

IN THE HIGH COURT OF AUSTRALIA

No S307 of 2010

SYDNEY REGISTRY

BETWEEN:

RONALD WILLIAMS

Plaintiff

COMMONWEALTH OF  
AUSTRALIA

First Defendant

MINISTER FOR SCHOOL  
EDUCATION, EARLY CHILDHOOD  
AND YOUTH

Second Defendant

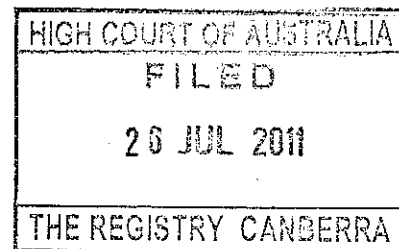
MINISTER FOR FINANCE AND  
DEREGULATION

Third Defendant

SCRIPTURE UNION  
QUEENSLAND

Fourth Defendant

FOURTH DEFENDANT'S SUBMISSIONS



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Filed on behalf of the Fourth Respondent by

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## PART I: PUBLICATION OF SUBMISSIONS

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

## PART II: ISSUES

2. The following issues arise:

- (a) is the entering into by the Commonwealth of Australia of the Darling Heights Funding Agreement ("**DH Funding Agreement**"), and therefore the agreements described in subparagraph (b) below, an exercise of the executive power of the Commonwealth because the agreements:
  - (i) provide benefits to students (ss.61 and 51(xxiiiA) of the Constitution);
  - (ii) are with the fourth defendant ("**SUQ**") as a trading corporation (ss. 61 and 51(xx) of the Constitution); or
  - (iii) otherwise constitute an exercise of executive power that falls within s.61 of the Constitution?<sup>1</sup>
- (b) is the Commonwealth of Australia (whether by its officers or otherwise), in the exercise of the executive power of the Commonwealth under s.61 of the Constitution, entitled to enter into any agreement renewing or extending the DH Funding Agreement or any other agreement with SUQ in respect of the 2012 calendar year and thereafter on substantially the same terms or substantially to the same effect as the DH Funding Agreement (save as to the term thereof)?
- (c) does the chaplain currently engaged by SUQ pursuant to the DH Funding Agreement hold an office under the Commonwealth, and, if so, does the agreement impose a religious test as a qualification for that office, contrary to s.116 of the Constitution?
- (d) is the only substantive relief to which the plaintiff is entitled, if he otherwise succeeds in his claims, limited to an order restraining the Commonwealth of Australia (whether by its officers or otherwise) from entering into any agreement renewing or extending the DH Funding Agreement or from entering any other agreement with the SUQ in respect of the 2012 calendar year and thereafter on substantially the same terms or substantially to the same effect as the DH Funding Agreement (save as to the term thereof)?

## PART III: NOTICES UNDER SECTION 78B OF THE JUDICIARY ACT 1903

3. Appropriate notices have been served by the plaintiff.

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<sup>1</sup> SUQ has defined the issues in subparagraphs (a), (b) and (d) by reference to the DH Funding Agreement and any extension or renewal thereof but the same issues may also be expressed by reference to the NSCP, of which the DH Funding Agreement is an integral part.

#### PART IV: MATERIAL FACTS

4. Subject to referring to the source material, SUQ does not challenge the statement of material facts set out in paragraphs 6-15 of the plaintiff's amended submissions. However, in the course of these submissions, SUQ will refer in each section to particular facts that are relevant to the submissions in that section.

#### PART V: SUQ'S ARGUMENT

##### STANDING AND ENTITLEMENT TO RELIEF

###### *Relevant Facts*

- 10 5. The DH Funding Agreement was entered into between the Commonwealth and SUQ on 9 November 2007, but was extended until 31 December 2011.<sup>2</sup>
6. The plaintiff first enrolled three of his children at the Darling Heights primary school on 5 October 2009. The fourth child was enrolled on 27 January 2010.<sup>3</sup> At all material times since at least November 2007, SUQ, at the request of the Darling Heights School principal, has provided a chaplain at the school pursuant to the DH Funding Agreement.<sup>4</sup>
7. The Commonwealth has made all of the payments required to be made by it pursuant to the DH Funding Agreement in respect of each calendar year during the term of the agreement, being part of 2007, and all of 2008, 2009, 2010 and 2011. The last payment required to be made by the Commonwealth for the extended period of 1 year and 83 days at the rate of \$20,000 pa (ie for the period between 8 October 2010 and 31 December 2011) was made to SUQ on 13 October 2010.<sup>5</sup>
- 20 8. In each of the above years, payments were made to SUQ from funds drawn from the Consolidated Revenue Fund by a financial controller in the Commonwealth department responsible for the outcomes in the relevant Appropriation Acts for each year. The financial controller has acted pursuant to the drawing rights granted under the *Financial Management and Accountability Act 1997*.<sup>6</sup>
9. No further payments are due to be made by the Commonwealth in respect of the 2011 calendar year, and no agreement has yet been entered into between the Commonwealth and SUQ in respect of the 2012 calendar year or thereafter.
- 30 10. However, the 2011-2012 *Appropriation Act (No 1)* has provided for an appropriation, relevantly in the same terms as previous years,<sup>7</sup> and the portfolio budget statements provide for the continuation of the NSCP in 2012.<sup>8</sup> The DH Funding Agreement is likely to be renewed (or extended), or an agreement in substantially the same terms or

<sup>2</sup> Special Case Book ("SCB") 2/634-733

<sup>3</sup> Special Case, [2], SCB 1/1

<sup>4</sup> Special Case, [38]-[39], SCB 1/15-16, SCB 2/688.25-35

<sup>5</sup> Special Case, [73], SCB 1/21, SCB 2/734-741

<sup>6</sup> Special Case, [86]-[89] (SCB 3/1347-1367)

<sup>7</sup> Schedule 1, p 55; see also [91L] of the Amended Statement of Claim where the relevant outcome is described as:

"Improved learning, and literacy, numeracy, and educational attainment for school students, through funding for quality teaching and learning environments, workplace learning and career advice".

<sup>8</sup> See 2011-2012 Portfolio Budget Papers, pp 49, 62, 63

substantially to the same effect is likely to be entered into between SUQ and the Commonwealth in respect of the 2012 calendar year.<sup>9</sup>

11. This proceeding was issued on 21 December 2010, which was after the date of the last payment due under the DH Funding Agreement on 13 October 2010. Accordingly, as at the date of issue, no further moneys were due to be drawn pursuant to the *Appropriation Act (No 1) 2010-2011*.
12. The substantive relief claimed by the plaintiff in relation to the drawing and payment of moneys by the Commonwealth to SUQ in respect of the NSCP at the Darling Heights primary school is in paragraphs 7A(b), 8(b) and 11 of the Amended Writ of Summons. The only parliamentary authorisation for the drawing and payment of those moneys appears in the *Appropriation Act (No 1) 2011-2012*, which is only relevant to the NSCP at the Darling Heights school for the 2012 school year.
13. In its Amended Defence, SUQ claims that the plaintiff's standing and/or entitlement to relief, if he otherwise succeeds in his claims (whether in relation to s.61 or s.116), should be limited to injunctive relief in the terms, or to the effect, set out in paragraph 2(d) above.

#### **Relevant Principles**

14. A person seeking a declaration that a statute is constitutionally invalid must demonstrate that there is an immediate right, duty or liability to be established by the determination of the Court in order for there to be a "matter", or justiciable controversy".<sup>10</sup> In order for there to be an "immediate" right, duty or liability, there must at least be some available remedial measure to enforce the right, duty or liability. If there is no legal remedy for a wrong, there is no matter for the purposes of Ch III of the Constitution.<sup>11</sup>
15. Cases involving questions of the constitutional validity of statutes have always required that a plaintiff at least demonstrate that his or her person or property is, or in the immediate future will probably be, affected by the statute under challenge.<sup>12</sup>
16. Put another way, a person will have no "immediate" right, duty or liability for determination if the person has no special interest in the subject of the action, and therefore lacks standing to seek the remedy claimed. This way of expressing the issue acknowledges that the question of whether there is a constitutional matter cannot be divorced from the question of standing.<sup>13</sup> However, the definition of "matter" controls whether there is a constitutional matter, rather than common law rules of standing.<sup>14</sup>

<sup>9</sup> See 2011-2012 Portfolio Budget Papers, p 49

<sup>10</sup> *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265-266, *Croome v Tasmania* (1997) 191 CLR 119 at 136, *Abebe v The Commonwealth* [1999] HCA 14; (1999) 197 CLR 510 at 528, [32]

<sup>11</sup> *Abebe v The Commonwealth* [1999] HCA 14; (1999) 197 CLR 510 at 527-528, [31]-[32], *Truth about Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* [2000] HCA 11; (2000) 200 CLR 591 at 611-612, [46],[49]-[50]; 637, [122]

<sup>12</sup> For example, see *Toowoomba Foundry Pty Ltd v The Commonwealth* (1945) 71 CLR 545 at 570; *Croome v Tasmania* (1997) 191 CLR 119 at 136-137

<sup>13</sup> *Abebe v The Commonwealth* [1999] HCA 14; (1999) 197 CLR 510 at 528, [32]; *Truth about Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* [2000] HCA 11; (2000) 200 CLR 591 at 612, [47]; *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 262, [37]; *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 35, [50]-[51]

<sup>14</sup> *Truth about Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* [2000] HCA 11; (2000) 200 CLR 591 at 629, [100]

17. Finally, for the plaintiff to be entitled to the exercise of discretionary declaratory or injunctive relief he must have "a real interest" in the relief.<sup>15</sup>

### **Submissions**

18. The exercise of executive power that is central to the plaintiff's claims is the entry by the Commonwealth into the DH Funding Agreement pursuant to which it is obliged to make payments in relation to the NSCP at the Darling Heights school. No issue arises on the plaintiff's case concerning the validity of the Appropriation Acts as such. Also, as no further payments are due to be made under the DH Funding Agreement,<sup>16</sup> and no further funds are to be drawn prior to the expiry of the agreement on 31 December 2011 pursuant to any Appropriation Act, there is no proper basis for any relief to be granted against the Commonwealth or SUQ in respect of payments under the DH Funding Agreement or under any Appropriation Act.
19. The legal issue arising in respect of the DH Funding Agreement is whether it is beyond the executive power of the Commonwealth to contract to make the payments provided for under the agreement. On the basis of the decision in *NSW v Bardolph*,<sup>17</sup> payments under the DH Funding Agreement may not be made out of the Consolidated Revenue Fund until there has been a parliamentary appropriation in respect of the moneys to be paid. As all the requisite payments have been made under the respective Appropriation Acts, and no claims are made by the plaintiff in respect of repayment (in respect of which the plaintiff has no relevant interest and which in any event would raise a range of additional issues<sup>18</sup>), any relief to which the plaintiff would be entitled is necessarily in relation to future payments proposed to be made by the Commonwealth pursuant to the 2011/2012 *Appropriation Act (No 1)* and under any renewal (or extension or re-entry) of the DH Funding Agreement. The relief set out in [2(d)] above is intended to state the only relief that might be appropriate in these circumstances.
20. Any interest which the plaintiff has in preventing the Commonwealth executive drawing money for, or making payments under, the DH Funding Agreement is derived from the enrolment of his children at the Darling Heights school at which a chaplain is engaged as part of the NSCP. He is not entitled to claim, and is not claiming, an injunction to prevent SUQ from continuing to provide the chaplain currently engaged in the NSCP at the school for the 2011 year. Even if such a claim were made, it would involve third parties (including the school chaplain, other students and their parents, and the school council) who are not before the Court. Also, in so far as any claim is made to restrain the Commonwealth from continuing to give effect to the DH Funding Agreement, the only relevant effect would be to prevent the Commonwealth from enforcing SUQ's obligations under the agreement and the 2010 Guidelines, which likewise would involve the rights of third parties (eg the school community) and is not relief the plaintiff has "a real interest" in seeking.
21. There is a further and particularly compelling ground why the relief (if any) to be granted should only relate to the 2012 year and onwards. As was recognised in *Pape v Federal*

<sup>15</sup> *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 582

<sup>16</sup> Special Case, [73]

<sup>17</sup> (1934) 52 CLR 455

<sup>18</sup> Such as whether, and if so how, the *ultra vires* doctrine may apply to contracts by the Commonwealth Crown, any restitution defences (eg change in position), the operation of s.64 of the *Judiciary Act* and the possibility of third party rights being involved.

*Commissioner of Taxation*,<sup>19</sup> the declaratory relief sought in that particular controversy had consequences far wider than the narrowly framed issue in that case and could have acquired "a permanent, and larger dimension."<sup>20</sup> That is particularly so in the present case given that the NSCP has been instituted at schools throughout Australia for the 2011 year, chaplains have been engaged pursuant to the program for that year, payments have been made for the 2011 year, and a key aspect of the NSCP upon which all involved have relied is that it is required to be carried out pursuant to the standard form Funding Agreements and the 2010 Guidelines,<sup>21</sup> which are, inter alia, to be monitored by the Commonwealth. An examination of the rights of the Commonwealth and of the obligations of SUQ under the DH Funding Agreement and the 2010 Guidelines discloses the incongruities, complexities and potential interference with third party rights and obligations that would arise if any declaratory or injunctive relief were to be granted in relation to the DH Funding Agreement or the 2010 Guidelines in respect of any year prior to 2012. The plaintiff has no "real interest" in the granting of such relief.

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22. Further, any declaration in relation to the DH Funding Agreement would be a declaration as to the force and effect of a contract to which the plaintiff is not a party and in respect of which he has no rights and interests in any legal sense. His only interest derives from the enrolment of his children at the Darling Heights school after the agreement was entered into. It is also relevant in respect of relief that, when the plaintiff commenced this proceeding, the Commonwealth had made all payments under the agreement in respect of the NSCP operating at the school until 31 December 2011.
23. Bare declarations of invalidity in relation to the Appropriation Acts and drawing rights in respect of 2007-2008, 2008-2009, 2009-2010 and 2010-2011 will produce no remedial or foreseeable consequence for the parties to the litigation. That is because no consequential relief is, or can be, sought based upon any such invalidity, given that no further payments are to be made in respect of the DH Funding Agreement. The declarations sought will therefore produce no foreseeable consequences for the parties and cannot engage the judicial power of the Commonwealth.<sup>22</sup> Making declarations for the sake of "completeness" as sought in [76] of the Plaintiff's submissions reveals the absence, rather than the presence, of grounds for declaratory relief.
24. For the foregoing reasons, questions 1(a), 1(b)(i)-(iv) and 1(c)(i)-(iv) of the special case should be answered "No". Alternatively, for the same reasons, the Court should in its discretion limit any relief to which the plaintiff may otherwise be entitled to injunctive relief in respect of the 2012 year and thereafter, and not grant any declaratory or other relief in respect of the 2011, or any earlier, year. Any declaratory relief in respect of the 2012 year or later would be based on a contract that has not yet been entered into and is inappropriate and unnecessary.

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<sup>19</sup> (2009) 238 CLR 1

<sup>20</sup> See at 69, [158] (Gummow, Crennan and Bell JJ). See also Hayne and Kiefel JJ at 99, [274], and Heydon J at 138, [401]

<sup>21</sup> SCB 2/604-630

<sup>22</sup> *Truth about Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* [2000] HCA 11; (2000) 200 CLR 591 at 613, [52]. See also *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 582

## LEGISLATIVE POWER

25. It is not in dispute that the executive power of the Commonwealth to expend moneys and to enter into contracts in respect of the provision of services is at least co-incident with the power of the legislature in respect of matters that fall within any head of Commonwealth legislative power.<sup>23</sup>
26. On one view, the Commonwealth executive may only act to the extent that such acts are or could be authorised by legislation. The other view is that the Commonwealth executive power extends to areas that fall within any subject matter of legislative power.
- 10 27. In *Victoria v The Commonwealth of Australia and Hayden (AAP)*,<sup>24</sup> Barwick CJ and Gibbs J stated the test in the first manner. Barwick CJ said that, subject to certain irrelevant exceptions, "the executive may only do that which has been or could be the subject of valid legislation" (at 362). Gibbs J considered that once it was concluded that an executive act was "one in respect of which legislation could not be validly passed, it follows that public moneys of the Commonwealth may not lawfully be expended for the purposes of" that act (at 379).
- 20 28. Mason and Jacobs JJ took the other approach. On this issue, Mason J said that "it is evident that in scope [executive power] is not unlimited and that its content does not reach beyond the areas of responsibilities allocated to the Commonwealth by the Constitution, responsibilities which are ascertainable from the distribution of powers, more particularly the distribution of legislative powers, affected by the Constitution itself ...." (see at 396). Jacobs J said: "Primarily [executive power] is limited to those areas which are expressly made the subject matters of Commonwealth legislative power ..." (at 405). In *Pape v Commissioner of Taxation*,<sup>25</sup> Heydon J cited Professor Winterton's phrase that "the contours of executive power generally follow those of legislative power".<sup>26</sup>
29. SUQ contends that the implementation by the Commonwealth of the NSCP, in part by entering into the DH Funding Agreement with SUQ, satisfies each of the tests set out above.
- 30 30. SUQ's first contention is that the agreement and the NSCP provides benefits to students within the meaning of s.51(xxiiiA). SUQ's second contention is that the Commonwealth's legislative power in respect of trading corporations under s.51(xx) extends to regulating the activities of SUQ, as a trading corporation, in relation to its entry into and implementation of the NSCP under the DH Funding Agreement. The activities of other project sponsors, which are trading corporations, may be similarly regulated.

### Providing Benefits to Students – s.51(xxiiiA)

#### Relevant Facts

31. When first announcing the NSCP on 29 October 2006, the Prime Minister described it as assisting "our schools in providing greater pastoral care and supporting the spiritual wellbeing of their students".<sup>27</sup>

<sup>23</sup> Plaintiff's submissions, [17]

<sup>24</sup> (1975) 134 CLR 338

<sup>25</sup> [2009] HCA 23; (2009) 238 CLR 1

<sup>26</sup> See at 181, [520]

<sup>27</sup> SCB 2/493.18

32. The stated purpose of the funding provided under the DH Funding Agreement "is to contribute to the provision of chaplaincy services at Your school, to assist Your school and community in supporting the spiritual wellbeing of students."<sup>28</sup> In furtherance of that purpose, chaplains provide "general religious and personal advice to those seeking it, comfort and support to students and staff, such as during times of grief"; Chaplains are to engage in "supporting students and staff to create an environment of cooperation and respect Chaplains"; "working in a wider spiritual context to support students and staff of all religious affiliations"; and Chaplains are to be "approachable by all students, staff and members of the school community of all religious affiliations".<sup>29</sup>
- 10 33. School chaplains must abide by the NSCP Code of Conduct, which provides that a school chaplain's role is "to support school students and the wider school community in a range of ways, such as assisting students in exploring their spirituality; providing guidance on religious values and ethical matters; helping school counsellors and staff in offering welfare services and support in cases of bereavement, family breakdown or other crisis and loss situations".<sup>30</sup> A school chaplain is required to "[a]ct as a reference point for students, staff and other members of the school community on religious, spiritual issues, values, human relationships and wellbeing issues".<sup>31</sup>
- 20 34. The 2010 Guidelines for the NSCP, with which a school chaplain is obliged to comply by reason of the Code of Conduct, repeat that the NSCP "assists schools and their communities to support the spiritual wellbeing of their students." The Guidelines also provide that this "might include support and guidance about ethics, values, relationships, spirituality and religious issues; the provision of pastoral care; and enhancing engagement with the broader community".<sup>32</sup>
- 30 35. The 2010 Guidelines also state that the objectives of the NSCP "are to assist schools and their communities to provide greater pastoral care, general religious and personal advice and comfort to all students and staff".<sup>33</sup> As well, they state that the key tasks of a school chaplain include "assisting school counsellors and staff in the delivery of student welfare services; supporting students to explore their spirituality; providing guidance about spiritual, values and ethical matters; and facilitating access to the helping agencies in the community, both religious and secular".<sup>34</sup>
36. Under the relevant Appropriation Acts the money drawn upon for the 2010, 2011 and 2012 NSCP is to achieve the outcome of "improved learning, and literacy, numeracy and educational attainment for school students, through funding for quality teaching and learning environments, workplace learning and career advice".<sup>35</sup>
37. NSCP funding was specifically sought for a school chaplain at the Darling Heights primary school to provide the following services over and above those which could be provided by teaching staff.<sup>36</sup>

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<sup>28</sup> Clause C1 of the DH Funding Agreement (SCB 2/638)  
<sup>29</sup> Clause C3 of the DH Funding Agreement (SCB 2/638.31-51)  
<sup>30</sup> Code of Conduct (SCB 2/622.22-26)  
<sup>31</sup> Code of Conduct (SCB 2/622.45-50)  
<sup>32</sup> 2010 Guidelines, [1.1] (SCB 2/607.16-18)  
<sup>33</sup> 2010 Guidelines, [1.3] (SCB 2/608.17-19)  
<sup>34</sup> 2010 Guidelines, [1.5] (SCB 2/609.35-40)  
<sup>35</sup> Administered Outcome 2 for DEEWR in *Appropriation Act (No 1) 2011-2012* (Schedule 1, p 55)  
<sup>36</sup> Special Case, [54], SCB 1/18



- (a) to allow the existing chaplain to work more days to provide pastoral care to students, staff and parents; to provide individual support for parents in situations affecting students (eg family breakdowns); to respond to critical incidents, such as loss of life in the school community due to accidents or suicide; to provide programs for students who are educationally or socially at risk; to participate more fully in personal development programs for students, reading programs and other school activities; to assist student leaders at the school; to provide programs in relation to educational practices, personal grooming and hygiene, nutrition and relationships for Australian and overseas students; and to provide holiday activity programs;<sup>37</sup>
- 10 (b) to expand the existing chaplaincy program to allow the chaplain to work with students and reading groups and to provide classroom assistance; to provide programs covering self-esteem, appreciation, positive thinking and talking, responsible behaviour and boys mentoring; and to work with teachers, staff and parents.<sup>38</sup>
38. The references above to the provision of support by school chaplains to the "school community", to "staff" or to "parents" do not affect the proper characterisation of the NSCP at the Darling Heights school as the provision of benefits to students at the school. That is obviously its object. Support under the NSCP, of the school community, staff and parents is ancillary to that object and is for the purpose of providing a better educational outcome for the students. The sole purpose of the school is to provide educational and like benefits for the students. The provision of any incidental benefits of the NSCP for parents, staff or the school community is to better enable the school to educate and provide other benefits to the students.
- 20 39. SUQ's Annual Report for 2009 under the heading "What do school chaplains do?" outlines the practical operation of the NSCP by outlining the range of activities of school chaplains, which can fairly be characterised as providing benefits to students,<sup>39</sup> the essential characteristics of which are described in paragraph [24] of SUQ's defence to the further amended statement of claim (SCB Sup/72-85).

### **Relevant Principles**

- 30 40. The provision of "benefits to students" in s.51(xxiiiA) is one of eleven separate heads of legislative power in the placitum, and each head of power should be read independently and as a plenary grant of power.<sup>40</sup> This is confirmed by the exception in respect of civil conscription only applying in respect of two heads only.<sup>41</sup>
41. The concept of "benefits" has received a wide interpretation in relation to sickness and hospital benefits. The concept is not confined to the grant of money or some other

<sup>37</sup> See the funding application at SCB 2/692.25-45

<sup>38</sup> Special Case, [41] (SCB 1/16), see also the funding application at SCB 2/693.14-24

<sup>39</sup> SCB 1/167.35-55. Other activities of school chaplains, which can fairly be characterised as benefits to students, are set out in the Prime Minister's speech to the Australia Christian Lobby National Conference, Canberra on 21 November 2009 (See SCB 2/499-503); SUQ's Annual Report for 2007 (See SCB 1/100, 103); SUQ's Annual Report for 2008 (See SCB 1/134-135); SUQ's Annual Report for 2009 (See SCB 1/155, 159,161,165,167). Further, SUQ employs approximately 500 school chaplains in the State of Queensland (See SCB Sup/154).

<sup>40</sup> *Federal Council of the British Medical Association v The Commonwealth* (1949) 79 CLR 201 at 286 (Williams J), and 259 (Dixon J)

<sup>41</sup> *Federal Council of the British Medical Association v The Commonwealth* (1949) 79 CLR 201, *Alexandra Private Geriatric Hospital Pty Ltd v The Commonwealth* (1987) 162 CLR 271 at 279

commodity and may encompass the provision of a service or services.<sup>42</sup> Given the beneficial intent of s.51(xxiiiA), it is sufficient for present purposes that the concept receive at least the interpretation given to “benefits” in the context of sickness and hospital benefits. In particular, the specific reference in other heads of power under s.51(xxiiiA) to “allowances”, “pensions” and “child endowment”, affords a compelling reason not to read down the concept of benefits so it is limited to allowances or other financial benefits.

42. The contention that the provision of any benefits to students must be provided directly to students by the Commonwealth is contrary to the decision in *Alexandra Private Geriatric Hospital Pty Ltd v The Commonwealth*,<sup>43</sup> in which it was held that the Commonwealth may provide a benefit to patients in approved nursing homes by a subsidy paid to the service provider, being the proprietor of the homes. The Court said (at 281):

“if the scheme is capable of being supported as a law with respect to the provision of a money payment by the Commonwealth to the proprietor of a nursing home in consideration of nursing care provided to a patient it likewise will be capable of being supported as a law with respect to the provision of nursing care for that patient. In the former case, it will be seen as the means chosen by Parliament of controlling the application and ensuring the effectiveness of the benefits paid; in the latter case, the scheme will be seen as the means adopted to provide those benefits.”

## 20 **Submissions**

43. For the reasons outlined at [31]-[39] above, the chaplaincy services provided by SUQ pursuant to the NSCP under the DH Funding Agreement constitute the provision of benefits to students. As in *Alexandra Private Geriatric Hospital*, the entry into of standard form funding agreements by the Commonwealth with Project Sponsors, such as SUQ, was the means adopted by the Commonwealth to provide the benefits.
44. Applying either of the tests set out above, the contracting by the Commonwealth with service providers, such as SUQ, to provide benefits to students for which the Commonwealth is to pay under the contracts could be the subject of legislation under, and falls within the area covered by, s.51(xxiiiA).
- 30 45. It is incorrect to suggest that the reliance upon s.51(xxiiiA) in the present case opens up legislative power under s.51(xxxix) to pass laws with respect to education generally, or even with respect to the NSCP generally. As was observed by Brennan J in *Davis v The Commonwealth*,<sup>44</sup> the legislative power with respect to matters incidental to execution of the executive power extends “to protect the efficacy of the execution by the Executive Government of its powers and capacities.” Thus, the power attracted to s.51(xxxix) would be the power, only in so far as is necessary, “to protect the efficacy” of the standard form funding agreements (incorporating the relevant guidelines and Code of Conduct), including the DH Funding Agreement, and the implementation of the NSCP at the relevant school pursuant to those agreements.

<sup>42</sup> *Alexandra Private Geriatric Hospital Pty Ltd v The Commonwealth* (1987) 162 CLR 271 at 280

<sup>43</sup> (1987) 162 CLR 271 at 281

<sup>44</sup> (1988) 166 CLR 79 at 113 cited in *R v Hughes* (2000) 202 CLR 535 at 555 [39] and in *Pape* at 87 [228] (Gummow, Crennan and Bell JJ)

## Trading Corporations – s.51(xx)

### Relevant Facts

46. Under cl 2.1(k) of the objects of SUQ's constitution,<sup>45</sup> the company has power, inter alia, to do all such lawful things as are incidental or conducive to the attainment of SUQ's religious objects. In pursuance of that power, SUQ has engaged in a wide range of financial and commercial activities, which resulted in it generating a gross revenue of \$27,955,000 in the 2010 calendar year. Similar gross revenues of \$29,894,000 and \$24,603,381 were generated by SUQ for the 2009 and 2008 calendar years respectively.<sup>46</sup> The expenses incurred by SUQ in respect of its activities were \$27,335,000 (2010), \$26,967,000 (2009) and \$23,540,915 (2008).<sup>47</sup>
47. The detail of the financial and commercial activities, and of the expenses incurred by SUQ, is set out in the Special Case at [8]-[18],<sup>48</sup> and in the documents referred to in those paragraphs.

### Relevant Principles

48. In *Quickenden v O'Connor*,<sup>49</sup> Black CJ and French J summarised the decisions concerning the criteria for the identification of a trading or financial corporation for the purposes of s.51(xx). In adopting the "activities approach", their Honours stated the test as it has evolved in the High Court as whether the corporation in question "engages in substantial or significant trading activities, notwithstanding that trading is not its primary purpose".<sup>50</sup>
49. On this test, substantial trading activity is a sufficient condition for characterisation of a corporation as a trading corporation, regardless of the purpose for which it was formed. However, it need not be the predominant element of corporate activity, so long as it is not a peripheral part of a corporation's activities.<sup>51</sup> For example, the West Perth Football Club and the Western Australian National Football League,<sup>52</sup> the Royal Prince Alfred Hospital and the Red Cross Society,<sup>53</sup> and the University of Western Australia<sup>54</sup> have all been held to be trading corporations. Absent any corporate activity, other indicia may be invoked, such as the constitution of a corporation which has not begun to carry on business.<sup>55</sup>
50. Once attracted, the corporations power extends to:
- "the regulation of the activities, functions, relationships and business of a constitutional corporation, the creation of rights and privileges belonging to such a

<sup>45</sup> SCB 1/69.47

<sup>46</sup> Special Case [14], SCB 1/4-6

<sup>47</sup> Special Case, [17], SCB 1/10-11

<sup>48</sup> SCB 1/2-13

<sup>49</sup> (2001) 109 FCR 243 at 258-260, [41]-[47]

<sup>50</sup> (2001) 109 FCR 243 at 260, [47]. This approach may be contrasted with the test for determining whether an entity is a charitable institution for the purposes, inter alia, of tax and other exemptions. That test requires a consideration of whether the purpose or main purpose of the institution was charitable and whether it had ceased to carry out that purpose. Thus, in *FCT v Word Investments Ltd* (2008) 236 CLR 204 a company, which was a trading corporation on the basis of the activities approach, was found to be a charitable institution, because that was the purpose or main purpose of its trading activities.

<sup>51</sup> See *R v Trade Practices Tribunal; Ex parte WA National Football League (Inc)* (1979) 143 CLR 190 at 208, 234, 239 and see also *Quickenden v O'Connor* (2001) 109 FCR 243 at 259, [44], 261, [51] (Black CJ and French J)

<sup>52</sup> *R v Trade Practices Tribunal; Ex parte WA National Football League (Inc)* (1979) 143 CLR 190

<sup>53</sup> *E v Australian Red Cross Society* (1991) 27 FCR 310

<sup>54</sup> *Quickenden v O'Connor* (2001) 109 FCR 243

<sup>55</sup> *Fencott v Muller* (1983) 152 CLR 570 at 602, *Quickenden v O'Connor* (2001) 109 FCR 243 at 260, [45]

corporation, the imposition of obligations on it, and in respect of those matters, to the regulation of conduct of those through whom it acts, its employees and shareholders and, also, the regulation of those whose conduct is or is capable of affecting its activities, functions, relationships or business.<sup>56</sup>

### Submissions

51. SUQ's financial and commercial activities involve raising SUQ's revenues by donations, sales, interest, federal and state government agreements, motor vehicle levies on employees, registered training organisation activities, state conference income, sale of cattle, fundraising events and camps income.<sup>57</sup>
- 10 52. SUQ's expenditure of that revenue involves finance costs, marketing expenses, chaplaincy expenses, administration expenses, expenditure in providing camps and other programs and costs associated with the sale of books and livestock.<sup>58</sup>
53. All of these activities are part of the commercial, financial and trading enterprise conducted by SUQ for the purpose of achieving its religious objects. The provision of chaplains by SUQ is for reward and a part of the grants for chaplains is applied to administration expenses, which constitutes SUQ's return (or charge) for the provision of the service.<sup>59</sup> Also, GST is payable in respect of the DH Funding Agreement and SUQ has been registered for GST since 1 July 2000.<sup>60</sup> It is wrong in principle to segregate this activity as if it were not part of the "trading activities" of SUQ. If the service was provided by a commercial enterprise on the same basis and terms as SUQ, save that it did so at a profit, it would indisputably be a trading activity. The fact that SUQ does not have a purpose of making a profit from the activity does not deny its characterisation as a trading activity.
- 20 54. In any event, even if the chaplaincy income were to be disregarded, the other revenue raising activities including, in particular, the training organisation, state conference, fund raising events and camps, are substantial or significant trading activities that are sufficient to characterise SUQ as a trading corporation.
55. It is clear from the passage of Gaudron J in *Re Pacific Coal*,<sup>61</sup> which was adopted in *Work Choices* and is set out at paragraph [50] above, that s.51(xx) could be engaged in the present context to regulate the activities and contractual relationships of the trading corporations, including SUQ, engaged in the provision of chaplains pursuant to the NSCP in a manner similar to that discussed in relation to s.51(xxiiiA). Applying either of the tests set out above, the Parliament could regulate the standard form funding agreements
- 30

<sup>56</sup> *Re Pacific Coal Pty Ltd; Ex parte Construction, Forestry, Mining and Energy Union* (2000) 203 CLR 346 at 375, [83] (Gaudron J) approved in *New South Wales v The Commonwealth (Work Choices)* (2006) 229 CLR 1 at 114-115, [178] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ)

<sup>57</sup> Special Case, [14]-[15], SCB 1/ 4-10

<sup>58</sup> Special Case, [17]-[18], SCB 1/ 10-12

<sup>59</sup> See the item "chaplaincy levies" in Other Ministry Income compared to NSCP Commonwealth Government Grant Income at SCB 1/281.29, 1/321.25, 1/360.25. The comparative amounts for expenses in respect of the grants are \$2,064,338 / \$8,953,024 (2008); \$2,110,000 / \$13,000,000 (2009); and \$2,323,000 / \$11,012,000 (2010). These items are summarised in the Special Case at [14], SCB 1/5. The item "chaplaincy levies" is described at Special Case, [15.5.4], SCB 1/8.20.

<sup>60</sup> Special Case, [12A]. A charitable institution may make a taxable supply for GST purposes: A New Tax System (Goods and Services Tax) Act 1999 (GST Act), section 9-20(1)(e). A "taxable supply" is widely defined in section 9-5 of the GST Act, would include the provision of chaplaincy services. The invoices at SCB 2/734-741 show GST was in fact paid.

<sup>61</sup> *Re Pacific Coal Pty Ltd; Ex parte Construction, Forestry, Mining and Energy Union* (2000) 203 CLR 346 at 375, [83]

entered into by the trading corporations by providing for, and regulating, for example, entry into and compliance with the contractual obligations, including the 2010 Guidelines and the Code of Conduct. The subject matter of the law is a trading corporation(s) and the law is regulating part of the activities and business of a trading corporation(s) and, in doing so, is imposing obligations.

56. Also, as stated above, the legislative power with respect to matters incidental to execution of the executive power extends "to protect the efficacy of the execution by the Executive Government of its powers and capacities".<sup>62</sup> In the present context, s.51(xxxix) could authorise a law to protect the efficacy of the execution by the Executive Government of the standard form funding agreements, the 2010 Guidelines and the Code of Conduct in so far as they were entered into by trading corporations. The precise manner or form of the regulation is not in point. What is important for present purposes is that the Parliament could pass such a law under s.51(xx) and the area of any such law falls within s.51(xx). As with s 51(xxiiiA) any such law is not a gateway to a power to pass laws with respect to education generally or even with respect to the NSCP generally.

#### **EXECUTIVE POWER – s.61**

##### ***Relevant Facts***

57. Under the DH Funding Agreement, the Commonwealth agreed to pay the amounts specified in the agreement for the provision by SUQ of the NSCP at the Darling Heights school.
58. The NSCP is a national program funded by the Commonwealth pursuant to standard form funding agreements in the form of the DH Funding Agreement. The purpose of the NSCP is to improve educational outcomes for primary and secondary students throughout Australia.
59. Participation by primary and secondary schools throughout Australia is voluntary and a chaplain is provided by a Project Sponsor to the school only if requested to do so by the principal representing the school community.<sup>63</sup>

##### ***Relevant Principles***

60. The plaintiff's claim that the Commonwealth "lacked power" to enter into the DH Funding Agreement, with the consequence that it is "wholly void and of no effect", raises the unresolved question of the constraints (if any) imposed by the Constitution on the Commonwealth's capacity to contract.
61. The starting point is s.61, which vests the executive power of the Commonwealth in the Queen and provides it is exercisable by the Governor-General as the Queen's Representative. As was observed by Evatt J in *NSW v Bardolph*,<sup>64</sup> putting to one side the Crown's special powers, privileges immunities and prerogatives, the Crown has never been "regarded as less powerful to enter into contracts than one of [its] subjects". Of course, as Evatt J recognised that power was subject to a constitution in which legislative and executive authority may be limited by reference to subject matter. The extent of any

<sup>62</sup> *Davis v The Commonwealth* (1988) 166 CLR 79 at 113 (Brennan J)

<sup>63</sup> 2010 Guidelines at SCB 2/607.16-20, 2/612.10-45

<sup>64</sup> (1934) 52 CLR 455 at 474-5

limits upon a capacity to enter contracts has not been determined by the High Court since *Bardolph*.<sup>65</sup>

62. Professor Campbell has expressed the view that:

“Since rights and duties created by contract are created not by the exercise of powers that are peculiarly governmental, but by voluntary act of the parties, the power of the Commonwealth to contract is not inhibited by the “restraints which the Constitution imposes on federal lawmaking”<sup>66</sup>

10 63. The majority in *Pape* rejected the view that the Commonwealth's executive power is limited to the sphere of its legislative power. But, the main cases in which the limits of Commonwealth executive power have been explored, such as *AAP*, *Davis*<sup>67</sup> and *Pape*, have considered that question in the context of a law which necessarily raises a question about the inter-action between, inter alia, ss.61 and 51 (xxxix). No such issue arises in the present case, which is solely concerned with the contractual capacity of the Executive Government to expend money.

64. Even on the more expansive view of executive power a concern has been expressed about it not interfering or competing with the constitutional distribution of legislative and executive of power.<sup>68</sup>

20 65. Nonetheless, in *AAP*, Mason J (at 397-8) concluded that, subject to executive power not reaching beyond the responsibilities ascertainable from the constitutional distribution of powers, the Commonwealth's character and status as a national government enabled it 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.

66. In *AAP*, Jacobs J (at 413) considered that the growth in Australia's national identity resulted in the Commonwealth executive having power to expend money to “formulate and co-ordinate plans and purposes which require national rather than local planning and to exercise legislative power to appropriate funds accordingly”.

30 67. In *Davis*, the Court found that provision made in the *Australian Bicentennial Authority Act* 1980 (Cth) for the commemoration of the bicentenary was within the executive power of the Commonwealth. Mason CJ, Deane J and Gaudron J (at 94) considered that the commemoration fell “squarely within the executive power”, as it was “a matter falling within the peculiar province of the Commonwealth in its capacity as the national, and federal government” and was “pre-eminently the business and the concern of the Commonwealth as the national government”.

<sup>65</sup> Prior to *Bardolph*, there was an early view that Commonwealth contracts could only be entered with legislative authority: see *The Commonwealth v Colonial Combing, Spinning & Weaving Co Ltd* (1992) 31 CL 421 and *The Commonwealth v Colonial Ammunition Co Ltd* (1924) 34 CLR 198. However, the context of *Colonial Combing, Spinning & Weaving* was largely affected by three out of four agreements being an invalid attempt by the Executive to impose taxation and the majority in *Colonial Ammunition* resolved that case on a point of contractual construction (at 207-208). See also Seddon, *Government Contracts* (4<sup>th</sup> ed, 2009) at 69, [2.11].

<sup>66</sup> Campbell, E, “Federal Contract Law” (1970) 44 ALJ 580. The quoted passage was a summing up of the argument put in the earlier article “Commonwealth Contracts” (1970) 44 ALJ 14 particularly at 17-18 and 23.

<sup>67</sup> *Davis v The Commonwealth* (1988) 166 CLR 79

<sup>68</sup> See, for example, *Tasmanian Dams Case* (1983) 158 CLR1, 252 per Deane J, *AAP* (1975) 134 CLR 338 at 396 per Mason J and *Pape* at 60 [127] per French CJ and at 85-86 [220]–[222] per Gummow, Crennan and Bell JJ

68. Wilson and Dawson JJ agreed with the conclusion reached by their Honours but expressed a concern at 103-104 that that conclusion cannot accord to the Commonwealth a legislative power to "cross the boundaries between State and Commonwealth responsibility laid down by the Constitution". That issue did not arise as their Honours considered that the "character and status of the Commonwealth as a national government are qualities which are themselves to be found within the confines of the Constitution". That, in their Honours' views, resulted in the relevant executive power being within the confines of the Commonwealth and "outside the competence of the States" (at 104). Toohey J (at 117,119) generally agreed with Wilson and Dawson JJ.
- 10 69. Brennan J (at 107) acknowledged that the scope of s.61 was not amenable to exhaustive definition. After referring to the controversy in past decisions concerning, inter alia, the scope of prerogative or other non-statutory powers and capacities within the executive power of the Commonwealth (at 109-110), Brennan J (at 110) agreed with Jacobs J in *AAP* that the phrase "maintenance of this Constitution" in s.61 imports the idea of Australia as a nation with the consequence that the phrase assigns a function to the Executive Government "not only to institutions of government but more generally to the protection and advancement of the Australian nation". Brennan J (at 111) approved the criterion of Mason J in *AAP*, stating that it "invites consideration of the sufficiency of the powers of the States to engage effectively in the enterprise or activity in question and of the need for national action (whether unilateral or in co-operation with the States) to secure the contemplated benefit".
- 20 70. In *Pape*, French CJ and Gummow, Crennan and Bell JJ rejected the view that the executive power under s.61 was confined to the areas in respect of which the Commonwealth had legislative power.
71. French CJ (at 60 [127]) regarded s.61 as having to be "capable of serving the proper purposes of a national government" but accepted that the exigencies of "national government" cannot be invoked to set aside, inter alia, the distribution of powers between the Commonwealth and the States.
- 30 72. Gummow, Crennan and Bell JJ (at 87 [228]) accepted the formulation of Brennan J in *Davis*, and Mason J in *AAP*, that s.61 confers on the Executive Government power to engage in enterprises and activities peculiarly adopted to the government of a nation and which cannot otherwise be carried on for the benefit of a nation. However, earlier (at [220]) their Honours saw no good reason to so constrain the power of the executive under s.61 after appropriation by Parliament, to expend moneys raised by taxation imposed by the Parliament. In respect of any such expenditure, their Honours saw the executive power to be no less than that of the executive of the United Kingdom in 1901.

### **Submissions**

- 40 73. It is important to recognise that the analysis in each of the above cases was concerned with the validity of a law and therefore necessarily with the interaction between ss.61 and 51 (xxxix).
74. The present case is distinguishable in that it is solely concerned with the executive power under s.61 and the power in question, being the capacity to contract to expend money, does not compete or interfere with the distribution of legislative or executive power under

the Constitution. Also, subject to the plaintiff's s.116 claim, no question arises as to the power being inconsistent with any express or implied constitutional prohibition or limitation on federal power.

75. The DH Funding Agreement and the NSCP do not fetter or limit the legislative or executive power of the states in any way. The NSCP is subject to state law and the legislative and executive powers of the state in relation to the NSCP are unaffected by the agreement and the NSCP.
76. The only relevant fetter on state power in the present context is derived from the Constitution, namely that the States have no legislative (or executive) power to affect the capacities of the Commonwealth executive, including its capacity to contract.<sup>69</sup>
77. The role of s.51 (xxxix) in the context of the Executive Government's capacity to contract is, as explained above at [45] and [56], limited to protect "the efficacy of the execution of the Executive Government of its powers and capacities". An example of legislation in aid of the executive capacity to contract may be found in Pt IX of the *Judiciary Act* 1903 (Cth) (see for example, ss 56 and 64). As was observed in *Pape* by Gummow, Crennan and Bell JJ at 87-8 [228] a law in "aid of" the executive power is not a law "in aid of any subject which the Executive Government regards as of national concern".
78. Accordingly, the Commonwealth's entry into the DH Funding Agreement in reliance on s.61, rather than on any head of legislative power, does not have the potential to lead to legislative power in relation to education generally or to the NSCP generally. Rather, it can lead no further than to legislation in aid of the integrity or efficiency of the DH Funding Agreement (and other such agreements) to which the State is not a party.
79. The NSCP is quintessentially a national education program. It involves an exercise of executive power for a public purpose calculated to be in the national interest. As with the Bicentennial Authority it is not able in any practical sense to be conducted by any one state. It is peculiarly adapted to being implemented as a Commonwealth government, and Commonwealth funded, program to be available on a voluntary basis for the benefit of all school children throughout the nation provided that their school community requests it. It is a program that falls within "the peculiar province of the Commonwealth in its capacity as the national and federal government".<sup>70</sup> Finally, the only substantive obligation on the Commonwealth is to expend moneys, after appropriation by the Parliament. On this basis, the exercise of Commonwealth executive power to enter the DH Funding Agreement should be held to be valid.
80. If, contrary to its submission, SUQ is required to meet the higher threshold of an "enterprise and activities peculiarly adapted to the government of a nation which cannot otherwise be carried on for the benefit of a nation"<sup>71</sup> then SUQ submits the NSCP meets that criterion for the reasons already articulated in these submissions about the NSCP. Consideration of the sufficiency of the powers of the States to engage effectively in the NSCP and of the need for national action (whether unilateral or in co-operation with the

<sup>69</sup> *Commonwealth v Western Australia* (1991) 196 CLR 392 at 471 and *Re Residential Tenancies Tribunal (NSW) Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 440. See also *Pape* at 86 [224]

<sup>70</sup> *Davis* at 94 per Mason CJ, Deane J and Gaudron J.

<sup>71</sup> Mason J in *AAP* at 397, Brennan J in *Davis* at 11 1 and Gummow, Crennan and Bell JJ in *Pape* at 87 ([228])



States) to secure the contemplated benefits of the NSCP,<sup>72</sup> leads to the answer that SUQ has met the threshold.

## SECTION 116

### *Relevant Facts*

81. Under the DH Funding Agreement, the Commonwealth provided funding to SUQ for it to provide a chaplain for the Darling Heights school at the request of its school principal. The chaplain engaged by SUQ is required to act at the direction of the principal of the school and is otherwise to comply with the terms of his or her engagement by SUQ.<sup>73</sup>
- 10 82. Further, pursuant to the Second Queensland Procedure published by the Queensland Department of Education and Training,<sup>74</sup> SUQ has entered into an Agreement for Chaplaincy Services with the State of Queensland in which all chaplains provided by SUQ must abide, inter alia, by the Department's Code of Conduct and the Second Queensland Procedure.<sup>75</sup>
83. The DH Funding Agreement provides that the chaplains sign the Code of Conduct<sup>76</sup> and thereby agree with SUQ<sup>77</sup> to comply with that Code. Any suspected or actual failure of a chaplain to comply with the Code of Conduct imposes obligations on SUQ, which include, inter alia, to investigate whether there has been a breach of the Code and, if so, to prevent the chaplain continuing to deliver chaplaincy services, and to notify the Commonwealth.<sup>78</sup> SUQ may also be required to repay funding which was provided for that chaplain.<sup>79</sup> All of the obligations in respect of the chaplain are imposed on SUQ, while the only obligation of the Commonwealth is to provide funding.<sup>80</sup>
- 20 84. A school chaplain may be of any religious affiliation or, in the particular circumstances where a school has been unable to locate a suitable school chaplain to provide services at the school,<sup>81</sup> may be a secular pastoral care worker.<sup>82</sup> The decision about the affiliation and nature of a school chaplain is made by each school community.<sup>83</sup>

### *Relevant Principles*

85. There is little authority on the relevant limb of s.116, which provides that "no religious test shall be required as a qualification for any office ... under the Commonwealth".

<sup>72</sup> *Davis* at 111 per Brennan

<sup>73</sup> 2010 Guidelines, [3.2], SCB 2/612.15-45

<sup>74</sup> Special Case, [20], SCB 1/13, 381-406

<sup>75</sup> Special Case, [24], SCB 1/13, 408-491

<sup>76</sup> Clause C11 of Part A of Schedule 1 of the DH Funding Agreement, SCB 2/639.45-48

<sup>77</sup> Query, whether the chaplain also makes an agreement with the principal of Darling Heights primary school.

<sup>78</sup> Clauses C12-C14 of Part A of Schedule 1 of the DH Funding Agreement, SCB 2/639.48-640.18

<sup>79</sup> Clause C15 of Part A of Schedule 1 of the DH Funding Agreement, SCB 2/640.18-20, clause 5.1(b) of Schedule 2 to the DH Funding Agreement, SCB 2/647.48-648.15

<sup>80</sup> Compare Parts A and B of Schedule 1 of the DH Funding Agreement, SCB 2/638-645

<sup>81</sup> 2010 Guidelines for the NSCP at SCB 2/609.10-12, National School Chaplaincy Program Guidelines, Secular Service Providers Policy, SCB Sup/207-209

<sup>82</sup> 2010 Guidelines for the NSCP at SCB 2/608.30-35 (paragraph 1.4), SCB 2/612.25-30 (paragraph 3.2), SCB 2/621.10-30 (definitions of "Secular Pastoral Care Workers" and "School chaplain"). There are distinct Codes of Conduct for School chaplains and Secular Pastoral Care Workers: SCB 2/622-626. DEEWR has applied a policy of providing funds under the NSCP for secular (non-religious) pastoral care workers in the circumstances described in an internal written policy titled "The NSCP Guidelines: Secular Service Providers Policy", Special Case [34A – 34C], SCB Sup/207-209

<sup>83</sup> 2010 Guidelines for the NSCP at SCB 2/608.30-35 (paragraph 1.4), SCB 2/612.25-30 (paragraph 3.2)

86. As was observed by Stephen J in *Attorney-General (Vict); ex rel Black v The Commonwealth*,<sup>84</sup> the section:

“prohibits one avenue of encroachment open to legislature and executive alike – the imposition of religious tests for office holders.”

87. The text, context and purpose of s.116 plainly require that the prohibition on a religious test be a test that is required by the Commonwealth as a qualification for an office falling within the executive, judicial or parliamentary arms of the Commonwealth. It may also extend to Commonwealth statutory office holders.

### **Submissions**

- 10 88. A chaplain holds no office under the Commonwealth. Relevantly, for present purposes the chaplain is engaged by SUQ to provide chaplaincy services at the Darling Heights school, under the control and direction of the principal. The chaplain owes no obligation to the Commonwealth and has not entered any contractual or other arrangement with the Commonwealth. The fact that the Commonwealth is the source of funding for the engagement of the chaplain by SUQ cannot transform the chaplain’s legal relationship with SUQ and the Darling Heights school principal into a relationship under which the chaplain is holding any office under the Commonwealth. Likewise, because the State of Queensland also provides funding for chaplains and requires compliance with its Code of Conduct for all chaplains engaged by SUQ, this does not result in the chaplains holding any office under the State.
- 20 89. The plaintiff’s case on this question necessarily raises the associated question of whether the chaplain, who the plaintiff contends holds office under the Commonwealth, is therefore an officer of the Commonwealth for the purposes of s.75(v). This Court’s extensive consideration of s.75(v) would not countenance any notion of a person who is not appointed to any office by or on behalf of the Commonwealth being characterised as an officer of the Commonwealth.
- 30 90. In any event, the DH Funding Agreement and the NSCP do not require a chaplain to satisfy a religious test. As is pointed out in [84] above, in order to qualify for funding under the DH Funding Agreement and the NSCP, the chaplain can be from any religious persuasion or may be a secular pastoral worker.

### **THE APPROPRIATION ACTS**

91. As explained at [12] above, the relevant question is whether expenditure by the Commonwealth under any renewal or extension, of the Darling Heights Funding agreement is within the *Appropriation Act (No 1) 2011-2012*.<sup>85</sup>
92. However, the first appropriation act in each of the years during which SUQ was funded (ie, 2007-2008, 2008-2009, 2009-2010 and 2010-2011) appropriated money out of the Consolidated Revenue Fund for the particular outcomes of the Commonwealth instrumentalities described in the administered items set out in a schedule to each Act.<sup>86</sup> In

<sup>84</sup> (1981) 146 CLR 559 at 610

<sup>85</sup> Special Case, [85B], SCB Sup/297-323

<sup>86</sup> See *Appropriation Act 2006-2007*, s.8(1) (SCB 2/749); *Appropriation Act 2007-2008*, s.8(1) (SCB 2/855); *Appropriation Act 2008-2009*, s.8(1) (SCB 3/1004); *Appropriation Act 2009-2010*, s.8(1) (SCB 3/1118); *Appropriation Act 2010-2011*, s.8(1) (SCB 3/1240)

the event that SUQ's submissions on standing or relief are not accepted, the submissions below also relate to each of the Appropriation Acts.

93. Relevantly, in each of the relevant years an administered outcome for which the Commonwealth has appropriated funds is, in substance, the achieving of the outcome of providing high quality education and teaching for school students.<sup>87</sup> These appropriated funds were capable of being expended upon an activity which was rationally capable of facilitating this outcome (ie activities in furtherance of the NSCP).<sup>88</sup> Pastoral care and care for the spiritual well-being of students is rationally capable of contributing to their capacity to learn.
- 10 94. Hence, on a plain reading of the text of the Appropriation Acts, the appropriations for the administered items identified are capable of being used for the NSCP.
95. In any event, each of the Appropriation Acts provides that if the portfolio budget statements tabled in the Commonwealth Senate or House of Representatives in relation to Bill for that Appropriation Act indicates that activities of a particular kind were intended to be treated as activities in respect of a particular outcome, then the expenditure for the purpose of carrying out those activities is taken to be expenditure for the purpose of contributing to achieving the outcome.<sup>89</sup>
- 20 96. The portfolio budget statements for each of the Appropriation Acts in each of the years while SUQ was funded indicated that activities in furtherance of the NSCP were activities which were intended to be treated as activities in respect of the School Education Outcomes.<sup>90</sup>
97. In these circumstances, the effect of each of the Appropriation Acts in the years in respect of which SUQ was funded was that funds for the relevant administered outcome were expressly deemed to be available for use in the NSCP.
98. The plaintiff relies upon an agreement between the Houses of Parliament to displace the ordinary meaning of the Appropriation Acts. He claims that, notwithstanding the evident intention to appropriate funds for the activities referred to in the portfolio budget papers, the appropriation for such activities was only to the extent that the activities were within the ordinary annual services of the Commonwealth Government.
- 30 99. The plaintiff then says that, because the NSCP was not part of the ordinary annual services of Government in 2006-2007 (being a new policy for which there was never a proper appropriation in the third appropriation act), the first appropriation act in each following year does not in fact make any appropriation for the NSCP.

<sup>87</sup> *Appropriation Act (No 1) 2006-2007* (SCB 2/756), *Appropriation Act (No 1) 2007-2008* (SCB 2/862), *Appropriation Act (No 1) 2008-2009* (SCB 3/1017), *Appropriation Act (No 1) 2009-2010* (SCB 3/1127), *Appropriation Act (No 1) 2010-2011* (SCB 3/1252)

<sup>88</sup> Compare *Combet v The Commonwealth* (2005) 224 CLR 494 at 523, 529-530, 550, 565, [6]-[7], [27], [123]

<sup>89</sup> See *Appropriation Act 2006-2007*, s.4(2) (SCB 2/746); *Appropriation Act 2007-2008*, s.4(2) (SCB 2/852); *Appropriation Act 2008-2009*, s.8(2) (SCB 3/1004); *Appropriation Act 2009-2010*, s.8(2) (SCB 3/1118); *Appropriation Act 2010-2011*, s.8(2) (SCB 3/1240), *Appropriation Act 2011-2012*, s.8(2) (SCB Sup/305);

<sup>90</sup> 2007-2008 portfolio budget statements, pp 18, 52 (SCB 3/944, 978); 2008-2009 portfolio budget statements, pp 43, 50 (SCB 3/1083, 1090); 2009-2010 portfolio budget statements, pp 75, 76 (SCB 3/1207, 1208); 2010-2011 portfolio budget statements, pp 55, 57 (SCB 3/1315, 1317), 2011-2012 portfolio budget statements, pp 4, 49-51 (SCB Sup/256, 257)

100. In effect, this submission ignores the unambiguous text of the Act and entirely negates the effect of the references to the NSCP in the portfolio budget statements for 2007-2008 and every subsequent year.
101. The task of statutory construction begins with the text of the act itself. This principle applies equally to appropriation acts: *Combet v The Commonwealth*.<sup>91</sup>
102. The plain meaning of the Appropriation Acts, which deem the NSCP to be within the relevant administered outcome by virtue of the references to the NSCP in the portfolio budget statements, cannot be displaced by reference to extrinsic material and considerations of whether the NSCP may be classified as the "ordinary annual services of Government".<sup>92</sup>
103. In substance, the plaintiff's submission amounts to this: the NSCP cannot be classified as an "ordinary service of the Government" and hence is presumed to be outside the appropriation made by each of the first appropriation acts from 2007 onwards. However, the plaintiff himself acknowledges that the question of whether a bill is for the "ordinary annual services of the Government" in terms of s.54 of the *Constitution* is a non-justiciable issue.<sup>93</sup> The effect, however, of the plaintiff's submission is to make the question of what constitutes "ordinary annual services of the Government" a justiciable issue by attempting to limit the operation of the first appropriation act in a way which excludes matters which, on a plain reading, are within the appropriation act.

20 **PART VI: PROPOSED ANSWERS TO SPECIAL CASE**

104. Question 1(a), (b)(i)-(iv) and (c)(i)-(iv) should each be answered "No". Accordingly, questions 2, 3, 4 and 5 do not arise. However, when the questions are amended to include the 2011-2012 Appropriation Act (No 1), and an appropriate question is formulated, SUQ will contend that if the plaintiff otherwise succeeds in his claims, he would be entitled to an order restraining the Commonwealth of Australia (whether by its officers or otherwise) from entering into any agreement in respect of the 2012 year or thereafter renewing or extending the DH Funding Agreement, or from entering any other agreement with the SUQ on substantially the same terms or substantially to the same effect as the DH Funding Agreement (save as to the term thereof).
- 30 105. If Questions 2(a) and (b) arise, they should each be answered "No".
106. If Questions 3(a)-(d) arise, they should each be answered "Yes".
107. If Questions 4(a) and (b) arise, they should each be answered "No".
108. In relation to question 5 the only relief that properly may be granted is as set out in [104].
109. If the plaintiff fails, SUQ should be entitled to its costs. However, if the plaintiff succeeds, there should be no order for costs made against SUQ as it has acted in good faith in reliance upon the relevant Appropriations Acts and the capacity of the Commonwealth to enter into, and make payments under, the DH Funding Agreement and any renewal or

<sup>91</sup> (2005) 224 CLR 494 at 521, 563; [4], [119]

<sup>92</sup> *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)* (2009) 239 CLR 27 at 46, [47]

<sup>93</sup> Plaintiff's submissions, [50], consistent with the traditional view stated in *Northern Suburbs General Cemetery Reserve Trust v The Commonwealth* (1993) 176 CLR 555 at 578.

extension thereof in reliance on those Acts. In these circumstances, the Commonwealth alone should be responsible for the plaintiff's costs.

Dated: 26 July 2011

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