HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY **No S307 of 2010**

BETWEEN

RONALD WILLIAMS
Plaintiff

AND

COMMONEALTH 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

FURTHER SUBMISSIONS ON BEHALF OF THE ATTORNEY-GENERAL OF TASMANIA, INTERVENING

PART I: SUITABILITY FOR PUBLICATION

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

PART II: BASIS OF INTERVENTION

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

PART III: WHY LEAVE TO INTERVENE SHOULD BE GRANTED

3. Not applicable.

Date of Document: 19 August 2011

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PART IV: APPLICABLE LEGISLATION

4. The applicable constitutional and statutory provisions are those identified in [85]-[86] of the Plaintiff's Amended Submissions.

PART V: SUBMISSIONS

5. Pursuant to leave granted by the court **[T. 5180]** the Attorney-General of Tasmania makes the following further written submissions in relation to the "alternative" argument which has been advanced on behalf of the Attorney-General of Queensland **[T. 4213 – 4937]** concerning the scope of the executive power of the Commonwealth.

6. That argument is understood to be that the executive power of the Commonwealth extends to "*...all of those things* [which] *arise implicitly from the creation of the nation by the* [Constitution or from] *the terms of a Commonwealth statute expressly or implicitly, or the terms of the Constitution expressly or implicitly.*" **[T. 4525 – 4535]**

7. The argument differs from the "Deakin position" referred to and summarised by Gummow J at T.4790[1] in that it would relevantly confine the executive power by reference to those matters which <u>are</u> the subject of valid Commonwealth legislation as opposed to those which "...<u>could be</u> the subject of valid legislation."[2] (emphasis added)

8. The Attorney-General of Tasmania submits that, for the reasons which follow, the alternative argument advanced by the Attorney-General of Queensland should be preferred to the "Deakin position" as reflected in the dicta of Barwick CJ and Gibbs J in *Victoria v The Commonwealth and Hayden* (1975) 134 CLR 362 (the AAP case).

9. The submission is confined to the operation and scope of the executive power of the Commonwealth as it relates to the heads of concurrent legislative power conferred upon the Commonwealth Parliament by s 51 of the *Constitution* or what was referred to in argument as "the contours of legislative competence"[3].

10. Further, the Attorney-General of Tasmania accepts that the executive power of the Commonwealth will extend to the doing of all things which are necessary or reasonably incidental to the execution and maintenance of a valid law of the Commonwealth once that law has taken effect[4] (but subject to s 4 of the *Acts Interpretation Act 1901* – anticipatory exercise of powers). However, the exercise of even that "incidental" executive power is amenable to regulation by the Parliament by means of laws authorised to be made pursuant to s 51(xxxix) of the *Constitution*.

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1 "[Deakin] found it impossible to resist the conclusion that the Commonwealth has executive power, independently of legislation, with respect to every matter to which its legislative power extends."

2 Barwick CJ in the *AAP Case* (1975) 134 CLR 338 at 362

3 [9452], [9950] etc.

4 *Quando lex aliquid concedit concedere videtur et illud sine quo res ipsa non potest.* (When the law gives a man anything it gives him also that without which the thing itself cannot exist.)

11. Questions about the need for enabling legislation to enliven the executive power of the Commonwealth have been raised by this Court as early as 1905[5] and 1906[6] and were raised by the very members of this Court to whom the inclusion of s 61 in the text of the *Constitution* has been attributed.[7] However the apparent need to resolve this question has seemingly been obscured by what, since *Pape*[8], is now understood to have been a long standing but mistaken belief that laws enacted pursuant to s 83 of the *Constitution* were both capable of and in fact did, if they were valid, confer a power to spend money thereby appropriated from the Consolidated Revenue Fund.

The AAP Case

12. In the *AAP Case* Barwick CJ was concerned to identify what is meant by the phrase "the purposes of the Commonwealth" appearing in s 81 of the Constitution. His Honour said (at p. 362.8);

> "However, to whatever source it be referred, any act or activity of the Commonwealth must fall within the confines of some power, legislative or executive, derived from or through the Constitution. In this connexion I have not included any reference to the judicial power because, in my view, such a reference would be irrelevant to the matter in hand. In the long run, whether the attempt is made to refer the appropriation and expenditure to legislative or executive power, it will be the capacity of the Parliament to make a law to govern the activities for which the money is to be spent, which will determine whether or not the appropriation is valid. With exceptions that are not relevant to this matter and which need not be stated, the executive may only do that which has been or could be the subject of valid legislation. Consequently, to describe a Commonwealth purpose as a purpose for or in relation to which the Parliament may make a valid law, is both sufficient and accurate." (emphasis added)

13. Similarly, Gibbs J said in the same case (at p. 374.3)

> "In this context the words "the purposes of the Commonwealth" in s 81 naturally refer to purposes for which the Commonwealth, as a political entity, is empowered by the Constitution to act..."

14. And at p.375.2 His Honour continued (references omitted);

> "It therefore seems correct to say that "purposes of the Commonwealth" are purposes for which the Commonwealth has power to make laws – purposes which however are not limited to those mentioned in ss 51 and 52 but which, as was pointed out by Starke J and Dixon J in the *Pharmaceutical Benefits Case*, may include matters

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5 *Brown v Lizars* 2 CLR 837 per Griffith CJ at 852 and Barton J at 861

6 *Robtelmes v Brenan* (1906) 4 CLR 395 per Griffith CJ at 403 and Barton J at 414

7 Winterton, G. "The limits and use of executive power by Government" (2003) 31(3) Federal Law Review 421 at 422

8 *Pape v Commissioner of Taxation and Anor* (2009) 238 CLR 1

incidental to the existence of the Commonwealth as a state and to the exercise of its powers as a national government."

15. It is these dicta which appear to have laid the foundation for the view that the executive power of the Commonwealth includes or extends to any matter that is or that could be the subject of a valid Commonwealth law.

16. Three observations may be made concerning these dicta.

10 17. First, as mentioned, their Honours were not directly concerned to define the limits or scope of the executive power. Rather, the task was to give meaning to the phrase "the purposes of the Commonwealth" which appears in s 81 of the *Constitution* and delimits the purposes for which the Consolidated Revenue Fund may be appropriated. It was in that precise context that Barwick CJ concluded that to describe a Commonwealth purpose as a purpose for or in relation to which the Parliament may make a valid law was "both sufficient and accurate". Their Honours' observations concerning the scope of the executive power thus formed a premise of the argument, not its conclusion.

20 18. Secondly, the *AAP case* was decided at a time when it was understood and accepted that ss 81 and 83 of the *Constitution* together authorised both the appropriation of funds from the Consolidated Revenue Fund and the expenditure of those funds. Certainly Barwick CJ [at p. 360.5 and 361.4] proceeded upon that basis.[9] In that context no further or additional legislative provision authorising the relevant expenditure was thought to be necessary as the appropriation, if valid, was understood to supply the lawful authority to spend. This was the position in the *AAP Case.* It was therefore impossible in that case to test the validity of the expenditure by reference to any legislative provision other than the "line item" description set forth in the *Appropriation*
30 *Act.* It was that circumstance which caused critical attention to be focussed on the phrase "the purposes of the Commonwealth" in s 81 and, in the absence of any substantive legislative provision, on the *potential* outer limits of the executive power of the Commonwealth.

19. Thirdly, and despite the fact that the observations of Barwick CJ and Gibbs J referred to above are not expressed in conditional or hypothetical terms, it is submitted that it is not without significance that their Honours were speaking in the context of proceedings involving a demurrer to a defence. The Court was thus required to assume that the facts pleaded in the Commonwealth's
40 defence were true[10] and to take the widest interpretation of the phrase "the purposes of the Commonwealth" (and thus, of the executive power of the Commonwealth) which was reasonably open. It is submitted that the dicta should therefore be understood as seeking to describe the maximum possible extent of the executive power of the Commonwealth rather than as seeking to define its actual limits.

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9 That is no longer the law – *Pape v Commissioner of Taxation and Anor* (2009) 238 CLR 1

10 *Lubrano v Gollin & Co. Pty Ltd* ((1919) 27 CLR 113. See also *South Australia v The Commonwealth* (1961-2) 108 CLR 130 per Dixon CJ at 142 and *Kathleen Investments Australia Ltd v The Australian Atomic Energy Commission & Anor* (1977) 139 CLR 117

Concurrent Legislative Power

20. While it may be correct to regard the scope of the executive power of a polity which enjoys plenary legislative power as being co-extensive with the scope (if any) of that legislative power, the same assumption should not be made in relation to a polity such as the Commonwealth, many of the express legislative powers of which are merely "concurrent" with those of other polities.

21. This matter was touched upon, obiter, by French J in Ruddock v Vadarlis [2001] FCA 1329 at [191-192]. His Honour said;

> "191 The scope of the executive power conferred by s 61 of the Constitution is to be measured by reference to Australia's status as a sovereign nation and by reference to the terms of the Constitution itself. The effect of the statute law, in this case the Migration Act, will be considered separately.
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> 192 It is not necessary for present purposes to consider the full content of executive power and the extent to which it may operate upon the subject matter of the heads of Commonwealth legislative power. Given that the legislative powers conferred by s 51 are concurrent with those of the States, subject to the paramountcy of Commonwealth statutes, (covering cl 5 and s 109) it could not be said that, absent statutory authority, executive power may be exercised in relation to all those matters..." (emphasis added)

22. The Attorney-General of Tasmania respectfully adopts the passage underlined above and submits that, in the absence of a valid law of the Commonwealth, it cannot be said that the executive power of the Commonwealth may be exercised in relation to the subject-matters of the heads of power enumerated under s 51 of the Constitution.

23. It is submitted that that part of the executive power of the Commonwealth which depends upon or relates to the concurrent legislative powers conferred on the Commonwealth by s 51 of the Constitution, either does not exist or may not be exercised unless and until the Commonwealth Parliament actually exercises that legislative power whereupon the required executive power (i.e., the power necessary for the "execution and maintenance"[11] of that law) arises in, or may be exercised by, the Commonwealth and is, to an identical extent, displaced in the States.

24. Acceptance of the proposition that the executive power of the Commonwealth "extends" and that of the States abates, to enable the execution and maintenance of the laws of the Commonwealth by the Commonwealth as and when those laws take effect, resolves the following issues;

- The potential for the concurrent but inconsistent exercise of Commonwealth and State executive power with respect to the same subject-matter. Commonwealth executive power cannot co-exist with State executive power with respect to the same matter.

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[11] See the *Constitution*, s 61

- The potential for the existence of a sphere of Commonwealth executive activity in relation to the concurrent legislative heads of power which requires no imprimatur[12] from the Parliament and which is immune from, or beyond the scope of, statutory judicial review:[13] The executive power of the Commonwealth being exercisable only for "the execution and maintenance of the Constitution and the laws of the Commonwealth"[14]

25. Finally, lest it be contended otherwise, the identification of whether a particular instance of the exercise of the executive power is within or without the scope of a particular Commonwealth law presents no more difficulty or uncertainty (and possibly less) than does the identification of whether that same exercise of executive power can be supported by reference to s 61 of the Constitution alone or by reference to s 61 together with one or other of the placita of s 51.

Dated the 19th of August 2011

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12 Either by way of legislation or by the approval of the provision of financial assistance "to any State" pursuant to s. 96 of the *Constitution*. Note that s 96 does not authorise the provision of financial assistance "to any *person*".

13 This observation does not overlook the fact that the unsupervised exercise of executive power (if publicly known) is always ultimately subject to political control by the will of the electors.

14 To the extent to which there is a Commonwealth executive power which is exercisable other than by reference to a law of the Commonwealth, that power is capable of being regulated by the Parliament pursuant to s 51 (xxxix) of the *Constitution*.