IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY **No. S307 of 2011**

BETWEEN:

RONALD WILLIAMS
Plaintiff

and

THE COMMONWEALTH OF AUSTRALIA
First Defendant

MINISTER FOR SCHOOL EDUCATION, EARLY CHILDHOOD AND YOUTH
Second Defendant

MINISTER FOR FINANCE AND DEREGULATION
Third Defendant

SCRIPTURE UNION QUEENSLAND
Fourth Defendant

WRITTEN SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA (INTERVENING)

Date of Document:
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Solicitor for the Attorney-General for the State of South Australia (Intervening)

Part I: Certification

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

Part II: Basis of Intervention

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

Part III: Why leave to intervene should be granted

3. Not applicable.

Part IV: Constitutional and legislative provisions

4. The Attorney-General for the State of South Australia accepts the Plaintiff's statement of applicable constitutional provisions, statutes and regulations.

Part V: Submissions

5. In summary:

   5.1 as to question 1, the Plaintiff does not have standing to challenge the appropriation of funds as it remains the law that in the absence of the existence of the identification of an interest in the precise executive action to be challenged, the Plaintiff has no standing. In the light of the concession of the Commonwealth it is unnecessary to make submissions as to whether the Plaintiff has standing to challenge the funding agreements.

   5.2 as to question 2(a), the Commonwealth does have executive power to enter into the agreements because its head of legislative power concerning "benefits to students" supports its executive action in that respect. It does not, however, have power to enter into the agreements on the basis of its legislative power to regulate "trading corporations" because SUQ is not such a body. The further submission that the Commonwealth has executive power unfettered by the distribution of its legislative power is inconsistent with the delineation of the powers in the *Constitution* and does not support its executive action to enter into the relevant agreements.

   5.3 as to questions, 2(b) and 4, an SUQ chaplain does not hold an office "under the Commonwealth" within the meaning of s116 because the chaplains are not engaged in the exercise of public power nor are they under the effective control of the Commonwealth and are thus not holding an office "under the Commonwealth".

   5.4 South Australia makes no submission in relation to question 3, 5 and 6.

Standing

6. South Australia supports the submission of the Commonwealth that the Plaintiff has no standing to challenge the appropriation of funds from Consolidated Revenue.[1] Given the concession of the Commonwealth it makes no submission as to whether or not the Plaintiff has standing to challenge the funding agreements.[2] However, because of the potential effect of any statement by this Court of principles concerning standing to challenge executive decisions, South Australia makes the following submissions about the underlying principles governing standing in Constitutional matters.

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1 Submissions of the Commonwealth at [7].
2 Submissions of the Commonwealth at [17].

7. At a federal level the notion of standing and the concept of "matter" necessary for the exercise of federal judicial power are inter-related or, put another way, subsumed in one another.[3] The extent, however, to which the concept of "matter" can provide discernable criteria for the resolution of standing issues is less clear.[4]

8. Certainly, at least insofar as there is a case in which there is no controversy to be resolved and where the matter is a purely hypothetical question, the concept of "matter" provides some content to the standing requirements.[5]

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9. The criteria of a "matter" focuses attention on the relationship between the impugned executive action or law *and* the challenging plaintiff.[6] This explains how, in a case such as this, standing could potentially exist in relation to one aspect of the case sought to be brought, but not another. However, beyond that it is unclear whether the concept of "matter" can supply any further discernable criteria so as to be able to practically resolve in a given case the entitlement of the plaintiff to bring a challenge.

10. Recent decisions of this Court remain explicable on the basis either that standing has been found to exist applying the requirements for standing at common law by the
20 identification of an interest, or where standing to challenge has been conferred by statute. In that way the standing of the Plaintiffs in *Croome v State of Tasmania*[7] is founded on regulation of the norm of conduct that affected the Plaintiffs personally.[8] In *Pape v Federal Commissioner of Taxation,*[9] putting the concession of standing to one side, the Plaintiff's interest in the bonus payment existed by reason of the obligation of the Commissioner of Taxation to make the payment and the right of the Plaintiff to receive it.[10] In *Truth About Motorways v Macquarie Infrastructure Investment Management Ltd*[11] Parliament itself conferred standing on a party irrespective of any direct interest that party had.[12]

11. The older case law, even in light of the more recent focus on the relationship between
30 standing and "matter", remains consistent in terms of ultimate resolution with the decisions in *Croome, Pape* and *Truth About Motorways*. Thus, *Anderson v The Commonwealth*[13] and the finding there of the absence of the Plaintiff's special interest to challenge the sugar agreement is consistent with more recent authority. As it was put by Gummow, Crennan and Bell JJ in *Pape,* it remains the case that a plaintiff is not entitled to "roam at large" over a statute in relation to provisions that do not affect them.[14] Considered in that way, the relevant requirement remains that in order to challenge an impugned law a plaintiff must continue to demonstrate standing at common law – that they

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3 *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 [50] (French CJ), [152] (Gummow, Crennan and Bell JJ); *Croome v State of Tasmania* (1997) 191 CLR 119 at 132-133 (Gaudron, McHugh and Gummow JJ).

4 *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591 at [45] (Gaudron J).

5 *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591 at [17], [37], [48] (Gaudron J).

6 *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591 at [122] (Gummow J).

7 *Croome v State of Tasmania* (1997) 191 CLR 119.

8 *Croome v State of Tasmania* (1997) 191 CLR 119 at 127-128 (Brennan CJ, Dawson and Toohey JJ), 137-138 (Gaudron, McHugh and Gummow JJ).

9 *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1.

10 *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at [52] (French CJ), [154] (Gummow, Crennan and Bell JJ), [273] (Hayne and Kiefel JJ).

11 *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591.

12 *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591 at [20], [30] (Gaudron J), [125] (Gummow J), [142] (Kirby J).

13 *Anderson v Commonwealth* (1932) 47 CLR 50.

14 *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at [156] (Gummow, Crennan and Bell JJ).

have an interest greater than that of an ordinary member of the public - or they have been given standing by legislation.

12. That statement of principle supports the Commonwealth's contention in addition to its submission addressing the case law on appropriation and standing that the Plaintiff has no standing to challenge the drawing of monies by way of appropriation.

The Executive power

A. Is the exercise of the executive power to enter into contracts with SUQ supported by the common law capacities of the Executive?

13. In *Pape* the Court rejected a submission that the Commonwealth has an unfettered spending power conferred by s81 of the *Constitution*. In this case, the Commonwealth submits that it has an unfettered spending power arising from its common law capacities sourced from s 61 of the *Constitution*. The extension of the executive power proposed by the Commonwealth should be rejected for the following reasons:

    13.1 It is contrary to long standing authority of this Court.

    13.2 The combined effect of the extended executive power and the incidental power would have the effect of extending Commonwealth legislative power beyond the spheres of legislative responsibility conferred on the Commonwealth Parliament by ss51, 52 and 122 of the *Constitution*.

    13.3 The conferral on the Commonwealth executive of an unfettered power to spend would confer a power on the Commonwealth executive to make grants to the states which s96 envisages will only be made in the discretion of the Commonwealth Parliament.

i. The nature of Commonwealth executive power

14. The executive power of the Commonwealth conferred by s61 includes: powers conferred by statute; the prerogative powers of the Crown; the common law capacities that the Crown shares in common with natural persons; and, "a capacity to engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation" (the fourth source).[15]

15. Accepting that any limitation upon the Commonwealth's executive power must arise from the *Constitution*, including its structure, the most significant of the restrictions is to be implied from the definition of the Commonwealth Parliament's legislative power. The text of the Constitution, and the intention of the framers, was to carefully delineate the limits of the Commonwealth Parliament's legislative power. To read the executive power as unconfined by the limits of legislative power works to the contrary. It has the effect, because of the relationship between s61 and s51(xxxix) to dramatically expand those carefully contemplated limits. The obvious should not be ignored.

16. The quotation relied upon by the Commonwealth[16] drawn from the decision in *Pape*[17] does not address, with respect, this issue. Rather, there the Court is addressing the

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15 *Victoria v Commonwealth & Hayden* (1975) 134 CLR 338 at 397 (Mason J); *Davis v The Commonwealth* (1988) 166 CLR 79 at 111 (Brennan J); *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at [133] (French CJ), [228] (Gummow, Crennan and Bell JJ). It is unnecessary for the purposes of this case to consider the ambit of the Commonwealth executive power arising under the fourth source, or to determine whether the power properly understood falls within the prerogative power of the Commonwealth or the express extension of the executive power by s61 for "the execution and maintenance of this Constitution, and of the laws of the Commonwealth."

16 Commonwealth submissions at [42].

respective limits of the executive of the Commonwealth and the States. It does not address the question of any limit on the executive power of the Commonwealth to be drawn from the delineation of Commonwealth legislative power.

17. Leaving the common law capacities to one side, the Commonwealth's executive powers are limited by reference to "the broad division of responsibilities between the Commonwealth and the States achieved by the distribution of legislative powers"[18]:

    17.1 The Commonwealth's exercise of powers conferred by statute is self-evidently confined within the limits of the Commonwealth's legislative powers.

    17.2 The Commonwealth's exercise of prerogative powers is confined to those prerogatives that fall within the Commonwealth's areas of legislative competence.[19]

    17.3 The Commonwealth's fourth source of executive powers is also not unlimited. As noted above the power only arises to support "activities peculiarly adapted to the government of a nation" and "which cannot otherwise be carried on". The existence of the power is clearest where its exercise "involves no real competition with State executive or legislative competence".[20]

    It would be incongruous if the common law capacities of the Commonwealth executive were not similarly constrained.

ii. Proposed extension contrary to existing authority

18. The existing authority in this Court confirms that like the other sources of Commonwealth executive power the common law capacities are limited.[21] These capacities are constrained within the limits of the Commonwealth's legislative competence:

    18.1 *Wooltops*[22] concerned the entry by the Commonwealth executive into agreements with a company engaged in the manufacture and sale of wool tops. Neither the *War Precautions Act 1914-1916* (Cth) nor the *War Precautions (Wool) Regulations 1916* (Cth) conferred authority for the entry into the agreements. The Court found that there was no source of authorisation otherwise to be found that gave the Commonwealth executive power to make or ratify the agreements. The Court treated the words "laws of the Commonwealth" in s61 as delimiting the boundaries of Commonwealth executive power.[23] In this regard, Isaacs J emphasised the

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17 *Pape v Federal Commissioner for Taxation* (2009) 238 CLR 1 at [220] (Gummow, Crennan and Bell JJ)

18 *Victoria v Commonwealth & Hayden* (1975) 134 CLR 338 at 398 (Mason J).

19 *Federal Commission of Taxation v Official Liquidator of EO Farley Ltd* (1940) 63 CLR 278 at 321-322 (Evatt J); *Cadia Holdings Pty Ltd v New South Wales* (2010) 84 ALJR 588 at [30]-[34] (French CJ), [86]-[89] (Gummow, Hayne, Heydon and Crennan JJ); H Evatt, *The Royal Prerogative* (1987 reprint) 220-238; *Barton v Commonwealth* (1973) 131 CLR 477, 498 (Mason J).

20 *Davis v The Commonwealth* (1988) 166 CLR 79 at 93-94 (Mason CJ, Deane and Gaudron JJ), cited in *Pape v Federal Commissioner for Taxation* (2009) 238 CLR 1 at [131] (French CJ), [239] (Gummow, Crennan and Bell JJ). See similarly, *Commonwealth v Tasmania (Tasmanian Dam Case)* (1983) 158 CLR 1 at 252 (Deane J); *Victoria v Commonwealth & Hayden* (1975) 134 CLR 338 at 364 (Barwick CJ), 396-398 (Mason J); *Davis v The Commonwealth* (1988) 166 CLR 79 at 111 (Brennan J).

21 Campbell despite advocating a different view, acknowledges that the authorities of the Court "generally point to the conclusion that to be valid a contract by the Crown in right of the Commonwealth must be one that parliament could, if it has not done so already, validly authorize": E Campbell, "Commonwealth Contracts" (1970) 44 ALJ 14, 22-23.

22 *Commonwealth and the Central Wool Committee v Colonial Combing, Spinning and Weaving Company Ltd* (1922) 31 CLR 421.

23 *Commonwealth and the Central Wool Committee v Colonial Combing, Spinning and Weaving Company Ltd* (1922) 31 CLR 421, 437-441 (Isaacs J); see also at 431-432 (Knox CJ and Gavan Duffy J).

need to delimit and distinguish the constitutional domain of the new federal entity from the domain of the States.[24]

18.2 In *Commonwealth v Australian Commonwealth Shipping Board*[25] the Court considered whether the Australian Commonwealth Shipping Board, established by the *Commonwealth Shipping Act 1923* (Cth) had acted beyond power in entering into an agreement with a council to supply, deliver and erect steam turbo-alternators. The Court treated the executive and legislative powers of the Commonwealth as coextensive, concluding that the agreements were beyond power because in the ordinary conditions of peace military defence did not warrant the establishment of business for the purpose of such trade.[26] The majority said that it was "impossible to say that an activity unwarranted in express terms by the Constitution is nevertheless vested in the executive."[27]

18.3 *Attorney-General (Victoria) v Commonwealth*,[28] involved a challenge to the operation by the Commonwealth Government of a clothing factory which made uniforms for the defence forces and in times of peace, uniforms for other departments of the Commonwealth. The Court found the operation to be authorised by the *Defence Act 1903-1932* (Cth). As such, it was unnecessary to decide whether it could have otherwise been supported.[29] Rich J was not prepared to accept the argument that the Commonwealth executive could enter into business operations without legislative power.[30] Relying on *Commonwealth v Australian Commonwealth Shipping Board*, Starke J said that there was no executive power to establish and maintain clothing factories for other than Commonwealth purposes.[31]

18.4 In *Re KL Tractors Ltd*[32] an unsecured creditor of a company being wound up by the Commonwealth sought an order expunging proof of a debt owed to the Commonwealth on the basis that the contracts to which the debt related were said to be beyond the power of the Commonwealth. The Court found that it would not have been open to the company to resist payment of the debt on the basis the Commonwealth had exceeded its constitutional limits. It was therefore unnecessary to decide whether it had indeed exceeded those limits. However, in touching on that issue, the majority framed their discussion in similar terms to those in *Attorney-General (Victoria) v Commonwealth*, namely whether production for a civilian purpose was incidental to the defence power.[33]

18.5 *Victoria v Commonwealth & Hayden*[34] concerned the validity of an appropriation from the Consolidated Revenue Fund for the purpose of the Australian Assistance Plan. In considering the extent of the Commonwealth's executive power, Barwick CJ said "the executive may only do that which has been or could be the subject of valid legislation."[35] Gibbs J provided to similar effect that "the executive cannot act

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24 *Commonwealth and the Central Wool Committee v Colonial Combing, Spinning and Weaving Company Ltd* (1922) 31 CLR 421, 439-440 (Isaacs J).
25 *Commonwealth v Australian Commonwealth Shipping Board* (1926) 39 CLR 1.
26 *Commonwealth v Australian Commonwealth Shipping Board* (1926) 39 CLR 1 at 9 (Knox CJ, Gavan Duffy, Rich and Starke JJ).
27 *Commonwealth v Australian Commonwealth Shipping Board* (1926) 39 CLR 1 at 10 (Knox CJ, Gavan Duffy, Rich and Starke JJ).
28 *Attorney-General (Victoria) v Commonwealth* (1935) 52 CLR 533.
29 Gavan Duffy CJ, Evatt and McTiernan JJ did not address the question: see *Attorney-General (Victoria) v Commonwealth* (1935) 52 CLR 533 at 559-560.
30 *Attorney-General (Victoria) v Commonwealth* (1935) 52 CLR 533 at 562 (Rich J).
31 *Attorney-General (Victoria) v Commonwealth* (1935) 52 CLR 533 at 567 (Starke J).
32 *Re KL Tractors Ltd* (1961) 106 CLR 318.
33 *Re KL Tractors Ltd* (1961) 106 CLR 318 at 334 (Dixon CJ, McTiernan and Kitto JJ).
34 *Victoria v Commonwealth & Hayden* (1975) 134 CLR 338.
35 *Victoria v Commonwealth & Hayden* (1975) 134 CLR 338 at 362 (Barwick CJ).

in respect of a matter which falls entirely outside the legislative competence of the Commonwealth" and referred to the distribution of power between the Commonwealth and States being "not merely of legislative power".[36] Mason J expressed a similar view.[37]

iii. Proposed extension would extend Commonwealth legislative power beyond the spheres of legislative responsibility conferred on the Commonwealth

19. If the Commonwealth's proposed extension of its executive power were accepted then this would enable the Commonwealth executive to regulate, by spending and contractual rather than legislative means, matters that would otherwise be beyond the reach of the Commonwealth Parliament pursuant to ss51, 52 and 122.[38] This is said to be justified on the basis that the exercise of such powers is non-coercive.[39]

20. Yet, acceptance of the Commonwealth's submission would not only entail an expansion of the Commonwealth non-coercive executive power. By virtue of s51(xxxix) an expansion of the executive power must also entail a corresponding expansion of Commonwealth legislative power.[40] Given the unprecedented nature of the Commonwealth's proposed extension of its powers, the operation of s51(xxxix) upon the exercise of the common law capacities is uncertain. The following two possibilities emerge:

20.1 *The broad view*: On one view, there is nothing in the language of s51(xxxix) that would prevent the Commonwealth Parliament from enacting coercive laws that are incidental to the exercise of the common law capacities. If so, then when the Commonwealth executive enters into a contract there would be no reason why the Commonwealth Parliament may not pass a law pursuant to s51(xxxix) which alters the legal obligations owed under that contract. Further, where the contract is entered into in order to pursue a policy objective then arguably the incidental power extends the legislative power of the Commonwealth Parliament to regulate the policy field entered upon by the executive. Thus, on this broad view of s 51(xxxix), the apparently innocuous extension of non-coercive common law capacities may in fact expand Commonwealth legislative power beyond the spheres of legislative responsibility assigned by ss51, 52 and 122.

20.2 *The narrow view*: In order to avoid the result contemplated above, it may be said that the incidental power as it applies to the exercise of the common law capacities should be limited.[41] However, to the extent that constraints are imposed upon the exercise of legislative power pursuant to s51(xxxix), to regulate the executive exercise of common law capacities, then problems of representative government may emerge. Such problems may be particularly acute where the common law capacities are exercised in pursuit of policy objectives. If the Parliament is hampered by a narrow view of the operation of s51(xxxix) then its ability to regulate the conduct of the executive, and the consequences of the exercise of its common law capacities, may be compromised. The capacity of the Parliament to control spending under contracts by way of its powers with respect to

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36 *Victoria v Commonwealth & Hayden* (1975) 134 CLR 338 at 379 (Gibbs J).
37 *Victoria v Commonwealth & Hayden* (1975) 134 CLR 338 at 399 (Mason J).
38 L Zines, *The High Court and the Constitution* (5th ed), p 355 ("Administrative law writers in both Britain and Australia have shown that the technique of administrative regulation by contract is pervasive in modern times.") See also, T Daintith "Regulation by Contract: the New Prerogative" (1979) 32 Current Legal Problems 41; C Saunders and K Yam, "Government regulation by contract: Implications for the rule of law" (2004) 15 PLR 51; and N Seddon, *Government Contracts* (4th ed), p65.
39 Submissions of the Commonwealth at [41].
40 Submissions of the Commonwealth at [45].
41 Submissions of the Commonwealth at [45].

appropriation, or to control the method by which contracts are negotiated and made,[42] may be insufficient for this purpose.

21. Whichever view is adopted, the Commonwealth's submission countenances instances where the Commonwealth Parliament has no power to legislate, but where the executive branch may act and may consequently expand the ambit of Commonwealth legislative power. Beyond the limited, and often extreme circumstances, in which it is appropriate for the Commonwealth executive to invoke its fourth source powers, the executive should not have greater powers than are conferred on the Commonwealth Parliament.

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iv. Proposed extension inconsistent with the conferral of the grants power on the Commonwealth Parliament

22. The proposed extension of Commonwealth executive power pays insufficient attention to the role played by s96 of the *Constitution*. If the Commonwealth's submission were correct then the framers would not have considered the inclusion of s96 to be necessary, rather payments to the states could have been made by the Commonwealth executive pursuant to its common law power to spend.

20 23. In response to this argument the Commonwealth contends that the purpose of s96 is "to put beyond doubt the power of the Parliament to attach conditions to grants made to the States."[43] This submission is inconsistent with the drafting history of s96 which began with a motion moved by Mr Henry of Tasmania at the Melbourne Convention for the insertion of a new clause in the following terms:

> The Parliament may, upon such terms and conditions and in such manner as it thinks fit, render financial aid to any state.

Mr Henry expressed the view that the clause would be necessary during the early years
30 after federation because of the restrictions in the other financial clauses.[44] The present s96 was introduced at the Premiers Conference in 1899. Quick and Garran expressed the view that s96 was intended to meet difficulties that might be caused by the "unyielding requirements of the distribution clauses, and to remove any possible necessity for an excessive tariff."[45] Read in light of this history and its position in Chapter IV of the *Constitution*, it is plain that, contrary to the submission of the Commonwealth, the purpose of s96 was not to clarify that grants could be imposed on condition, but rather to confer on the Commonwealth Parliament a power to make grants to the states.

24. It is true that in the course of the Convention Debates there was some discussion about
40 whether or not s96 was necessary. The view was expressed that it was not necessary because by virtue of the nature of the federal compact, the Commonwealth would have the power to come to the aid of a state.[46] Mason J shared that view, and for that reason, concluded that the purpose of s96 was to attach conditions to grants.[47] Importantly, however, there was no suggestion on behalf of the participants in the Convention Debates, or on behalf of Mason J in AAP, that the Commonwealth had power simply by virtue of its capacity as a juristic entity to enter into contracts.[48]

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42 Cf E Campbell, "Commonwealth Contracts" (1970) 44 ALJ 14 at 15.

43 Submissions of Commonwealth at [46].

44 *Official Record of the Debates of the Australasian Federal Convention* (Melbourne), 17 February 1898 at 1100.

45 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, 1901, at 869.

46 *Official Record of the Debates of the Australasian Federal Convention* (Melbourne): 17 February 1898 at 1104 (Sir John Forrest); p 1104 (Mr McMillan); 1105 (Mr Wise); cf at 1108, 1111 (Mr O'Connor). Quick & Garran, *The Annotated Constitution of the Australian Commonwealth*, 1901, 869.

47 *Victoria v Commonwealth & Hayden* (1975) 134 CLR 338 at 395 (Mason J).

48 Any suggestion that Mason J's views expressed in *Victoria v Commonwealth & Hayden* at 395 as to the purpose of s96 may indicate that he was of the view that the Commonwealth's executive common law capacities are unfettered is denied by His Honour's comments at 398: The presence of s96 "confirms

25. Finally, s96 confers the power to make grants to the states upon the Commonwealth Parliament. If the Commonwealth's submission is accepted, then despite the specific terms of s96 the Commonwealth executive should now also be taken to enjoy a power equivalent to that enjoyed by the Parliament pursuant to s96.

B. Is the exercise of the executive power to enter into contracts with SUQ supported by s51(xx) ?

26. South Australia contends that SUQ is not a trading corporation within the meaning of s51(xx). Consequently, s51(xx) cannot underpin the exercise of the executive power by the Commonwealth in entering into the relevant contracts with the SUQ. South Australia adopts the submissions of the Plaintiff and supplements those with the following.

27. Whether or not SUQ is a trading corporation for the purposes of s51(xx) is a question of characterisation. A significant determinant, in most instances the decisive determinant, are the activities undertaken by the corporation.[49] In *Adamson's Case*, Mason J explained:[50]

> 'Trading corporation' is not and never has been a term of art or one having a special legal meaning... Essentially it is a description or label given to a corporation when its trading activities form a sufficiently significant proportion of its overall activities as to merit its description as a trading corporation.

28. Trading activity in this context denotes the activity of buying or selling goods or services for reward.[51] The question is whether the trading activities of a corporation are significant relative to the non-trading activities of the corporation in question, rather than whether those activities are significant in an absolute sense.[52] Questions of fact and degree arise.[53] Questions of degree arise because the power is one to legislate with respect to corporations of a particular character, not to legislate with respect to trading, and because the corporation must be capable of answering the constitutional description.[54] Various different verbal formula have been used to describe the proportion of a corporation's trading activity that is necessary to demonstrate that the corporation is a constitutional corporation for the purposes of the activities test: "*a substantial corporate activity*";[55]

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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 s96."

49 *R v Federal Court of Australia; Ex parte WA National Football League* (1979) 143 CLR 190 at 208 (Barwick CJ), 233 (Mason J), 237 (Jacobs J), 239 (Murphy J); *Fencott v Muller* (1983) 152 CLR 570 at 601 (Mason, Murphy, Brennan and Deane JJ).

50 *R v Federal Court of Australia; Ex parte WA National Football League* (1979) 143 CLR 190 at 233 (Mason J).

51 *R v Trade Practices Tribunal; Ex parte St George County Council* (1974) 130 CLR 533 at 569-570 (Stephen J (in dissent)); *R v Federal Court of Australia; Ex parte WA National Football League* (1979) 143 CLR 190 at 209 (Barwick CJ), 235 (Mason J).

52 *R v Trade Practices Tribunal; Ex parte St George County Council* (1974) 130 CLR 533 at 543 (Barwick CJ (in dissent)); *R v Federal Court of Australia; Ex parte WA National Football League* (1979) 143 CLR 190 at 233 (Mason J); *State Superannuation Board v Trade Practices Commission* (1982) 150 CLR 282 at 304 (Mason, Murphy and Deane JJ). It is submitted that various decisions that have considered sufficiency of trading activity in absolute terms are wrong in that regard: *E v Australia Red Cross Society* (1991) 27 FCR 310 in which it was held that the hospital's trading activities were significant even though they were "*dwarfed*" by the government subsidies received and *United Firefighters' Union of Australia v Metropolitan Fire and Emergency Services Board* (1998) 83 FCR 346 in which the multi-million dollar trading revenue was said to be significant even thought it only constituted 5% of the total receipts.

53 *R v Federal Court of Australia; Ex parte WA National Football League* (1979) 143 CLR 190 at 234 (Mason J); *State Superannuation Board v Trade Practices Commission* (1982) 150 CLR 282 at 304 (Mason, Murphy and Deane JJ); *Fencott v Muller* (1983) 152 CLR 570 at 589 (Gibbs CJ).

54 *The Queen v Trade Practices Tribunal; Ex parte St George County Council* (1974) 130 CLR 533 at 543 (Barwick CJ).

55 *R v Federal Court of Australia; Ex parte WA National Football League* (1979) 143 CLR 190 at 208 (Barwick CJ).

"*significant proportion of its overall activity*";[56] "*not insubstantial*".[57] In the *State Superannuation Board Case* a majority of the Court downplayed the significance of any difference arising from these various formulations and settled on the phrase "*trading activities on a significant scale*".[58]

29. It is not necessary that there be a profit motive; although, the presence of a profit motive is usual.[59] Governmental bodies and not-for-profit non-government community sector bodies regularly engage in trade, in the relevant sense, when they provide goods or services for reward. Hence, in the *Tasmanian Dam Case* this Court held that the Hydro-Electric Commission was engaged in trading activity, despite the fact that it was a statutory authority established for a public purpose.[60]

30. Consideration of the sources of a corporation's revenue is only relevant in so far as it may reflect the proportion of a corporation's trading activities when compared to its overall activities.[61]

31. The purposes for which a corporation was formed are not irrelevant to the characterisation exercise, but are not determinative and will rarely be of great assistance.[62] This is particularly so in light of changes in the corporations law in 1984 such that it is no longer necessary for a company to state its objects in a constitution.[63] As Barwick CJ noted:

> ... But to conclude that the purpose of its incorporation was to trade is quite another matter. It is, in my opinion, only necessary to recall the wide spread of the objects of a company formed under the *Companies Acts* as expressed in its memorandum of association, particularly in days when the doctrine of ultra vires was more readily applied, to appreciate the difficulties encountered in attempting in all cases to attribute purpose to incorporation. Material extrinsic to the memorandum might for some purposes be resorted to, to decide why and to what end a body was incorporated. But it would be, to my mind, most unsatisfactory to have to follow such a course in order to identify the subject matter of constitutional power. Further, even if an object of a company seemed dominant at the date of incorporation, in the course of the company's existence it may cease to have significance and an object which seemed incidental at incorporation may become central to its current activities. In days of "diversification" in corporate industry this may prove a frequent phenomenon.[64]

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56 *R v Federal Court of Australia; Ex parte WA National Football League* (1979) 143 CLR 190 at 233 (Mason J).

57 *R v Federal Court of Australia; Ex parte WA National Football League* (1979) 143 CLR 190 at 239 (Murphy J).

58 *State Superannuation Board v Trade Practices Commission* (1982) 150 CLR 282 at 304 (Mason, Murphy and Deane JJ).

59 *R v Trade Practices Tribunal; Ex parte St George County Council* (1974) 130 CLR 533 at 539 (Barwick CJ (in dissent)), 563 (Gibbs J), 569 (Stephen J (in dissent)); *R v Federal Court of Australia; Ex parte WA National Football League* (1979) 143 CLR 190 at 235 (Mason J).

60 *Commonwealth v Tasmania* (1983) 158 CLR 1.

61 N Gouliaditis, "*The meaning of 'trading or financial corporations': Future directions*" (2008) 19 PLR 110 at 127. The activities test may have been misapplied in this respect by various lower court decisions which appear to have compared the trade generated income and the non-trade generated income of the corporation in question, rather than its trading and non-trading activities. Examples of decisions that appear to adopt reasoning of this sort include: *E v Red Cross* (1991) 27 FCR 310, 345; *United Firefighters Union of Australia v Metropolitan Fire and Emergency Services Board* (1998) 83 FCR 346 at 351; *Orion Pet Products v RSPCA* (2002) 120 FCR 191 at 219; *Quickenden v O'Connor* (2001) 109 FCR 243 at 272-273 (Carr J).

62 *State Superannuation Board v Trade Practices Commission* (1982) 150 CLR 282 at 303 (Mason, Murphy and Deane JJ) and 295 (Gibbs CJ and Wilson J); *Fencott v Muller* (1983) 152 CLR 570 at 588-589 (Gibbs CJ), 602 (Mason, Murphy, Brennan and Deane JJ), 611 (Wilson J) and 622-624 (Dawson J).

63 *Companies and Securities Legislation (Miscellaneous Amendments) Act 1983* (Cth) s34. See also *Corporations Act 2001* (Cth), s 134.

64 *R v Trade Practices Tribunal; Ex parte St George County Council* (1974) 130 CLR 533 at 542 (Barwick CJ).

32. Whilst it is true that the framers did not intend that s51(xx) would extend to the full range of corporations, including, for example, municipal and charitable corporations as the character of those corporations was then understood,[65] to restrict the application of s51(xx) to corporations whose purpose is not the pursuit of gain to be distributed and yet a significant proportion of the activities of which is trading, would be inconsistent with the broad textual method of constitutional interpretation that has been applied since the decision in the *Engineers Case*.[66] It is also to fail to take account of the developing nature of the law concerning corporations as at the time of Federation and since.[67] That said, just as the exclusion of charitable and municipal corporations from the meaning of "trading corporations" would be inconsistent with the plain words of s51(xx) where a significant proportion of the activities of such corporations is trading, so too would it be an unwarranted expansion of the meaning of "trading corporations" to include any corporation that simply has the capacity to trade.[68] Such an interpretation would include within the meaning of "trading corporation" a corporation that was not created with a trading purpose, has never traded and has no intention of trading into the future.[69] *Fencott v Muller* is not to the contrary.[70] That case was decided prior to enactment of the *Companies and Securities Legislation (Miscellaneous Amendments) Act 1983* (Cth). Thus capacity is an inappropriate indicia of the character of a corporation. Further, capacity is a blunt instrument for the identification of those corporations in relation to which uniformity of regulation was considered desirable. Similarly, to the extent that s51(xx) performs a protective function[71] a test focusing on capacity fails other than in the most general way to identify those corporations with respect to which regulation for protective purposes is desirable.

33. South Australia contends that corporations will not be engaged in trading activity when undertaking activities pursuant to a government grant or statutory command.[72] Such activity does not involve the striking of a commercial bargain which is a necessary feature of trade in the relevant sense. There is a difference between trading and giving. The point in relation to activity engaged in pursuant to money given by way of grant is well made by Gouliaditis:[73]

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65 See the references in N Gouliaditis, "*The meaning of 'trading or financial corporations': Future directions*" (2008) 19 PLR 110, 119-122.

66 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

67 *Work Choices Case* (2006) 229 CLR 1 at [107]-[123] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

68 Submissions of the Commonwealth at [34]-[36].

69 Given that the correct character of a corporation turns on its activities, it is possible that the status of corporations may change as their trading activities fluctuate from time to time. This possibility was acknowledged in *Quickenden v O'Connor* (2001) 109 FCR 243 in which Black CJ and French J said, at 261, [51] that: "*The University was not established for the purpose of trading and at another time, closer to the time of its creation, it may not have been possible to describe it as a trading corporation. But at the time relevant to this case and at present, it does fall within that class.*"

70 *Fencott v Muller* (1983) 152 CLR 570.

71 *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 404 (Isaacs J).

72 *Aboriginal Legal Service of Western Australia (Inc) v Lawrence [No 2]* (2008) 37 WAR 450 AT 470-471 [69]-[74] (Steytler P), 472-473 [81]-[82] (Pullin J); *E v Australian Red Cross* (1991) 27 FCR 310, 343 (Wilcox J) ("*the gratuitous provision of a public welfare service [blood transfusion services], substantially at government expense*" was not trade); *Mid Density Development Pty Ltd v Rockdale Municipal Council* (1992) 39 FCR 579, 584 (Davies J) ("*carrying out a function of government in the interests of the community is not a trading activity*"); *Quickenden v O'Connor* (2001) 109 FCR 243, [51] (Black CJ and French J); *cf* [109] (Carr J) ("*It is questionable whether the provision of educational services within the statutory framework of the Higher Education Funding Act amounts to trading. The Act creates a liability for each student to the University in respect of each course of study undertaken in a semester. The amount is not fixed by the University but rather by the Minister under published guidelines. The concept of 'trading' is a broad one. It is doubtful, however, that it extends to the provision of services under a statutory obligation to fix a fee determined by law and the liability for which, on the part of the student, appears to be statutory*").

73 N Gouliaditis, "*The meaning of 'trading or financial corporations': Future directions*" (2008) 19 PLR 110, 127; cited with apparent approval in *Aboriginal Legal Service of Western Australia (Inc) v Lawrence [No 2]* [2008] WASCA 254 at [128] (Le Miere J).

> [T]he authorities seem to establish that revenue from grants should not count as trade. That must be correct. However, there is a growing trend for grants to take the forms of contracts, especially funding provided to non-profit organisations and municipal corporations. Whether the contract is in truth a trade arrangement or simply a mechanism to provide funding will turn on the facts of each case. But activities undertaken pursuant to a grant in the guise of a commercial arrangement should not be taken to be trading activities.

34. The focus of the inquiry in applying this aspect of the test is not on the nature of the service that is provided, but rather is on the true nature of the bargain that is struck.[74]

35. Applying these principles to the facts of this case, it is clear from the material before the Court that SUQ is primarily engaged in the activity of providing chaplaincy services. SUQ employs more than 500 school chaplains who provide services in over 600 schools.[75] However, the provision of chaplaincy services by SUQ does not constitute trade in the relevant sense. This conclusion does not follow from the nature of the service provided, or the fact that SUQ is a not-for-profit organisation. Rather, it follows from a consideration of the nature of the bargain struck between the Commonwealth and SUQ. While Commonwealth funding was provided in accordance with agreements entered into with SUQ, in accordance with the NSCP Guidelines, the agreements were simply a mechanism to provide government grant funding under the NSCP. The agreements did not have the necessary character of commerciality to warrant the characterisation of activities carried out pursuant to them as trading activity.

36. This conclusion is supported by the following facts taken together: the agreements were in standard form;[76] there was no competitive tender process for the provision of the chaplaincy services; SUQ made application in accordance with the Guidelines; funding followed a determination by the Minister, or a delegate, that SUQ satisfied the selection criteria under the Guidelines;[77] the maximum amount of funding of $20,000 per annum was pre-determined under the NSCP Guidelines;[78] funding was provided in lump sums once per year in advance of services being rendered;[79] the services to be provided under

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74 *Bankstown Handicapped Children's Centre Association Inc v Hillman* (2010) 182 FCR 483, 511-512 [51]-[55] (the Court).

75 See SUQ Annual Report 2009, SCB Vol 1, 167 (the 2009 Report is the most recent report included in the SCB).

76 Special Case, SCB Vol 1, 17 at [50].

77 A NSCP online application form is to be submitted to the relevant Department at the time. The application must be endorsed by the relevant school principal or authority. The Department, in assessing applications for the purposes of making a recommendation to the Minister, takes into account selection criteria specified under the Guidelines including evidence of support from community consultation, the school community's need for chaplaincy services, value for money, and the extent of existing cash/in-kind support: 2007 Updated Guidelines, SCB Vol 2, 549-552; 2008 Updated Guidelines, SCB Vol 2, 580-583. However, note that where the number of applications that successfully meet the assessment criteria exceeds the available funding, the Department may prioritise applications that demonstrate a greater need of the funding: 2007 Updated Guidelines, SCB Vol 2, 545 [2.4]; 2008 Updated Guidelines, SCB Vol 2, 576 [2.4].

78 Under the NSCP Guidelines, the maximum amount of funding for any one school and its community is in most cases $20,000 per annum. Schools chaplains will normally need to be active for at least the equivalent of two full school days per week to obtain maximum funding. Although the schools may engage a chaplain for more days per week, or engage the services of more than one school chaplain, the amount of funding available will not increase: 2007 Updated Guidelines, SCB Vol 2, 544 [2.2]; 2008 Updated Guidelines, SCB Vol 2, 575 [2.2]; 2010 Updated Guidelines, SCB Vol 2, 610 [2.2]. If providing the services cost more than the funding, the Commonwealth will not provide funding to cover the additional costs: Darling Heights Funding Agreement, SCB Vol 2, 639 [C.10].

79 Under the Darling Heights Funding Agreement, the first lump sum of $20,000 plus GST is provided on signing of the agreement and acceptance of a valid tax invoice. Each lump sum thereafter is provided on receiving a valid tax invoice, after the acquittal of previous funds and a satisfactory progress report has been given: SCB Vol 2, 639 [C.7]–[C.9], SCB Vol 2, 645 [M], SCB Vol 2, 646 [3]. The first progress report and statement of acquittal of funds is to be provided by SUQ nine months after signing of the agreement, and next are to be provided one year after the acceptance of the previous progress report: SCB Vol 2, 642 [I]. This is consistent with the NSCP Guidelines: 2007 Updated Guidelines, SCB Vol 2, 558-559

the NSCP were defined in the NSCP Guidelines and funding agreements;[80] funds were to be used only for purposes directly related to the provision of chaplaincy services in the school for which funds were provided.[81] Considered together these indicia establish that funding to SUQ under the agreements, in accordance with the NSCP, was in the nature of the provision of grant monies rather than payment for services in accordance with a trade agreement.

37. Further, the remaining sources of funding for SUQ's provision of chaplaincy services (State funding, chaplaincy levies, and funding from local chaplaincy committees) do not suggest that SUQ is engaged in trade in the provision of such services. The funding from the Queensland government is of a similar nature to that under the NSCP. Chaplaincy levies received by SUQ in respect of chaplains do not appear to be the result of any trade-like arrangement.[82] Similarly, the revenue generated by local chaplaincy committees is in the nature of fundraising rather than trade.[83] Therefore, SUQ's provision of chaplaincy services does not constitute trading.

38. Looking to SUQ's other activities, South Australia agrees with the Plaintiff[84] that the only activities of SUQ that could be said to be trading are: its sale of books, training materials and various other merchandise; its provision of training courses through its Youth Ministry Internship Scheme; its annual Staff Professional Development Conference; its activities associated with its Stock up for Hope fundraising event and its subsidiary, SU Queensland Trading Pty Ltd, which deals with cattle; its Build the Future fundraising Dinner; its running of holiday camps and missions.[85] These activities generated less than 10% of SUQ's total revenue in all but the first of the relevant periods.[86] These trading activities are not of such a significant scale so as to make SUQ a trading corporation.

[6.4]–[6.7]; 2008 Updated Guidelines, SCB Vol 2, 589-590 [6.4]–[6.7]; 2010 Updated Guidelines, SCB Vol 2, 618 [5.7]–[5.10].

80 See 2007 Updated Guidelines, SCB Vol 2,542-543; 2008 Updated Guidelines, SCB Vol 2, 573-574; 2010 Updated Guidelines, SCB Vol 2, 608-609; Darling Heights Funding Agreement, SCB Vol 2, 638-639.

81 2007 Updated Guidelines, SCB Vol 2, 555 [5.7]; 2008 Updated Guidelines, SCB Vol 2, 586 [5.7]. 2010 Updated Guidelines, SCB Vol 2, 615 [4.7]. Where SUQ has not performed its obligations under the agreement, the Commonwealth may withhold or suspend any payment in whole or in part, and in such circumstances SUQ must still continue to perform its obligations under the agreement: Darling Heights Funding Agreement, SCB Vol 2, 646 [3.2]–[3.3]. Note also that SUQ must not subcontract the performance of any obligations under the Agreement: SCB Vol 2, 647 [7].

82 The Special Case (SCB Vol 1, 8 at [15.5.4]) is unclear as to the exact nature of these levies. It states that revenue under this category 'includes all chaplaincy services, NSCP funded, State funded and community funded services. Chaplaincy levies are drawn from the NSCP Commonwealth Grant Income and State Government [Grant Income]'. SUQ Annual Report 2007 states (at SCB Vol 1, 116) that of the total amount of $4,381,900 of chaplaincy 'Income', 88% comes from 'Community Donations', 1% comes from 'Interest', 3% comes from 'Fundraising Events' and 8% comes from 'Sundry'. In a year where the revenue generated from chaplaincy levies exceeded the revenue received from the Commonwealth and State governments, these statistics would appear to suggest that the levies are not received in the course of trade.

83 A 'local chaplaincy committee' is an advisory body established under the State funding scheme to assist the school principal with monitoring the provision of chaplaincy services and providing guidance and support to the chaplain: see Agreement between SUQ and Queensland, Sch 2 cl 4 and 11 (SCB Vol 1, 434-435). The committee consists of the chaplain, a nominated delegate of SUQ, the school principal, and religious, parent and student representative(s) from the school community. According to the Special Case (SCB Vol 1, 8 at [15.5.5]) local chaplaincy committees conduct fundraising activities to fund the chaplaincy programs in respect of which they were established to provide assistance.

84 Plaintiff's Amended Submissions, [36].

85 See Special Case, SCB Vol 1, 6–10 at [15]–[16].

86 These activities generated: $1,488,842 out of $10,937,576 (13.6%) in the period 1 April 2007 to 31 December 2007; $2,226,034 out of $24,603,381 (9.05%) in 2008; $2,435,000 out of $29,894,000 (8.15%) in 2009; and $2,195,000 out of $27,955,000 (7.85%) in 2010. See Special Case, SCB Vol 1, 6–10 at [15]–[16].

C. Is the exercise of the executive power to enter into contracts with SUQ supported by s51(xxiiiA)?

39. South Australia contends that the Commonwealth, through the NSCP, provides benefits to students within the meaning of s51(xxiiiA). Thus, accepting that the executive power of the Commonwealth extends to matters falling within s51(xxiiiA), the contracts entered into for the purposes of the NSCP were within power.

40. The meaning of the word 'benefit' as accepted by a majority of this Court in *British Medical Association v The Commonwealth*[87] and all members of this Court in *Alexandra Private Geriatric Hospital Pty Ltd v The Commonwealth*[88] is that expressed by McTiernan J in *British Medical Association v The Commonwealth*. His Honour stated:

> The material aid given pursuant to a scheme to provide for human wants is commonly described by the word 'benefit'. When this word is applied to that subject matter it signifies a pecuniary aid, service, attendance or commodity made available for human beings under legislation designed to promote social welfare or security: the word is also applied to such aids made available through a benefit society to members or their dependants. The word 'benefits' in par.(xxiiiA) has a corresponding or similar meaning.[89]

41. The plaintiff does not contend that services of the sort provided by chaplains under the auspices of the NSCP do not amount to a benefit to students within the meaning of s51(xxiiiA). Rather the complaint focuses upon the method invoked in providing those services. The contention is that s51(xxiiiA) empowers the Commonwealth to provide benefits to students, not to provide persons with financial assistance so that they may provide benefits to students.[90] To this Western Australia adds that here the benefits provided are to students and others.[91]

42. South Australia agrees with the submissions of the Commonwealth that it is not necessary that the Commonwealth provide the benefit directly to students.[92] There is no basis for reading the word "directly" into s51(xxiiiA).

43. The nature of the NSCP is analogous to the pharmaceutical benefits scheme held valid in *British Medical Association v The Commonwealth*. In that case Dixon J alluded to the issue here raised. His Honour said:

> The meaning [of the words 'with respect to the provision of'] appears to me to be the same as if the power had been expressed as one to make laws to provide &c. It might have been so expressed had it not been for the words "in respect of" at the head of the section. These words made the use of a substantive or verbal noun necessary and doubtless this accounts for the choice of the words "the provision." But to say that the meaning is the same as if the power had been one to provide the benefits &c. enumerated is not to restrict the Commonwealth to providing them directly and at the expense of the Treasury. The power perhaps might, for example, cover the establishment of contributory schemes; and it would cover the provision of benefits &c. through separate bodies set up for the purpose.[93]

44. In *British Medical Association v The Commonwealth*, although part of the Act was held invalid (s7A and the requirement that medical practitioners use a prescribed form when

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87 *British Medical Association v The Commonwealth* (1949) 79 CLR 201 at 246 (Latham CJ), 286-7 (Williams J) and 292 (Webb J).

88 *Alexandra Private Geriatric Hospital Pty Ltd v The Commonwealth* (1987) 162 CLR 271 at 280 (Mason ACJ, Wilson, Brennan, Deane and Dawson JJ).

89 *British Medical Association v The Commonwealth* (1949) 79 CLR 201 at 279 (McTiernan J).

90 Submissions of the Plaintiff at [31].

91 Submissions of Western Australia at [50]-[52].

92 Submissions of the Commonwealth at [22].

93 *British Medical Association v The Commonwealth* (1949) 79 CLR 201 at 20-1 (Dixon J) and see *Alexandra Private Geriatric Hospital Pty Ltd v The Commonwealth* (1987) 162 CLR 271 at 282-3 (The Court).

providing a prescription under the scheme), no member of this Court considered the scheme, and in particular, the manner of administering the Commonwealth funds to be beyond power.

45. Under the *Pharmaceutical Benefits Act 1947-1949* (Cth) the Commonwealth sought to provide free pharmaceutical benefits to members of the public. In order to obtain the benefits, certain conditions were required to be complied with:[94] firstly a prescription was to be provided by a medical practitioner on a prescribed form.[95] Secondly, that prescription was to be presented at an approved chemist who was not an officer of the Commonwealth.[96] Finally, upon doing so, the approved pharmacy was required to provide the pharmaceutical benefit free of charge to the member of the public,[97] and was entitled to payment for the benefit from the Commonwealth.[98] In that context, McTiernan J summarised:[99]

> The plan pursued by [the *Pharmaceutical Benefits Act 1947-1949* (Cth)] is that the Commonwealth pays for the medicine obtained at a pharmaceutical chemist's shop by any person who is in need of it. The payment by the Commonwealth for the medicine is action within the scope of the words "the provision of pharmaceutical benefits".

46. The NSCP is broadly similar in that the Commonwealth provides funding for the provision of a benefit which is provided by another organisation. The fact that another organisation, the project sponsor, may administer the Commonwealth funding does not alter the characterisation of the scheme as one for the provision of benefits to students. Under the NSCP, the school makes application directly to the Commonwealth for funding for a chaplaincy service. The funding application must nominate an organisation that will enter into a funding agreement with the Commonwealth Government under the program.[100] The application submitted by the Darling Heights State School nominated SUQ as the organisation that would enter into the funding agreement with the Commonwealth (the project sponsor).[101] If an application is successful, the Commonwealth enters into a funding agreement with the nominated project sponsor who will manage the funding on behalf of the school and its community, work in partnership with the school principal to provide chaplaincy services to the school (including employing the relevant chaplain - the NSCP Guidelines make clear that "funding recipients will be responsible for the disbursement of funds to all school chaplains providing services under the Programme"),[102] and ensure compliance with the funding agreement.[103] The project sponsor must only use the Commonwealth funding in order to deliver the chaplaincy services to the relevant school.[104] The cost of employing the chaplain is ultimately recovered by SUQ from the Commonwealth in accordance with the payment schedule in the funding agreement. The Commonwealth monitors adherence with the funding agreement and ensures projects are properly acquitted and the Australian Government funding is properly accounted for including by evaluating project outcomes, managing program funds, policy and performance, and reviewing progress of individual projects.[105]

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94 See the summary in *British Medical Association v The Commonwealth* (1949) 79 CLR 201 at 263-4 (Dixon J).
95 s8(1) of the *Pharmaceutical Benefits Act 1947-1949* (Cth).
96 s9(1) and s4(2) of the *Pharmaceutical Benefits Act 1947-1949* (Cth).
97 s7(3) of the *Pharmaceutical Benefits Act 1947-1949* (Cth).
98 s14(1) and s4(2) of the *Pharmaceutical Benefits Act 1947-1949* (Cth).
99 *British Medical Association v The Commonwealth* (1949) 79 CLR 201 at 280 (McTiernan J).
100 2007 Updated Guidelines, SCB Vol 2, 544 at [2.3].
101 NSCP Application dated 4 April 2007, SCB Vol 2, 688.
102 2007 Updated Guidelines, SCB Vol 2, 544 at [2.2]; 547 at [3.4].
103 Darling Heights Funding Agreement, SCB Vol 2, 646, schedule 1, Part B at [2.2]. 2007 Updated Guidelines, SCB Vol 2, 542 at [1.4].
104 Darling Heights Funding Agreement, SCB Vol 2, 639 at [C.5].
105 2007 Updated Guidelines, SCB Vol 2, 558-559.

47. In much the same way as the Commonwealth provided a pharmaceutical benefit through the pharmaceutical benefits scheme (and sickness and hospital benefits in *Alexandra Private Geriatric Hospital Pty Ltd v The Commonwealth*),[106] so too does the Commonwealth provide a benefit to students through the NSCP.

48. It is contended that the benefit must apply to students to the exclusion of all others. The argument is that the fact that the benefit incidentally affects another class of persons (the school staff and community) has the consequence that it cannot be characterised as a benefit to students. With respect, that is an unduly narrow characterisation of the nature of the scheme. The NSCP program exists for the very purpose of assisting schools and their communities to provide or enhance chaplaincy services to school students. That is, the program seeks to "assist schools and their communities to support the spiritual wellbeing of their students".[107] There is no doubt that staff and the school community may also benefit from the provision of chaplaincy services but that can be considered auxiliary to the achievement of the primary purpose which is to benefit students.[108]

49. It must be acknowledged that the power contained in s51(xxiiiA) is, within the limits of the subject matter, a plenary power to be construed "with all the generality which the words used admit".[109] It is also consistent with the express limitation of the power; it is confined to "the provision of" the relevant benefits and is not a power 'with respect to' the relevant benefits.[110] Further, it is consistent with the further limitation that the benefits be provided *to* students which presupposes the beneficiary to have a particular status which, in turn, presupposes the existence of an education system.[111]

Section 116 - does a school chaplain hold an office under the Commonwealth?

50. On the assumption that clause 1.5 in each of the successive versions of the NSCP Guidelines imposes a religious test that must be met in order that a person be eligible to provide chaplaincy services under a funding agreement entered into by the Australian Government in the implementation of the NSCP, South Australia contends that such a chaplain does not hold an "office ... under the Commonwealth" within the meaning of s116 of the Constitution.

51. Section 116 limits the power of the Commonwealth in four respects, each sometimes referred to as comprising distinct clauses. The first three concern the legislative power of the Commonwealth. The fourth, which is the subject of this case, constitutes a constraint upon both the legislative and executive power.[112] Thus the "Commonwealth" referred to in the first clause is the Commonwealth Parliament, whilst the "Commonwealth" referred to in the fourth clause includes both the Commonwealth Parliament and the Executive Government of the Commonwealth.

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106 *Alexandra Private Geriatric Hospital Pty Ltd v The Commonwealth* (1987) 162 CLR 271 at 280 (The Court). For the reasons advanced by the First, Second and Third Defendants at [24] of their submissions the provision of benefits by less direct means was within contemplation.

107 *Darling Heights Funding Agreement,* SCB Vol 2, 638 at [B.1], [C.1].

108 In this regard South Australia agrees with the Submissions of the Commonwealth at [25].

109 *R v Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways Pty Ltd* (1964) 113 CLR 207 at 225-226 (The Court); *Grain Pool (WA) v The Commonwealth* (2000) 202 CLR 479 at 492, [16] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

110 *British Medical Association v The Commonwealth* (1949) 79 CLR 201 at 242-3 (Latham CJ), 254 (Rich J), 260 (Dixon J), 279 (McTiernan J and 292 (Webb J); *Alexandra Private Geriatric Hospital Pty Ltd v The Commonwealth* (1987) 162 CLR 271 at 279.

111 And, as Western Australia notes, the power to make laws with respect to the provision of benefits to students is not allied with a power to make laws with respect to the provision of education services; Submissions of Western Australia at [46(b)]. This is consistent with the history of s51(xxiiiA).

112 *Attorney-General (Vic); Ex Rel Black v The Commonwealth* (1981) 146 CLR 559 at 605, 610 (Stephen J).

52. It is clear from the text of s116 that where it refers to any office or public trust under the Commonwealth it is not concerned with the 'federal community'.[113] That is, s116 does not apply in any of its four aspects to the States.[114] This is consistent with the history of the provision in the constitutional conventions.[115]

53. The meaning of "office ... under the Commonwealth" turns largely on the context in which it is found, construed in the light of the mischief to which it was directed.[116]

54. As to the mischief:

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54.1 in its original form the intent was to amend what was the then clause 109 so that it would apply to both the States and the Commonwealth and, as to the latter, address any suggestion that the reference to Almighty God in the preamble of the Constitution impliedly vested power in the Commonwealth to legislate with respect to religious matters.[117] This fear was born of the decision of the United States Supreme Court in *Church of the Holy Trinity v United States* where it was held that the United States was a Christian country and that, consequently, statutes framed in general terms were not to be construed in a manner inconsistent with this fact. At the 1898 Convention in Melbourne it was said that, relying on this authority, laws
20 requiring Sunday worship had been held valid.[118] It appears that the framers' thinking was that the reference in the preamble to Almighty God would provide a similar basis in Australia for imposing religious observance. The antidote was to amend the draft Constitution to include a buttressed version of the First Amendment to the Constitution of the United States. The amendment was negatived. Further, clause 109 was struck out, ostensibly because of its application to the States. Subsequently a fresh clause 109 was proposed in the form of what became s116. The intent of the framers remained the same.[119] It was to avoid the "recrudescence of religious strifes" said to have occurred in the United States - "A lifting of banners of those who wish to impose, for instance, a compulsory sabbath all through, in,
30 and upon every State, and a lifting of the banner of those who oppose that movement".[120] The difference between the amendment originally posed and the fresh clause lay in limiting the restriction to the Commonwealth only.

54.2 The intent of the framers is consistent with the observation made by Latham CJ in *Adelaide Company of Jehovah's Witnesses Inc v The Commonwealth*:

> Section 116, however, is based upon the principle that religion should, for political purposes, be regarded as irrelevant. It assumes that citizens of all religions can be good citizens, and that accordingly there is no justification in the interests of the community for
40 prohibiting the free exercise of any religion.[121]

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113 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) § 462, p 951.

114 *Attorney-General (Vic); Ex Rel Black v The Commonwealth* (1981) 146 CLR 559 at 577 (Barwick CJ), 594 (Gibbs J), 654 (Wilson J); *Kruger v The Commonwealth* (1997) 190 CLR 1 at 60 (Dawson J), 125 (Gaudron J).

115 *Official Record of the Debates of the Australasian Federal Convention* (Melbourne), 2 March 1898 at 1769.

116 *Sykes v Cleary* (1992) 176 CLR 77 at 96-97 (Mason CJ, Toohey and McHugh JJ).

117 *Official Record of the Debates of the Australasian Federal Convention* (Melbourne), 7-8 February 1898 at 654-664.

118 *Church of the Holy Trinity v United States* 13 US 457 (1892).

119 *Official Record of the Debates of the Australasian Federal Convention* (Melbourne), 2 March 1898, at 1769 -1779.

120 *Official Record of the Debates of the Australasian Federal Convention* (Melbourne), 7-8 February 1898, at 655 (Mr Higgins). Further, in *Attorney-General (Vic); Ex Rel Black v The Commonwealth* (1981) 146 CLR 559 at 616 Mason J alludes to the relationship between Church and State in England, Scotland and Ireland that would have been in the minds of the framers.

121 *Adelaide Company of Jehovah's Witnesses Inc v The Commonwealth* (1943) 67 CLR 116 at 126.

And, it may be added, the appointment of a person to an office under the Commonwealth on the basis of a religious test. The intent was to provide for religious equality, freedom of religion and the right to have no religion.[122]

55. As to context:

55.1 "Office" appears in ss17, 35, 44(vi), 62, 64, 65, 84, and 103(ii). Of these ss17, 35 62, 64, 65 and 103(ii) concern specific offices identified by the Constitution of defined authority (e.g. President of the Senate or Speaker of the House of Representatives). Sections 44(vi) and 84 have a broader application in that they are not limited to offices identified by reference to a particular position. They include the Commonwealth public service.[123] Having regard to the object of s116 (see [54.1] above) it stands to reason that it would apply beyond those offices of defined authority identified in the Constitution to the Commonwealth public service. If it were otherwise a particular religion could be given preference in the make up of the Commonwealth public service. Religious inequality would become part of the Executive landscape. Further, with that inequality, conceivably, the Executive or Departments of it or parts thereof, or agencies or instrumentalities of the Commonwealth, could become dominated by a particular religion with the result that the values and beliefs of that religion will inform the decision and policy making of the entity. Indirectly the establishment of a State religion occurs in some measure. Banners are raised.

55.2 Section 75(v) refers to officers of the Commonwealth. That is a very broad expression.[124] For the reasons advanced above such officers hold office under the Commonwealth. It has been said that it applies to the Commonwealth public service.[125] Of s75(v), in the context of whether or not a State judicial officer exercising federal judicial power is an "officer of the Commonwealth", this Court has stated:

> The Constitution, by Chapter III., draws the clearest distinction between federal Courts and State Courts, and while enabling the Commonwealth Parliament to utilize the judicial services of State Courts recognizes in the most pronounced and unequivocal way that they remain "State Courts." No reference is made to State Judges. Federal jurisdiction may be entrusted to State Courts, and, if so, the Judges of those Courts exercise the jurisdiction not because they are "officers of the Commonwealth"—which they are not—but because they are State officers, namely, Judges of the States. An "officer" connotes an "office" of some conceivable tenure, and connotes an appointment, and usually a salary. How can it be said that a State Judge holds a Commonwealth office? When was he appointed to it? He holds his position entirely under the State; he is paid by the State, and is removable by the State, and the Constitution knows nothing of him personally, but recognizes only the institution whose jurisdiction, however conferred, he exercises. ... The expression "officer of the Commonwealth" has not a fictional meaning. It has a real meaning that the person referred to is individually appointed by the Commonwealth; and therefore the Constitution takes his Commonwealth official position as in itself a sufficient element to attract the original jurisdiction of the Commonwealth High Court, supposing, of course, the "matter" is of the requisite nature. The phrase "officer of the

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122 *Attorney-General (Vic); Ex Rel Black v The Commonwealth* (1981) 146 CLR 559 at 616 (Mason J).

123 In *Sykes v Cleary* (1992) 176 CLR 77 s44(iv) and the expression "office of profit under the Crown", arguably a narrower expression in its application to the Commonwealth than "office ... under the Commonwealth", was held to include positions within the Commonwealth public service; at 96-97 (Mason CJ, Toohey and McHugh JJ). Section 84 refers to an officer retained in the service of the Commonwealth retiring from office. It contemplates that a member of the Commonwealth public service holds an office. Section 67 is not inconsistent with this.

124 *Re Refugee Tribunal; Ex parte AALA* (2000) 204 CLR 82 at 140, [161] (Hayne J).

125 *The Tramways Case [No 1]* (1914) 18 CLR 54 at 66 (Barton J); *Church of Scientology v Woodward* (1982) 154 CLR 25 at 65 (Murphy J).

> Commonwealth" is found in sub-sec. XXXIX. of sec. 51 in the same sense. See also the term "officers" in secs. 64, 67 and 84, which strengthen the view I have indicated.[126]

A similar comment may be made of s116. Whether the expression used be 'of the Commonwealth' or 'under the Commonwealth', there must be the contemplated connection with the Commonwealth. That is a connection that allows the Commonwealth to determine and impose the content of the test for qualification.

55.3 The expression "office ... *under* the Commonwealth" appears to connote a meaning different than "officer *of* the Commonwealth". This may be accounted for by the replication of the terms of the United States Constitution Art VI s3. Further, it has been said that the words "under the United States" in Art VI s3 were intended to do no more than indicate that the constraint did not apply to the States.[127] In any event the difference may be more illusory than real having regard, in particular, to the mischief that the section is intended to address and the clear indication that it is the Commonwealth that prescribes the test.

56. South Australia agrees with the Commonwealth that it is unnecessary in this case to determine to what extent the expressions 'officer of the Commonwealth' and 'office ... under the Commonwealth' in ss75(v) and 116 differ, or the question whether either may extend to include an independent contractor.[128] Whatever the content of the expression, "office ... under the Commonwealth" it cannot be satisfied here.

57. Here there are two obstacles to characterising the chaplains engaged at the Darling Heights State School under the NSCP as holding offices "under the Commonwealth" within the meaning of s116.

57.1. First, the chaplains are not engaged in the exercise of the public power of the Commonwealth. The activity which the chaplains perform, namely the provision of chaplaincy services to members of the school, is plainly not governmental in character. They do not owe any public duty, are not engaged in discharging any public or other statutory function, and do not make decisions which affect the rights or interests of citizens. Nor could chaplaincy services be considered, in any historical sense, a characteristically governmental activity.

57.2 Secondly, the Commonwealth lacks effective control of the chaplains. Chaplains are engaged by the SUQ. They do not contract with the Commonwealth.[129] They are paid by SUQ. There is no legal relationship between the chaplains and the Commonwealth. The Commonwealth has no role in their selection.[130] The chaplains are persons recognised by the school, its community and the appropriate governing authority as having the necessary skills and experience.[131] The funding agreement also contemplates the replacement of the nominated chaplain by the SUQ.[132] The individual chaplains are required to sign the Code of Conduct, which forms part of

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126 *R v Murray & Cormie; ex parte Commonwealth* (1916) 22 CLR 437 at 452 (Isaacs J). See also, *The Tramways Case [No 1]* (1914) 18 CLR 54 at 79 (Isaacs J.);*The King v Drake-Brockman; Ex parte National Oil Pty Ltd* (1943) 68 CLR 51 at 58-59 (Starke J); Bank *of New South Wales v The Commonwealth* (1948) 76 CLR 1 at 363 (Dixon J).

127 D L Dreisbach, *The Constitution's Forgotten Religion Clause: Reflections on the Article VI Religious Test Ban,* (1996) 38 J.Church and St. 261.

128 The issue whether an independent contractor could nevertheless fall within the expression "an officer of the Commonwealth" in s75(v) when some aspect of the exercise of statutory or executive authority of the Commonwealth has been contracted out was raised, but not decided in *Plaintiff M61/2010E v The Commonwealth* (2010) 85 ALJR 133 at [51] (The Court).

129 Special Case, SCB Vol 1, 19 at [64].

130 Special Case, SCB Vol 1, 19 at [63].

131 2010 Updated Guidelines, SCB Vol 2, 608 at [1.5].

132 Darling Heights Funding Agreement, SCB Vol 2, 639 at [C.6].

the Funding Agreement,[133] but, notably, the obligation to ensure they do so falls on SUQ, and the consequences of possible breaches of the Code involve repayment by SUQ of the funding.[134] Oversight of the provision of chaplaincy services resides with school principals.[135]

58. Even in so far as the Commonwealth's control over SUQ is concerned,[136] that control has a particular character. The Commonwealth must be able to enter into contracts which impose obligations on other parties without transforming that other party into an emanation of itself. No-one suggests that the providers of care in *Alexander Private Geriatric Hospital*[137] held offices under the Commonwealth. Accordingly, the fact of control by the Commonwealth over another party cannot be decisive of whether the other party is an "office ... under the Commonwealth".

59. In this case, the Commonwealth's control under the funding agreement is directed at the outcomes which SUQ is required to achieve, not at the manner in which those outcomes are to be achieved. The funding is provided for the outcomes identified in the funding application dated 4 April 2007 (which forms part of the agreement[138]), namely the expansion of the chaplaincy services previously in place at the school. The funding agreement imposes certain conditions as to the performance standards which SUQ must attain, such as those embodied in the NSCP Guidelines and Code of Conduct. However, the Commonwealth does not purport to exercise ongoing control over the delivery of the chaplaincy services. The inclusion within the funding agreement of reporting obligations on SUQ relating to project progress and acquittal of funds,[139] serves to highlight the lack of ongoing involvement and control exercised by the Commonwealth in the chaplaincy service at the school. It is simply the means by which the Commonwealth monitors whether SUQ has realised the outcomes it has contracted to achieve.

Dated: 20 July 2011

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133 2010 Updated Guidelines 2010, SCB Vol 2, 617 at [5.5].
134 Darling Heights Funding Agreement, SCB Vol 2, 639-640 at [C.11-C.15].
135 NSCP Guidelines SCB Vol 2, 612 at [3.2].
136 Submissions of the Plaintiff at [83]-[84].
137 *Alexander Geriatric Hospital Pty Ltd v The Commonwealth* (1987) 162 CLR 271.
138 Darling Heights Funding Agreement, SCB Vol 2, 638 at [C.2] and Attachment A SCB Vol 2, 693.
139 Darling Heights Funding Agreement, SCB Vol 2, 642 at [I.1].