IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

NO S307 OF 2010

BETWEEN: **RONALD WILLIAMS**
Plaintiff

AND: **COMMONWEALTH OF AUSTRALIA**
First Defendant

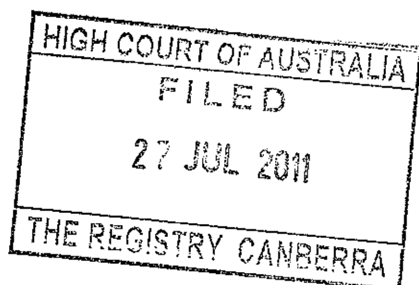
**MINISTER FOR SCHOOL EDUCATION, EARLY CHILDHOOD AND YOUTH**
Second Defendant

**MINISTER FOR FINANCE AND DEREGULATION**
Third Defendant

**SCRIPTURE UNION QUEENSLAND**
Fourth Defendant

ORIGINAL

## SUBMISSIONS OF FIRST, SECOND AND THIRD DEFENDANTS IN REPLY TO THE SUBMISSIONS OF THE INTERVENERS



## STANDING

1. The Commonwealth defendants accept that the plaintiff has standing to challenge the validity of the Darling Heights Funding Agreement.[1] The final payment due to be paid by the Commonwealth to SUQ under the Darling Heights Funding Agreement was paid in October 2010 and was made in respect of the provision of chaplaincy services at the School for the period until 31 December 2011.[2] Until the termination of the Agreement, there will be ongoing rights and obligations of both parties which stand to be affected by the Court's determination of the question of whether the Commonwealth had power to enter into the Agreement and to make the most recent payment to SUQ. The Commonwealth defendants accept, in particular, that fulfilment by SUQ of the conditions of that payment has an impact on the plaintiff's interests which is sufficient to give rise to a present justiciable controversy.

2. The same cannot be said in respect of earlier payments under the Agreement. The only consequence of a finding as to the invalidity of earlier payments could be the prospect of recovery of money from SUQ by the Commonwealth. The matter in respect of which the plaintiff has a special interest does not extend that far.

## BENEFITS TO STUDENTS

3. Victoria seeks to limit the concept of "benefits to students" in two ways, neither of which is supportable.

4. First, there is no basis in s 51(xxiiiA) for the assertion that the word "benefits" has a narrower meaning in the phrase "hospital and medical benefits" to that which it bears in "benefits for students".[3] The majority in the *Alexandra Hospital* case spoke of "the use *in the paragraph* of the word 'benefits'".[4] If anything, the express reference to "medical services" might be thought to narrow the concept of "medical benefits" rather than other classes of benefits referred to in the paragraph. But one grant of power under s 51 does not, in the absence of express words of limitation, narrow by implication the scope of any other grant of power. The word "benefits" is therefore to be given its ordinary meaning, and may clearly encompass the provision of a service.

5. Secondly, the expression "to students" defines the recipients of the relevant benefits rather than their nature or form (contrast eg "pharmaceutical benefits"). The requirement proposed by Victoria, that the benefits must relate specifically to the "pursuits" of a student, goes beyond the language of Dixon J in the *BMA case* (who spoke of benefits to meet "*needs arising from* ... particular situations or pursuits")[5] and would mean that s 51(xxiiiA) did not support the provision of benefits in the form of payments of money to students (or others) to alleviate financial need. Lack of

---

1 See Submissions of First, Second and Third Defendants, [55(1)] (the proposed answer to question 1 of the Special Case).

2 See Amended Special Case, [73] (SCB Supplementary Volume 106, 127.]

3 Cf Victoria Submissions, [33].

4 (1987) 162 CLR 271, 280 (emphasis added).

5 (1949) 79 CLR 201, 260.

money is a circumstance that students (and widows and unemployed persons) experience in common with many other members of the community.

## CORPORATIONS POWER: WHETHER SUQ IS A TRADING CORPORATION

6. The submission of New South Wales that "in all cases the corporation's purposes will have at least some relevance"[6] misunderstands the effect of *Fencott v Muller* and is inconsistent with the clear authority of the *State Superannuation Board* case. *Fencott* dealt with the specific situation of a corporation that as yet had no activities.

7. Victoria's proposed "refinement" of the activities test is in truth a fundamental departure. Taking the four propositions for which Victoria contends in this regard:[7]

10

7.1. There is no reason to regard s 51(xx) as requiring that a corporation have a "true character", if that is meant to convey a single essential character, and authority is directly against such a requirement.[8] Just as a person who is an "alien" for the purposes of s 51(xix) will also be able to be described in other ways, a "trading corporation" may also be an electricity provider or a mining or manufacturing corporation.

7.2. If it were necessary to search for the "true character" of an artificial legal person, that character would be found in the legal instruments that sustain its existence in law and endow it with legal capacities. As explained in chief, the only rationally defensible indicator of a corporation's "true character" (and the one which best accords with the framers' intentions as to the scope of s 51(xx)) is its capacities.

20

7.3. A requirement that trading be the "predominant or characteristic" activity of a corporation is also directly against existing authority,[9] and alien to the intention which evidently lies behind s 51(xx). Two corporations might engage in trading activities on the same scale and present the same risks to the community (eg arising from their limited liability, their raising of capital and trade in their shares); yet, on Victoria's argument, one would be beyond the reach of Commonwealth power if it also engaged in some other activity such as mining or manufacturing on a significant scale.

30

7.4. To say that an activity is not "predominant or characteristic" if it is merely "incidental" does not advance matters. However, the content of the term "incidental" requires some further analysis. In particular, there is an obvious distinction between trading which occurs as an incident of some other *activity*, and trading which is engaged in to generate revenue for some ulterior *purpose*. A corporation which trades might distribute profits to its members,

---

6 NSW Submissions, [5.30].

7 Victoria Submissions, [16].

8 *State Superannuation Board v Trade Practices Commission* (1982) 150 CLR 282, 303-304 (Mason, Murphy and Deane JJ); *Commonwealth v Tasmania* (1983) 158 CLR 1, 155-157 (Mason J), 179 (Murphy J), 240 (Brennan J), 292-293 (Deane J).

9 *State Superannuation Board v Trade Practices Commission* (1982) 150 CLR 282, 303-304 (Mason, Murphy and Deane JJ); *Commonwealth v Tasmania* (1983) 158 CLR 1, 155-157 (Mason J), 179 (Murphy J), 240 (Brennan J), 292-293 (Deane J).

retain those profits for re-investment, or apply those profits to some charitable or educational undertaking. Those possibilities do not deny the existence or significance of the trading activity, or influence whether or not the corporation is properly to be seen as a "trading corporation".

8. As to whether SUQ itself is a "trading corporation", it can be accepted that the striking of a commercial bargain lies at the heart of the concept of trading.[10] However, it does not follow that the numerous revenue-generating activities of SUQ[11] do not amount to trade. These activities of SUQ are not undertaken gratuitously; nor are they carried on pursuant to any statutory requirement; nor is the consideration for their provision fixed by statute.[12] SUQ's main activity is the provision of chaplaincy services, which it has bargained with the Commonwealth and the State of Queensland to provide for reward. SUQ's role in those transactions amounts to trading, even if what the Commonwealth and Queensland are seeking to achieve is the provision of gratuitous benefits and even if the relevant departments did not conduct competitive tendering processes. The position is directly analogous to that considered by the Full Court of the Federal Court in *Bankstown Handicapped Children's Centre Association Inc v Hillman*.[13] To focus on the nature of the services, rather than the transactions pursuant to which they are provided,[14] would lead to error.

9. Indeed, even though the submissions in chief focused on the period before the Darling Heights Funding Agreement was entered into (and before providing services under the NSCP became a large part of SUQ's activities), it is legitimate to take the NSCP and the Agreement itself into account in assessing whether SUQ is relevantly a "trading corporation". A corporation which has the capacity to trade, and which chooses for its own reasons to enter into transactions which constitute trading, may properly be said to be a trading corporation at the time it enters into those transactions.

## CORPORATIONS POWER: CONNECTION

10. A law authorising the executive government of the Commonwealth to enter into contracts with trading corporations[15] would operate, in circumstances where such contracts were not otherwise authorised, to validate the contracts and would clearly be a law regulating the activities, functions and relationships of such corporations.[16] However, the present case does not depend upon the characterisation of such a hypothetical law for the purposes of s. 51(xx). The issue before the Court is whether the executive power of the Commonwealth extends to making the Darling Heights Funding Agreement.

---

[10] Cf South Australia Submissions at [33]-[36].

[11] See Commonwealth Submissions in chief, [28].

[12] Contrast *Quickenden v O'Connor* (2001) 109 FCR 243, 261 [51] (Black CJ and French J).

[13] (2010) 182 FCR 483, 511-512 [54]-[55]. See also *Aboriginal Legal Service of Western Australia (Inc) v Lawrence* (2008) 37 WAR 450, 481 [133]-[137] (Le Miere J) (dissenting).

[14] As the majority did in *Lawrence* (2008) 37 WAR 450, 470-471 [69]-[74] (Steytler P), 472-473 [79]-[82] (Pullin J).

[15] Cf Victoria Submissions, [9]; NSW Submissions, [5.36].

[16] Cf *Work Choices Case* (2006) 229 CLR 1, 114-115 [178].

11. Victoria's submission that an executive power to enter into contracts with corporations on any subject would be "destructive of the allocation of powers and responsibilities between the States and the Commonwealth"[17] assumes that that "allocation" takes a particular form and that the corporations power is to be read down so as to preserve it. The Court rejected similar arguments, seeking to deny the consequences of an orthodox reading of the corporations power by an appeal to assumptions not reflected in the text, in the *Work Choices* case.

    11.1. A power to contract with trading corporations is not a power to "perform any executive act" or an "unlimited executive power". It is a power to enter into consensual relations with certain legal persons, whose performance of such obligations as they undertake is subject to the ordinary law.

    11.2. The result is not to render s 96 otiose or to "defeat" its scheme. Even if s 96 has a significance beyond that suggested by Mason J,[18] it does not follow from the existence of one constitutional mechanism for the provision of financial assistance that other provisions of the Constitution are to be construed so as not to provide alternative mechanisms. If s 96 had that effect, the Commonwealth would not have any power to provide financial aid to other countries under s 51(xxix). A head of Commonwealth legislative power is not to be given a restricted interpretation in order to prevent another head of power being rendered unnecessary, unless the other head of power contains some express exception or restriction.[19]

**BROAD EXECUTIVE POWER**

12. South Australia suggests that if (as the Commonwealth defendants submit in the alternative) the capacity of the executive government to spend money and to enter into contracts for that purpose is not limited by the federal distribution then s 51(xxxix) would entail a "corresponding expansion of Commonwealth legislative power".[20] Section 51(xxxix) would itself be unnecessary, in so far as it refers to the executive, if all potential exercises of executive power were within the subject-matters of other heads of legislative power. Section 51(xxxix) is not relevantly addressed to the "subjects" placed by the Constitution within the executive power of the Commonwealth "but rather to matters which arise in the execution" by the Executive of that executive power.[21] It extends to, but no further than, whatever might reasonably be seen to be appropriate or adapted or conducive to the execution of executive power by the Executive.[22]

13. On any view, s 51(xxxix) gives the Parliament authority to prohibit or regulate the doing by the Executive of things otherwise within executive power[23] including entering into a contract. Subject to s 51(xxxi), s 51(xxxix) also gives the Parliament

---

17 Victoria Submissions at [10].

18 Cf Commonwealth submissions in chief, [46]; South Australia Submissions, [23].

19 See Zines, *The High Court and the Constitution* (5th ed 2008), 33 and the cases cited there.

20 South Australia Submissions, [20]

21 *Burton v Honan* (1952) 86 CLR 169, 177-178 (Dixon CJ) quoted in *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 612 [216].

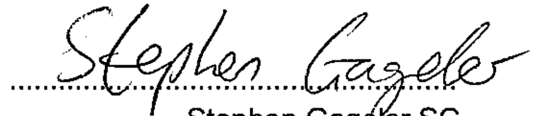
22 Cf *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 612 [216].

23 Cf *Brown v West* (1990) 169 CLR 195, 202.

authority to alter rights and obligations of the Executive under an existing contract.[24] The question of the further authority that s 51(xxxix) gives to alter the rights and obligations of persons who stand in a contractual relationship with the Commonwealth is one of degree. However, being limited to what is "incidental", it cannot change the nature of the underlying exercise of power. Just as s 51(xxxix) confers no power to implement an executive agreement in the form of an international treaty, it confers no power to implement an executive agreement in the form of a domestic contract.[25]

Date of filing: 27 July 2011

10



Stephen Gageler SC
Solicitor-General of the Commonwealth

.......................................................
Geoffrey Kennett SC

.......................................................
Stephen Free

Counsel for the First, Second and Third Defendants

---

24 Cf *Werrin v The Commonwealth* (1938) 59 CLR 150, 165-166 (Dixon J).

25 Cf *Davis v The Commonwealth* (1988) 166 CLR 79, 112.