase "benefits to students". It is also at odds with Dixon J's refusal in the *BMA Case*[6] to read the word "benefits" in s 51(xxiiiA) as extending to "anything tending to the profit advantage gain or good of a man".

17. Indeed, on the Commonwealth's case, a law that contemplates the payment of money by the Commonwealth to a service provider who in turn supplies a service to another person which can be expected (presumably by Parliament alone (CS [62])) indirectly to meet a "perceived need" of students, whether that need be material or emotional or spiritual, would be valid. Nonetheless, to accede to this would be to allow Parliament such leeway in determining the sufficiency of the connection between proposed Commonwealth action and the advantaging of students as to engage the principle that "no opinion of the Parliament as to the actual existence or occurrence of some matter or event which would provide a specific relation of the subject of a law with power can

[6] (1949) 79 CLR 201 at 260.

suffice to give the law that relation".[7]

18. Given this difficulty, it was entirely appropriate for Hayne J and Kiefel J in *Williams (No. 1)* to have considered the remarks in Parliament of the Hon H V Evatt for the purpose of ascertaining, by reference to the social services to which he referred, not merely "the contemporary meaning of language used", but also "the subject to which that language was directed".[8] Thus, in emphasising and describing the concept of social services, Kiefel J was merely articulating at a higher level of generality the connotation of the words in s 51(xxiiiA), knowing full well that those words are required, from time to time, to be applied to different and changing circumstances. In the Plaintiff's submission, far from meriting criticism, this was perfectly orthodox.[9]

19. As for the Commonwealth's invocation (at CS [79]) of s 14(a) and (b) of the *Education Act 1945* (Cth), it need only be said that even if s 51(xxiiiA) had been included in the *Constitution* at the time of the enactment of those provisions, their validity would have been doubtful. This is because those paragraphs describe the provision of assistance to persons so that they might become students, as distinct from the provision of assistance to persons who are students, which, as a matter of language, is the notion suggested by the phrase "benefits to students". It would thus be an error to construe s 51(xxiiiA) by reference to those paragraphs. In any event, by fastening upon Heydon J's suggestion in *Williams (No. 1)* that Mr Evatt regarded s 14(a) and (b) as capable of being supported by s 51(xxiiiA), the Commonwealth is engaging in precisely the mode of reasoning that it condemns, namely, a search for the actual intentions of those who framed or drafted the constitutional text.

20. Furthermore, the Commonwealth's criticisms of the reasoning employed by Hayne J does not sufficiently recognise that the words "services" and "benefits" appear in close proximity in s 51(xxiiiA), suggesting, at the very least, a consciously drawn distinction between those two concepts. Thus, contrary to CS [76] and [80], his Honour's approach did not involve failing to construe the *Constitution* "with all the generality which the words used admit",[10] having regard to their context; nor did it proceed upon the heresy that in the absence of any express limitation, one grant of power may be taken to limit the scope of another. Instead, his Honour was merely describing the implications of failing to adopt a construction of s 51(xxiiiA) informed by the distinction between "services" and "benefits".

21. In any event, the construction of s 51(xxiiiA) favoured by the Commonwealth and SUQ does little to assist their position. It appears to be common ground between all parties that a purported law with respect "to the provision of ... benefits to students" must, at the very least, identify the benefits sought to be provided (whether it be some form of emolument or a service), as distinct from the salutary results sought to be engendered by their provision. Notwithstanding what is said at CS [10]-[11], the legislation impugned in these proceedings does not give the force of law to, or otherwise "pick up", the Guidelines Revision 6 or any other document relating to the implementation of the NSCSWP. Instead, the combined effect of s 32B of the FMA Act and item 407.013 of Part 4 of Schedule 1AA to the FMA Regulations is merely to authorise arrangements entered into for the purposes of a program known as the NSCSWP, the objective of which is "[t]o assist school communities support the wellbeing of their students, including by strengthening values, providing pastoral care and enhancing engagement with the broader community".

22. It should be apparent then that the impugned laws do not identify, let alone exhaustively state, what service or services are to be provided to, or for the indirect benefit of, students as part of the NSCSWP. Nor are they confined to the voluntary, as distinct from compulsory, receipt of those services by students. This is significant because, as the Commonwealth recognises at CS [64], s 51(xxxiiiA) "does not support a law providing for the compulsory receipt of a benefit or service".

---

[7] *Australian Community Party v The Commonwealth* (1951) 83 CLR 1 at 200.
[8] *Cole v Whitfield* (1988) 165 CLR 360 ay 385.
[9] *Grain Pool of Western Australia v The Commonwealth* (2000) 202 CLR 479 at 493-494.
[10] *Work Choices Case* (2006) 229 CLR 1 at 103 [142].

The effect of the pleaded Appropriation Acts

23. The Commonwealth's reliance upon the various Appropriation Acts pleaded in its Amended Defence pays insufficient heed to the circumstance that the outcomes stated in Schedule 1 to each of those statutes are expressed to be outcomes for a particular financial year. Accordingly, if s 8 of each of those Acts were construed to authorise expenditure for the purpose of achieving those outcomes, that authorisation would be confined to expenditure occurring in the financial year to which any particular Appropriation Act (No. 1) relates. It must be recalled that the SUQ Funding Agreement obliges the Commonwealth to provide funding to SUQ over a period concluding on 31 January 2015. Subsection 8(1) of the 2011-2012 Appropriation Act thus plainly did not authorise entry into that agreement. Indeed, the temporally limited operation of each Appropriation Act (No. 1) would tend against construing it as affording legislative authorisation to spend.

24. As for any suggestion that s 8(1) authorised the transfer to SUQ of funds for the purposes of the NSCSWP in the 2011-2012 financial year, let it be assumed, for the sake of argument, that that provision did, on its proper construction, authorise expenditure for the purpose of achieving the outcomes stated in Schedule 1. A question would nonetheless arise as to whether s 8(1) could validly authorise expenditure for the purposes of the NSCSWP. If Hayne J and Kiefel J were correct in their construction of s 51(xxiiiA) of the *Constitution*, that question would have to be answered in the negative, at least to the extent that s 8(1), combined with Outcome 2 for the Education, Employment and Workplace Relations portfolio, is said to be a law with respect to the provision of benefits to students.

25. Moreover, if the construction of s 51(xxiiiA) contended for by the Commonwealth were adopted, the performance of the SUQ Funding Agreement in the 2013-2014 financial year – or rather any payment to SUQ for the purposes of the NSCSWP in that financial year – would suffer for want of legislative authorisation. The NSCSWP is described in DEEWR's 2013-2014 Portfolio Budget Statement ("**PBS**") in terms which replicate item 407.013 of Part 4 of Schedule 1AA to the FMA Regulations. And like the s 32B of the FMA Act and Schedule 1AA to the FMA Regulations, neither the 2013-2014 Appropriation Act nor the accompanying PBS for DEEWR incorporates, by reference or otherwise, the provisions of the Guidelines Revision 6. Consequently, if what is said above concerning item 407.013 is correct, then s 51(xxiiiA) of the *Constitution* would not support the valid operation of s 8(1) of the 2013-2014 Appropriation Act, in so far as it purported to authorise expenditure for the purposes the program described as the NSCSWP in DEEWR's PBS.

26. And for the reasons that follow, any reliance by the Commonwealth upon s 51(xxxix) of the *Constitution*, whether to support the validity of either s 32B of the FMA Act or the operation of the relevant Appropriation Acts for which it contends, is entirely misplaced.

***The Commonwealth's attempt to re-open* Williams (No. 1)**

Issue estoppel

27. In *James v The Commonwealth*,[11] the twin doctrines of issue estoppel and abuse of process were invoked – curiously enough, by the Commonwealth – against Mr James on the basis of this Court's earlier finding, in proceedings involving the same parties,[12] that s 92 of the *Constitution* did not bind the Commonwealth. Those arguments were rejected, but not because, as the Commonwealth now asserts (at CS [112]), findings on pure questions of law were regarded as incapable of giving rise to an issue estoppel. Indeed, as the learned editor of *Spencer Bower and Handley* observes, "[t]he determinations which will found an issue estoppel may be of law, fact, or mixed fact and law".[13] Nor were the Commonwealth's arguments rejected on the basis that the doctrine of issue estoppel does not apply in constitutional litigation. They were instead rejected

[11] (1935) 52 CLR 570.
[12] *James v The Commonwealth* (1928) 41 CLR 442.
[13] The Hon K R Handley, *Res Judicata*, 4th ed (2009) at [8.04]. See also *Queensland v The Commonwealth* (1977) 139 CLR 585 at 614-615.

because Mr James had succeeded in the earlier proceedings on a separate ground, with the result that the Court's findings on the application of s 92 to the Commonwealth were not legally indispensable to the result. Critically, there was not the slightest doubt expressed by any Justice as to the amenability of constitutional litigation to a plea of issue estoppel.[14]

28. The various remarks relied upon by the Commonwealth, particularly those of Gibbs J and Stephen J in *Queensland v The Commonwealth*,[15] disclose at most disquiet with the notion that the doctrine might be engaged in constitutional litigation to which the Commonwealth and a State are parties. This is understandable, given that the polities forming the Australian federation might be expected to be natural and frequent contestants in the constitutional arena. However, where a private party has commenced proceedings to agitate a constitutional question, he or she does so to vindicate some right or interest beyond ensuring that the limits inter se of the constitutional powers of the Commonwealth and the States are respected. In those circumstances, there is no reason for denying him or her or the opposing polity, as part of the process of enforcing and protecting, or refusing to protect, that right or interest, the substantive right constituted by an issue estoppel.[16] After all, implicit in the relief sought by any such party is the finality of the litigation in which it is granted.

29. If that be accepted, then not only would the Commonwealth be refused leave to re-open the correctness of *Williams (No. 1)*; it would not be entitled to seek such leave.

The Commonwealth Executive's power to contract and to spend

30. In enumerating (at CS [129]-[136]) those features of the Australian constitutional landscape that might explain or justify a departure from the traditional English conception of the Crown's capacity to contract and to spend, the Commonwealth has overlooked the notion – recognised by three Justices in *Williams (No. 1)*[17] – that the Commonwealth Executive is merely a branch of a nationality polity, and thus lacks any "legal personality distinct from the legislative branch". So much emerges from the inclusion, in s 61 of the *Constitution*, of the phrase "[t]he executive power *of the Commonwealth*" (emphasis added). This is to be distinguished from the tendency in English constitutional law, as reflected in the prominence given to the expression "the Crown", to describe both the State and the executive branch of government as metaphorical extensions of the Sovereign,[18] in circumstances where, as the Commonwealth observes (at CS [124]), the common law ascribes to the Crown the status of a corporation sole.

31. Two consequences follow from this. First, to speak of the capacities enjoyed by the legal person constituted by the Commonwealth of Australia is not to say anything meaningful about the width of the powers of the Commonwealth Executive. There is, after all, a conceptual difference between the powers of a single branch of a polity, whose position finds no analogy in, say, the board of directors of a private corporation, and the capacities that flow from that polity being a juristic person. For example, the capacity of the Commonwealth to own property does not necessarily entitle the Executive Government to use or to dispose of such property as any other legal person might under the general law; that would depend upon the scope of Commonwealth power, and particularly, executive power.[19]

32. Secondly, if the Commonwealth Executive lacks any legal personality distinct from the Commonwealth legislature, then the former cannot be assumed to have sufficient power to exercise, on behalf of the Commonwealth of Australia *and independently of Parliament*, each and every capacity flowing from the very fact of the Commonwealth's being a legal person. In this regard, it must be recalled that as at federation, the appropriation process was understood in the United

---

[14] See also *Victoria v The Commonwealth* (1957) 99 CLR 575 at 654-655.
[15] (1977) 139 CLR 585 at 597 and 605.
[16] The Hon K R Handley, *Res Judicata*, 4th ed (2009) at [1.09].
[17] (2012) 248 CLR 156 at 184 [21] per French CJ, at 237 [154] per Gummow and Bell JJ.
[18] *Sue v Hill* (1999) 199 CLR 462 at 498-499 [84]-[87].
[19] *Attorney-General (Vic) v The Commonwealth* (1935) 52 CLR 533 at 569; *Johnston v Kent* (1975) 132 CLR 164 at 170.

Kingdom as bearing upon the relationship between the Houses of Parliament and the Crown, in circumstances where the latter, described as "being the executive power",[20] had, and continues to have, a distinct legal personality. Given that the same cannot be said of the Commonwealth Executive, it would be simplistic to the point of error to assume that the *Constitution* requires no more than the appropriation process by way of parliamentary involvement in the exercise of the Commonwealth's capacity to spend.

33. It is at this point that attention should be directed to s 96 of the *Constitution*. On the basis of observations made by Mason J in the *AAP Case*,[21] the Commonwealth contends (at CS [142.2]) that that provision "was not intended to create a power to make grants to States – rather, it serves to put beyond question that legally enforceable conditions can be attached to such grants".[22] Implicit in this is the suggestion that s 96 merely assumes the existence of a power, otherwise conferred in the *Constitution*, to grant financial assistance to the States. If that be right, then it is, in the Plaintiff's submission, significant that s 96 identifies Parliament as the repository of that power.

34. For if:

(a) s 96 merely assumes the existence of such a power;

(b) the Executive enjoys a power to spend in the absence of legislative authorisation, which power is constrained only by the matters discussed at CS [129]-[136]; and

(c) the making of grants to the States is but one example of Commonwealth spending,

then one would expect s 96 to state that it is the Governor-General in Council, rather than Parliament, who "may grant financial assistance to any State on such terms and conditions as [he or she] thinks fit". That, however, is not what s 96 says. On the contrary, the very notion of a grant of financial assistance by Parliament, in circumstances where it is the Executive that would attend to the transfer of funds to the States, illustrates the error involved in treating the Executive as a separate juristic person.

35. It is crucial also that that s 96 speaks of the granting of financial assistance by Parliament, as distinct from the appropriation by Parliament of monies for the purpose of granting such assistance. Given that an appropriation involves no more than the "provisional setting apart or diversion from the Consolidated Revenue Fund of the sum appropriated", the logical conclusion of the Commonwealth's argument is thus to highlight s 96 as being indicative of an assumption that Commonwealth spending, at least in the form of grants to the States, requires legislative imprimatur beyond an appropriation.

36. Of course, this is not to deny the Executive any role in determining how, and on what terms, the States are to be offered financial assistance. As Mason J observed in the *AAP Case*,[23] "the executive power ... extends to the investigation and formulation of policies to be expressed in conditions to be attached to grants made to the States." However, it does not follow from this that the Executive is empowered, in the absence of legislative authorisation, to implement those policies.

37. Two further points should be made in relation to s 96. The first is that the attachment of conditions to grants of financial assistance requires that the Executive place before Parliament a bill setting out its proposed policy in sufficient detail for that policy to take effect as a legally enforceable condition to the grant. The language of s 96 would tend to suggest that it is for Parliament to consider and to authorise the stated policies of the Executive Government prior to their implementation. This recalls, to no small extent, the Plaintiff's earlier submission that the Commonwealth Executive cannot validly be authorised to spend "in blank".

---

[20] Erskine May, *A Treatise on the Law; Privileges, Proceedings and Usage of Parliament*, 10th ed (1893), pp 515-516, cited in *Pape* (2009) 238 CLR 1 at 76-77 [192].
[21] (1975) 134 CLR 338 at 395.
[22] See also J Quick and R R Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 870-871.
[23] (1975) 134 CLR 338 at 398.

38. The second point is that s 96 serves only to underscore the extent to which the Senate cannot be regarded as a mere antipodean analogue to the House of Lords. The "vestigial" nature of its function "as a chamber designed to protect the interests of the States"[24] may be conceded. Nonetheless it must follow from the fact of that function having been reposed in the Senate that it is only through the Senate that the States may influence the content of any conditions attached to grants proposed to be made under s 96. Thus, if s 96 is to be understood as merely putting beyond question the Commonwealth's ability to attach legally enforceable conditions to grants made to the States, it must also be taken as suggesting the significance attributed by the framers of the *Constitution* to the notion that the policies of the Executive, which may ultimately be reflected in the content of those conditions, should receive the prior scrutiny and approval of the Senate.

39. Accordingly, once provisions such as s 96 of the *Constitution* are read in their proper context – that is, shorn of any conflation of the polity constituted by the Commonwealth of Australia with the Commonwealth Executive or the attribution to the Executive of a separate legal personality – they are revealed to be at odds with the position contended for by the Commonwealth. More importantly still, the foregoing analysis, combined with what is said in the Plaintiff's submissions in chief at [67]-[83], demonstrates that resort need not be had to "reasoning of the impermissible 'reserved powers' kind" (CS [143.4]) in order to produce the result that "many, but not all, instances of executive spending and contracting require legislative authorisation" (CS [144]).

40. This is not to deny that the position of the States has some independent bearing upon the proper ambit of the executive power of the Commonwealth. However, that is only in relation to those areas of Commonwealth executive activity which do not require legislative authorisation. This is because, in so far as those areas of activity that do require such authorisation are concerned, considerations of federalism are accommodated by the need for the conferral of such authority to be supported by Commonwealth legislative power.

41. That being so, the argument advanced at CS [143] is entirely misconceived. What was said in *Williams (No. 1)* concerning the "overlap" between exercises of Commonwealth and State executive power was not proffered by any of the majority Justices as a "basis for inferring that parliamentary authority is required before the Commonwealth may spend and contract". It was instead the basis upon which those Justices refused to extend the areas in which the Executive might act without legislative imprimatur beyond what had been identified in cases such as *Pape*. Given Brennan J's remarks in *Davis v Commonwealth*[25] concerning the need to consider, amongst other things, "the sufficiency of the powers of the States to engage effectively in the [relevant] enterprise" – the correctness of which the Commonwealth does not now challenge – their Honours' reasoning was unimpeachable.

42. In a similar fashion, the Commonwealth's argument at CS [141] proceeds upon a failure to appreciate that it formed no part of their Honours' reasoning to suggest that s 64 of the *Constitution* defines "the outer boundaries of the power of the executive to spend and contract without an authorising statute". Indeed, it is difficult to see how the area of activity described in *Pape* as falling within the executive power of the Commonwealth – namely, activities "peculiarly adapted to the government of a nation and which cannot otherwise be carried out" for the nation's benefit – could possibly be subsumed within s 64.

43. In any event, contrary to CS [141.2]-[141.4], French CJ, in remarking upon s 64 of the *Constitution*,[26] was not indicating acceptance of the views expressed by Dixon J in *Bardolph* concerning the validity of contracts entered into by the Executive otherwise than "in the ordinary course of administering a recognised part of the government".[27] Instead, his Honour was merely observing that the criticisms subsequently made of *Bardolph* might have diminished force in a

---

[24] *Williams (No. 1)* (2012) 248 CLR 156 at 205 [61].
[25] (1988) 166 CLR 79 at 111.
[26] *Williams (No. 1)* (2012) 248 CLR 156 at 214-215 [79].
[27] *New South Wales v Bardolph* (1934) 52 CLR 455 at 508.

Commonwealth setting, particularly having regard to the Executive's powers in relation to "the execution and maintenance" of the *Constitution* and the express reference in s 64 to the administration of departments of State. That provision puts beyond doubt that the Commonwealth Executive does not require legislative imprimatur for activities undertaken in so administering. It is, moreover, to be construed in a manner "which allows for development in a system of responsible ministerial government".[28] That its words might be taken to offer but one criterion for determining when the Executive may act without legislative authorisation does not, therefore, serve constitutionally to entrench any particular conception of the role of government, and consequently does not afford any basis for rejecting the proposition that subject to other exceptions, such authorisation is otherwise required for the expenditure of public funds.

44. It is no answer to this to suggest, as the Commonwealth does at CS [141.4], that there is nothing about the administration of departments of State that should attract a lesser degree of scrutiny by Parliament. This fails to recognise that the appropriation process itself distinguishes between the ordinary annual services of the Government and "expenditures for new purposes not already covered by the existing powers or functions of a department",[29] and contemplates a diminution in the powers of the Senate with respect to proposed laws appropriating moneys for the former. One might ask, however, what it is about the ordinary annual services of the Government that would warrant that diminution. It seems merely to have been directed towards replicating the practices that developed at Westminster after 3 June 1678[30] for the purpose of ensuring the vigour and strength of the House of Commons relative to the House of Lords. The logical conclusion of the Commonwealth's argument would be to regard this as an insufficient justification for the inclusion in the *Constitution* of s 53. But just as that does not detract from Parliament's obligation to comply with s 53, so does the Commonwealth's argument not compel this Court to disregard the extent to which the text and structure of the *Constitution* require legislative authorisation of spending by the Executive, subject only to such exceptions as that to be discerned in the terms of s 64.

The Commonwealth's proposed limit upon executive power

45. On the assumption that there is no requirement for legislative authorisation of expenditure by the Commonwealth Executive, the Commonwealth contends that if there is to be a limit, beyond the matters discussed at CS [129]-[136], upon the Executive's power to spend, that power should nonetheless extend "to all those matters that are reasonably capable of being seen as of national benefit or concern" (CS [152]). In testing the correctness of this formulation, it is convenient to focus on that part of it which would permit the Executive to engage in spending on matters that do not fall within the ambit of Commonwealth legislative power.

46. Underpinning the Commonwealth's submission is an unspoken departure from the mode of reasoning concerning the scope of the Commonwealth's executive power that informed the decision in *Pape*. Reference has already been made to the remarks of Brennan J in *Davis v Commonwealth*. Those remarks should not be taken to suggest that where the executive power of the Commonwealth is invoked as supporting Commonwealth activity in relation to matters falling outside the express grants of Commonwealth legislative power, it is sufficient that the activity in question does not involve competition, in the sense of producing outcomes that conflict, with State executive action. Instead, his Honour was observing that the executive power of the Commonwealth is less likely to extend to fields of activity where the States are sufficiently empowered to act, irrespective of whether such power is exercised. In the Plaintiff's submission, this approach finds reflection in the proposition that the Commonwealth's executive power supports the undertaking of enterprises and activities which "are *peculiarly adapted* to the government of a nation and which *cannot otherwise be carried on*" for its benefit (emphasis added).[31] It is critical, then, that those words were given

---

[28] *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 460 [211].
[29] *Combet v The Commonwealth* (2005) 224 CLR 494 at 536-537 [47].
[30] J Quick and R R Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 667.
[31] *AAP Case* (1975) 134 CLR 338 at 397.

particular emphasis in the reasons of the majority Justices in *Pape*.[32]

47. The Commonwealth seeks to avoid the implications of this by asserting that the circumstances in *Pape* "might properly have given rise to executive action by both the Commonwealth and the States" (CS [143.1]). That submission, however, ignores the centrality to the reasoning of the majority Justices of the fact that no one State could have provided sufficient stimulus to meet the "adverse economic conditions affecting the nation as a whole" at the time of enactment of the impugned legislation.[33]

48. As for the suggestion (at CS [154.4(b)]) that the support of the States is sufficient to enliven the Commonwealth's executive power and with it the legislative power conferred by s 51(xxxix) of the *Constitution*, it need only be said that the *Constitution* already provides a mechanism by which the consent of the States can support Commonwealth legislative and executive activity in areas otherwise beyond the express grants of legislative power, namely, by engagement of s 51(xxxviii). Given then that the consent of the various State Parliaments is required for any expansion in the ambit of the Commonwealth's legislative and executive powers, there is no scope for the executive governments of the States to achieve a similar result merely by sharing some concern held by the Commonwealth Executive.

49. The Commonwealth's proposed limitation also suffers the defect that any matter that attracts the attention of the national government is, in one sense, reasonably capable of being seen as a matter of national concern. The extent of the Commonwealth's executive power would thus be dictated by the reach of its gaze, a notion quite at odds with the dictum that "a stream cannot rise higher than its source".[34] This, of course, is but one aspect of the difficulty in attempting to identify what might reasonably be capable of being seen to be a matter of national benefit or concern, a difficulty which finds parallels in the challenges that attend any attempt to identify matters of international concern in the context of applying s 51(xxix) of the *Constitution*.[35]

50. In this case, assuming that the impugned legislation or executive acts cannot be supported by s 51(xx) or (xxiiiA) of the *Constitution*, the extent of engagement of s 51(xxxix) is to be determined by asking whether the States are so lacking in the capacity to fund the supply of chaplaincy services in schools that the provision of such funding cannot be carried on otherwise than by means of Commonwealth executive action. The matters described in SC [23]-[32] (at CSC, 113-114) suggest that this question should be answered "no".

51. For the reasons outlined above, then, the submissions of the Defendants afford no answer to the Plaintiff's case.

Date: 17 April 2014

	Bret Walker		Gerald Ng
Phone	(02) 8257 2527	Phone	(02) 9233 4275
Fax	(02) 9221 7974	Fax	(02) 9221 5386
Email	maggie.dalton@stjames.net.au	Email	gng@selbornechambers.com.au

[32] (2009) 238 CLR 1 at 62-63 [131]-[133] per French CJ, 87 [228] per Gummow, Crennan and Bell JJ.
[33] (2009) 238 CLR 1 at 62-63 [133] per French CJ, 91 [241] per Gummow, Crennan and Bell JJ.
[34] *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 258.
[35] *XYV v The Commonwealth* (2006) 227 CLR 532 at 608-610 [219]-[220].