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

SUBMISSIONS OF FIRST, SECOND AND THIRD DEFENDANTS

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PART I SUITABILITY FOR PUBLICATION

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

PART II ISSUES

2. The principal issues (adopting the abbreviations used in the special case) are:

   2.1. whether the plaintiff has standing to challenge the validity of the drawing of money from the Consolidated Revenue Fund and, if so, whether the drawing of money from the Consolidated Revenue Fund for the purposes of the NSCP, and in particular the Darling Heights Funding Agreement ("Agreement"), is (or was) authorised by an appropriation.[1]

   2.2. whether the Commonwealth had or has executive power to enter into, and make payments pursuant to, the Agreement by virtue of:

      2.2.1. s 61 of the *Constitution* read together with s 51(xxiiiA);

      2.2.2. s 61 of the *Constitution* read together with s 51(xx); or

      2.2.3. s 61 of the *Constitution.*

   2.3. whether the individuals engaged by SUQ to provide chaplaincy services at the School hold an "office under the ... Commonwealth" for the purposes of s 116 of the *Constitution*, such that the Eligibility Criteria in the NSCP Guidelines constitute a religious test imposed as a qualification for an office under the Commonwealth, contrary to s 116.

PART III NOTICES PURSUANT TO SECTION 78B OF THE JUDICIARY ACT 1903

3. The parties have given adequate notice of the proceedings to the Attorneys-General in compliance with s 78B of the *Judiciary Act 1903* (Cth).[2]

PART IV MATERIAL FACTS

4. The material facts are set out in the special case.[3] The facts are accurately summarised in the plaintiff's submissions.[4]

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1 *Appropriation Act (No 3) 2006-2007* (Cth); *Appropriation Act (No 1) 2007-2008* (Cth); *Appropriation Act (No 1) 2008-2009* (Cth); *Appropriation Act (No 1) 2009-2010* (Cth); *Appropriation Act (No 1) 2010-2011* (Cth); and *Appropriation Act (No 1) 2011-2012* (Cth).

2 Special Case Book (**SCB**) Vol A, 40, 88.

3 SCB Vol 1, 1.

4 Plaintiff's Submissions at [6]-[15].

PART V APPLICABLE PROVISIONS

5. The applicable constitutional and statutory provisions are as identified by the plaintiff.[5]

PART VI ARGUMENT

6. There are two limbs to the plaintiff's challenge to the expenditure of money by the Commonwealth at the School under the NSCP. The first concerns the alleged absence of an appropriation authorising the drawing of money from the Consolidated Revenue Fund for the purpose of such expenditure. The second concerns the alleged absence of executive power to enter into the Agreement and make the expenditure.

CHALLENGE TO APPROPRIATIONS

7. The plaintiff lacks standing to challenge the drawing of money from the Consolidated Revenue Fund on the basis that there is or was no appropriation. The plaintiff's special interest in the *expenditure* of Commonwealth money in a way which affects the provision of chaplaincy services at the School does not give him standing to challenge the appropriation itself or to raise questions (and seek declarations)[6] as to its scope. In relation to the appropriation of money from the Consolidated Revenue Fund (as opposed to its expenditure), the plaintiff has no interest in the subject matter beyond that of any other member of the public and therefore lacks standing.[7] Appropriation Acts are fiscal rather than regulatory in character.[8] A citizen has no interest in money standing to the credit of the Consolidated Revenue Fund such as to support a contention that a payment to another from the Fund is not authorised by an appropriation.[9]

8. The plaintiff's challenge, in any event, fails on the merits. The plaintiff contends that the relevant Appropriation Acts, beginning with the *2006-2007 Appropriation Act (No 3)* and continuing with the *2011-2012 Appropriation Act (No 1)*[10] - each entitled "An Act to appropriate money out of the Consolidated Revenue Fund for the ordinary annual services of the Government and for related purposes" - did not and do not authorise the drawing of money from the Consolidated Revenue Fund for the purposes of the NSCP on the basis that the NSCP was and remains outside the

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5 Plaintiff's Submissions at [85]-[86].

6 SCB Vol A, 3-4 [1], [3], [5], [7].

7 *Anderson v Commonwealth* (1932) 47 CLR 50; *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493.

8 *Victoria v The Commonwealth (AAP Case)* (1975) 134 CLR 338, 386-387 (Stephen J), 392-393 (Mason J).

9 *AAP Case* (1975) 134 CLR 338, 402 (Mason J); see also *Attorney-General (Vict.) v The Commonwealth (Pharmaceutical Benefits Case)* (1945) 71 CLR 237, 248 (Latham CJ). The issue of standing to challenge appropriations was raised but not determined by the majority in *Combet v The Commonwealth* (2005) 224 CLR 494, 531 (McHugh J), 560 (Gummow, Hayne, Callinan and Heydon JJ).

10 The Plaintiff seeks leave to amend the statement of claim and writ of summons to incorporate a challenge to the current appropriation. The Commonwealth defendants consent to leave being granted.

concept of "ordinary annual services of the Government" as understood between the Houses of Parliament. In particular, the plaintiff contends that the accepted meaning of "ordinary annual services of the Government" excludes appropriations for "new policies not authorised by special legislation" and that the NSCP was and remains a "new policy".

9. The plaintiff's contention fails at three levels. First, and most fundamentally, the contention fails simply as a matter of construction. Each of the relevant Appropriation Acts, on its proper construction, expressly authorised the drawing of money from the Consolidated Revenue Fund for the purpose of expenditure under the NSCP. No resort is required to the meaning of "ordinary annual services of the Government" to understand the relevant operation of the Acts. Nor can the long title of each Act be construed as displacing the clear meaning of the words used within the Acts themselves.

10. The point of construction is adequately demonstrated by analysis of the *2007-2008 Appropriation Act (No 1)*, which covers the first year in which payments were made under the NSCP. Each of the other Appropriation Acts, including the current Act, is relevantly identical. [11]

11. The *2007-2008 Appropriation Act (No 1)* appropriated money from the Consolidated Revenue Fund "as necessary for the purposes of [the] Act": s 14, SCB Vol 2, 859. For each "administered item for an outcome of an entity", the Act authorised the issuing out of the Consolidated Revenue Fund of amounts up to the amount specified in that item and provided for such amounts to be applied for expenditure "for the purpose of carrying out activities for the purpose of contributing to achieving that outcome": s 8, SCB Vol 2, 855. The "administered item" for an outcome of an entity was the amount set out in Sch 1 opposite the outcome under the heading "Administered Expenses": s 3, SCB Vol 2, 851. Outcome 1 of DEST, as set out in Sch 1, was "School Education – Individuals achieve high quality foundation skills and learning from schools and other providers", SCB Vol 2, 862. At the time the Act was passed, the administered item in respect of outcome 1 of DEST was $234,371,000.[12] The Act therefore authorised the issuing out of the Consolidated Revenue Fund of amounts up to $234,371,000, subject to the requirement that such amounts be applied for expenditure for the purpose of carrying out activities for the purpose of contributing to achieving outcome 1 of DEST. The Act expressly provided that if the Portfolio Budget Statements (being the tabled statements in relation to the Bill for the Act: s 3) indicated that activities of a particular kind were intended to be treated as activities in respect of a particular outcome "then expenditure for the purpose of carrying out those activities is taken to be expenditure for the purpose of contributing to achieving the outcome": s 4(2), SCB

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[11] The corresponding provisions and contents of the budget papers are referred to in the defence filed by the Commonwealth defendants. In relation to the *2006-2007 Appropriation Act (No 3)* the relevant paragraph is 50.2, SCB Vol A, 56. In relation to the *2008-2009 Appropriation Act* the relevant paragraphs are 58, 59 and 66, SCB Vol A, 59-61. In relation to the *2009-2010 Appropriation Act* the relevant paragraphs are 72, 73 and 80: SCB Vol A, 62-64. In relation to the *2010-2011 Appropriation Act* the relevant paragraphs are 87, 88 and 91: SCB Vol A, 65-67.

[12] This appears from the Portfolio Budget Statements SCB Vol 3, 950. The copy of the Act reproduced at SCB Vol 2, 849-918 is a consolidated version incorporating amendments to the amounts in Schedule 1 that were made by various instruments pursuant to s 32 of the *Financial Management and Accountability Act 1997* (Cth).

Vol 2, 852. The relevant Portfolio Budget Statements indicated that activities in respect of the NSCP were intended to be treated as activities in respect of outcome 1 of DEST: SCB Vol 3, 944, 978. The Portfolio Budget Statements for DEST were tabled in the Senate in relation to the Bill on 9 May 2007: Special Case paragraph (**SC**) 78, SCB Vol 1, 21.

12. The *2007-2008 Appropriation Act (No 1),* read together with the Portfolio Budget Statements as is expressly required by s 4(2), plainly authorised the appropriation of money from the Consolidated Revenue Fund for the purposes of the NSCP. The use of the phrase "ordinary annual services of government" in the long title did not constrain the clear operation of these provisions. Contrary to the contention of the plaintiff,[13] the use of the phrase "ordinary annual services of government" in the long title of an Appropriation Act does not establish any presumptive meaning which can be displaced only by clear words. The words used in the relevant Acts are to be given effect according to orthodox principles of construction. Moreover, the plaintiff's construction proceeds on the erroneous view that s 8 of *2007-2008 Appropriation Act (No 1)* (and the equivalent provision in each of the other Acts) did not inform the scope of the appropriation but served "merely to authorise the expenditure of amounts issued in respect of an administered item for a prescribed purpose"[14] with the result that the appropriation made by s 14 must be understood in isolation from s 8.[15] An appropriation must designate the purpose or purposes for which the moneys appropriated might be expended.[16] Section 14, in appropriating the Consolidated Revenue Fund "for the purposes of [the] Act", plainly invoked s 8: the description in s 8 of the purposes for which amounts may be issued and applied was an essential part of the "purposes of [the] Act" and the appropriation itself.

13. Secondly, the historical record does not support the plaintiff's proposition that there is an understanding between the Houses which is on such settled terms as to support a conclusion that a particular program is outside the scope of an appropriation because the appropriation excludes "new policies not authorised by special legislation". The relevant facts indicate that since 1965 there has been an ongoing and unresolved dialogue between the Houses about aspects of the proper interpretation and application of the Compact of 1965 and the appropriateness of including or not including particular appropriations in odd and even number Appropriation Bills. In this regard it is significant that in recent years the Senate has continued to pass appropriation odd numbered Acts, even in circumstances where the Senate (or some members of the Senate) considered that the Acts contained appropriations which ought not to have been included pursuant to the Compact: SC paragraphs 102, 116, 117, 118, 120, 121, SCB Vol 1, 26-33. There is no suggestion in any of the material referred to by the plaintiff that in such circumstances the Senate or any of its members regarded the scope of the appropriations that were being enacted as being affected by this point. These

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13 Plaintiff's Submissions at [61].

14 Plaintiff's Submissions at [63].

15 Plaintiff's Submissions at [65].

16 *Brown v West* (1990) 169 CLR 195, 208; see also *Pape v Commissioner of Taxation* (2009) 238 CLR 1 ('*Pape*'); *State of New South Wales v The Commonwealth (The Surplus Revenue Case)* (1908) 7 CLR 179, 190; *The AAP Case* (1975) 134 CLR 338, 392. The restriction of expenditure to the specified purpose or purposes is the negative aspect of an appropriation identified by Mason J in the *AAP Case* at page 392.

exchanges indicate that, to the extent that there is a shared understanding of "ordinary annual services of government", it is of limited utility in construing the scope of a particular appropriation Act. Nor can recent differences of view be dismissed on the grounds that the understanding of the Executive is irrelevant: the Executive has the responsibility for formulating the Appropriation Bills (under s 56) and, understood in the context of responsible government, its position may be taken to be the same as that of the House of Representatives. It is a necessary party to any understanding.

14. Finally, even a strict application of the terms of the Compact of 1965 would not exclude appropriations for the NSCP from the description in the long titles of any of the relevant Appropriation Acts. The Compact relevantly included an understanding between the Houses that there would be a separate, even-numbered Appropriation Bill, subject to amendment by the Senate, containing relevantly "new policies not authorised by special legislation" but that "subsequent appropriations for such items" would be "included in the Appropriation Bill not subject to amendment by the Senate": see description of the Compact of 1965 by the Treasurer on 13 May 1965: SC paragraph 98, SCB Vol 1, 25. The distinction in this arrangement between the treatment of policies in their first and subsequent years is fatal to the plaintiff's argument. Even on the narrowest reading of the parliamentary practice, it is clear that payments toward a particular policy following the initial year of the policy have been accepted as being a continuing government activity falling within the "ordinary annual services of government": see SC paragraphs 107.2, 110, 119.2, 123(4), SCB Vol 1, 1, and corresponding documents.

15. The NSCP was first made the subject of an appropriation in 2006-2007, although as events transpired no money was paid by the Commonwealth pursuant to funding agreements forming part of the NSCP during the financial year which ended on 30 June 2007: SC paragraph 65, SCB Vol 1, 19. The *2006-2007 Appropriation Act (No 3)* provided for the issuing out of the Consolidated Revenue Fund of amounts for administered items and the application of such sums in similar terms to the provisions discussed above: s 8, SCB Vol 2, 777. The relevant "administered item" for DEST, outcome 1, was $11,158,000: Sch 1, SCB Vol 2, 784. The relevant Portfolio Additional Estimate Statements in relation to DEST referred expressly to the NSCP and thus established that activities under that program were intended to be treated as activities in respect of outcome 1 of DEST: SCB Vol 2, 808. The Portfolio Additional Estimate Statements for DEST were tabled in the Senate in relation to the Bill on 8 February 2007: SC paragraph 76, SCB Vol 1, 20.

16. Even if (assuming the plaintiff's description of the Compact to be accurate) the appropriation for the NSCP ought not have been included in the *2006-2007 Appropriation Act (No 3)* and the Senate may have had cause to object,[17] an appropriation was in fact made in that year for the purposes of that policy. The subsequent Appropriation Acts must be understood by reference to the appropriations made in past years. Identifying a legal deficiency in the 2006-2007 appropriation in 2011 cannot change the historical fact that the NSCP was a policy that had been the subject of a past appropriation and was therefore properly characterised as part of the ordinary annual services of the government. It is thus

[17] As it has on a number of occasions: SC paragraphs 102, 116, 117, 118, 120, 121, SCB Vol 1, 26-33.

entirely in keeping with the plaintiff's reading of the Compact for appropriations for the NSCP in subsequent years to have been treated as a continuing government activity falling within the "ordinary annual services of the government".

CHALLENGE TO THE AGREEMENT AND EXPENDITURE

17. The Commonwealth does not dispute the standing of the plaintiff to challenge the power of the Commonwealth to continue to make payments under the Agreement as well as the validity of the Agreement.[18] On the other hand, the plaintiff's challenge to past expenditure under the Agreement, and more generally to expenditure for the purposes of the NSCP otherwise than under the Agreement, lies beyond the scope of the matter before the Court in that it gives rise to no contested legal right, subsisting or future, which could properly be the subject of declaratory relief.[19]

18. The validity of the Agreement and the power of the Commonwealth to make payments under the Agreement turn on the scope of the executive power of the Commonwealth which is "described but not defined" in s 61 of the Constitution.[20] That is obviously the case as to the power to contract (there being no applicable legislation other than machinery provisions[21]). It is also the case as to the power to spend, following *Pape v Commonwealth*.[22] That case established that s 81 of the Constitution is not to be treated as an "appropriations power" that implicitly authorises the expenditure of money "for the purposes of the Commonwealth". Rather, s 81 (with s 83) merely confirms that parliamentary appropriation is a prerequisite for the lawful availability of money for expenditure. Authority to spend such money must be found in the executive power or in legislation enacted under a head of power in ss 51, 52 or 122.[23] Further, since s 81 is concerned only with parliamentary control over the executive (rather than relations between the Commonwealth as a body politic and its citizens, or other elements of the federation), there is no reason to regard the reference to the "purposes of the Commonwealth" as imposing a limit on the purposes for which money may validly be appropriated.[24] Any limit, if at all, lies in the power to spend.

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18 It is accepted that a contract which bound the Commonwealth to do something which it was not constitutionally permitted to do would be invalid.

19 *Gardner v Dairy Industry Authority* (1978) 52 ALJR 180, 184, 188-189; *Church of Scientology v Woodward* (1982) 154 CLR 25, 62.

20 *Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (*The Wooltops case*) (1922) 31 CLR 421, 440 (Isaacs J); see also *Davis v The Commonwealth* (1988) 166 CLR 79, 92 (Mason CJ, Deane and Gaudron JJ), 107 (Brennan J).

21 See *Financial Management and Accountability Act 1997* (Cth), s 44(1) and *Financial Management and Accountability Regulations 1997* (Cth), rr 8 and 9.

22 *Pape* (2009) 238 CLR 1.

23 *Pape* (2009) 238 CLR 1, 55 [111]-[112] (French CJ), 75 [184] (Gummow, Crennan and Bell JJ), 113 [320] (Hayne and Kiefel JJ), 211 [602] (Heydon J).

24 As noted by Gummow, Crennan and Bell JJ in *Pape* (2009) 238 CLR 1, 74 [180]-[183] and Hayne and Kiefel JJ in *Pape* (2009) 238 CLR 1, 113 [320], debate about the scope of s 81 in the *Pharmaceutical Benefits case* (1945) 71 CLR 237 proceeded from the unexamined premise that s 81 gives power to spend money. The same can be said of the judgments in the *AAP case* (1975) 134 CLR 338 that considered the limits of s 81, apart from that of Mason J. The need to identify any limit in s 81 disappears once the premise is rejected, as it was by the whole Court in *Pape*. See also *Davis* (1988) 166 CLR 79, 95-96.

19. The plaintiff's submissions miss the point in arguing that "no appropriation could validly have been made"[25] as a consequence of the alleged invalidity of the Agreement.[26] The existence of an enforceable contractual *obligation* to make payments (ie, a "valid" contract) is not a prerequisite to the existence of a *power* to make those payments. What is truly in issue is whether the executive power of the Commonwealth extends to making the payments.

Narrow basis: within the subject-matter of Commonwealth legislative power

20. The validity of the Agreement and expenditure as exercises of executive power can be established on a narrow basis, without canvassing broader questions as to the nature and scope of Commonwealth executive power. Let it be assumed that the breadth[27] of the executive power of the Commonwealth in all of its aspects (ie, the "prerogative" powers in the narrow sense, the powers that arise from the position of the Commonwealth as a national government,[28] and the "capacities"[29] which the Commonwealth has in common with other legal persons) is limited to the subject-matters of the express grants of legislative power in ss 51, 52 and 122 of the Constitution (together with matters that, because of their distinctly national character[30] or their magnitude and urgency,[31] are peculiarly adapted to the government of the country and otherwise could not be carried on for the public benefit). On that basis, both the making of the Agreement and the payments to SUQ are within the executive power of the Commonwealth in that:

20.1. the Agreement provides for, and its performance involves, the provision of benefits to students (cf s 51(xxiiiA)); and

20.2. the Agreement was entered into with, and provides for assistance to, a trading corporation formed within the limits of the Commonwealth (cf s 51(xx)).

Benefits to students power

21. "Benefits to students" in s 51(xxiiiA) are not limited to payments of money to students. This follows from ordinary principles relating to the construction of grants of legislative power,[32] and from the internal structure of s 51(xxiiiA) itself (some limbs of which expressly denote payments of various kinds – eg pensions and allowances – while others, including "benefits to students", are not so limited). Accordingly, for example, a law which provided for the provision of goods or

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25 Plaintiff's Submissions at [38].

26 The validity of the relevant Appropriation Acts is not put in issue by the pleadings or by the questions posed in the Special Case.

27 Using the terminology proposed in Winterton, *Parliament, the Executive and the Governor-General* (1983), 29-30.

28 Cf *Pape* (2009) 238 CLR 1, 60 [127] (French CJ), 83 [214] (Gummow, Crennan and Bell JJ).

29 Cf *Pape* (2009) 238 CLR 1, 60 [126] (French CJ).

30 As in *Davis v Commonwealth* (1988) 166 CLR 79, 94 (Mason CJ, Deane and Gaudron JJ), 104 (Wilson and Dawson JJ), 110-111 (Brennan J).

31 As in *Pape* (2009) 238 CLR 1, 63 [133] (French CJ), 91-92 [242] (Gummow, Crennan and Bell JJ).

32 *Grain Pool of WA v Commonwealth* (2000) 202 CLR 479, 492 [16].

services to students by the Commonwealth would be within s 51(xxiiiA) as one for the provision of "benefits".[33]

22. It was held in *British Medical Association v Commonwealth* that, in light of the phrase "the provision of", s 51(xxiiiA) only authorises laws with respect to the provision of relevant kinds of benefits by the Commonwealth.[34] However, in that case itself, it was not fatal to the validity of the impugned legislation that it provided for Commonwealth *funding* of the provision of medicines etc by private chemists. Similarly, in the *Alexandra Private Hospital* case, it was said to be irrelevant whether the relevant "benefit" was identified as the payment of money to the nursing home proprietor or the provision of accommodation to patients which that payment procured.[35] Accordingly, at least in the case of benefits provided in forms other than simple payments of money, it is not necessary that the Commonwealth itself be the direct provider of the relevant goods or services; it is sufficient if the Commonwealth brings about such provision by providing the necessary funding for it to occur.[36] This must be so since the Commonwealth can only act through its servants or agents: provision of a benefit to a student by the Commonwealth is necessarily indirect, at least to that extent.

23. It would be contrary to principles of interpretation established since the *Engineers case*[37] to regard s 51(xxiiiA) as subject to an implied limitation preventing the Commonwealth from involving itself in the provision of education. The paragraph is to be interpreted with all the generality that the words used admit.[38] It does not follow from the reference to "students" that the power only supports the provision of benefits to persons who are already enrolled in a course of study;[39] it may, for example, extend to assisting persons (by financial grants or otherwise) to become students. Further, even if the power is limited in that way, it does not follow that services which are provided to students in their capacity as such (as in the present case) cannot overlap or interact with the teaching that occurs in the course of study in which they are enrolled.

24. The scope of this aspect of s 51(xxiiiA) is not constrained by observations in Parliament, and in the "Yes" case which supported its adoption, to the effect that the new clause was needed to ensure the validity of existing measures in the aftermath of the *Pharmaceutical Benefits case*.[40] It is hardly to be presumed that such social welfare measures as were already in place (and whose validity had become doubtful) represented Parliament's or the electors' settled view for all time as to the benefits that might appropriately be provided by the Commonwealth. In any event, one of the existing measures whose validity was intended to be protected – the

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33 *British Medical Association v Commonwealth* 79 CLR 201, 260 (Dixon J), 280 (McTiernan J), 292 (Webb J); *Alexandra Private Geriatric Hospital Pty Ltd v Commonwealth* (1987) 162 CLR 271, 280 (Mason ACJ, Wilson, Brennan, Deane and Dawson JJ).

34 (1949) 79 CLR 201, 242-243 (Latham CJ), 254 (Rich J), 260 (Dixon J), 279 (McTiernan J), 292 (Webb J).

35 (1987) 162 CLR 271, 281 (Mason ACJ, Wilson, Brennan, Deane and Dawson JJ).

36 Cf Plaintiff's Submissions at [31].

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

38 *Grain Pool of WA v Commonwealth* (2000) 202 CLR 479, 492 [16].

39 Cf. Submissions of the Attorney-General for Western Australia ("WA Submissions") at [46].

40 See the materials referred to in the WA Submissions at [54] n 84.

Education Act 1945 (Cth) – conferred on the Universities Commission very broad powers to "arrange" for the training of discharged members of the forces and to "assist" other persons to "obtain training in Universities or similar institutions".[41] On any view, the breadth of that existing measure stands against any suggestion that the "benefits to students" limb of s 51(xxiiiA) was intended to be limited to particular kinds of benefits.

25. The provision of chaplaincy services by SUQ, as procured by the Agreement and funded by the Commonwealth thereunder, are "benefits to students" of a kind that could validly be put into effect by legislation under s 51(xxiiiA). This is so despite the fact that the Agreement contemplates chaplains making themselves available to staff and parents at the school as well as students.[42] The Agreement describes the purpose of the funding as being "to contribute to the provision of chaplaincy services at [the] school, to assist [the] school and community in supporting the spiritual wellbeing of students".[43] Given the close connection between the well-being of parents and teachers and that of students, and given that part of the benefit of having a chaplain is that he or she is present and available even when not actually engaged in providing pastoral care, the availability of chaplains under the NSCP to others in the "school community" is properly regarded as incidental to the provision of benefits in the form of chaplaincy services to students.

Corporations power

26. The two issues that arise in relation to s 51(xx) are whether SUQ is a "trading corporation" in the relevant sense, and whether that is sufficient to bring the Agreement and the payments within the executive power.

27. As to the *first* issue, on the current state of the authorities (and leaving aside the special case of a newly-formed or nascent corporation), a corporation is relevantly a "trading corporation" if trading forms a sufficiently significant proportion of its overall activities. This is so notwithstanding that:

    27.1. such trading activities might not be "predominant or characteristic";

    27.2. such trading activities may take place in order that the corporation can undertake some other primary or dominant undertaking; and

    27.3. the corporation might also properly be described in other ways.[44]

28. SUQ engages in trading activities that are substantial, quite apart from the provision of chaplaincy services for reward under the NSCP. To give an indication of the nature of SUQ's activities at the time the Agreement was entered into (and before

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41 Section 14(a), (b).

42 See the statement of proposed services at SCB Vol 2, 693, which formed part of the application for funding (SCB Vol 2, 688) and was thus incorporated into the Agreement (SCB Vol 2, 638 cl C2).

43 SCB Vol 2, 638.

44 *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).

the provision of services under the NSCP became a significant part of its business), it is useful to examine the income and expenditure figures for 2007 which are included in the Special Case. In simple revenue terms, SUQ's income of $10,936,576 for the period between 1 April 2007 and 31 December 2007 included:[45]

28.1. $41,110 in income from sales;[46]

28.2. $232,287 in income from interest;[47]

28.3. $185,515 in income from the provision of training and personal development workshops for reward (listed as YMIS income[48] and State Conference Fee income);[49]

28.4. $203,145 in income from the Stock up for Hope program;[50]

28.5. $552,684 in income from miscellaneous sources ;[51] and

28.6. $1,058,071 in income from fees for attending camps, missions and other programs organised by SUQ.[52]

29. The costs associated with these activities were also significant: for example, $2,866,361 spent on providing camps and other programs, $84,666 spent on Finance costs and $32,056 spent in connection with sales of books and livestock.[53] These activities, which constitute trading (being the supply of goods and services for reward), occur on a significant scale, both in absolute terms and as a proportion of SUQ's overall activities. It is not to the point that SUQ's trading activities currently run at a loss (and its continued viability thus depends on donations) or that they are undertaken in support of a broader objective that is evangelical rather than acquisitive.[54]

30. SUQ has continued to engage in significant trading activities since that time (SCB Vol 1, 6 [14] and SCB Vol 1, 11 [17]).

31. If the "activities test" were to be disapproved, the only viable alternative is to look to the *capacities* of the corporation concerned. Although some Justices have emphasised the "*purposes*" of a corporation as indicative of its character,[55]

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45 SCB Vol 1, 4-6 [14].

46 SCB Vol 1, 7 [15.2].

47 SCB Vol 1, 7-8 [15.4].

48 SCB Vol 1, 8-9 [15.5.7].

49 SCB Vol 1, 9 [15.5.8].

50 SCB Vol 1, 11 [15.5.9]; Plaintiff's submissions at [36]

51 SCB Vol 1, 10, [15.5.12]

52 SCB Vol 1, 10 [15.6].

53 SCB Vol 1, 10-11 [17].

54 SCB Vol 1, 38 [3].

55 *R v Trade Practices Commission; Ex parte St George County Council* (1974) 130 CLR 533, 553-554 (Menzies J), 561-562 (Gibbs J); *R v Judges of the Federal Court of Australia; Ex parte Western Australian National Football League* (1979) 143 CLR 190, 213 (Gibbs J), 219-220 (Stephen J).

historically the significance of purposes in company law was only to mark out a corporate body's powers through the doctrine of *ultra vires*.

32. The historical materials surveyed in the *Work Choices case*,[56] and in the submissions of the Attorney-General for Western Australia, indicate that "trading corporation" was not a term of art in the late nineteenth century and cannot be taken to have referred to some legislatively distinct sub-species of corporation. In this regard it is important to note that in this period "company" did not necessarily refer to a body which was a separate juristic person.[57] With that in mind, several points may be made:

10 32.1. "Trading Companies", in the long title to the 1862 Imperial Act, did not necessarily have the same meaning as "trading corporation" in the late 1890s.[58]

32.2. Section 4 of the 1862 Act[59] is the forerunner of the current s 115 of the *Corporations Act 2001*, which prohibits outsize partnerships. Its effect was to *require* a profit-making enterprise (company, association or partnership) larger than a certain size to be registered under the Act (and thereby incorporated under s 18) unless it was formed under other legislation. It did not create any dichotomy between different classes of incorporated bodies. The *right* to become registered (and thus incorporated) was conferred on any seven or
20 more persons associated for "any lawful purpose" (s 6) – ie, regardless of whether those persons' ultimate purpose was gain.[60]

32.3. Section 21[61] imposed a limit on the landholding capacity of a company (*semble* whether incorporated or not) formed for purposes not involving the acquisition of gain.

32.4. Section 23 of the 1867 Imperial Act[62] permitted a body which was about to be incorporated under the 1862 Act with limited liability to omit the word "limited" from its name if it proved to the Board of Trade that it intended to apply its profits to the advancement of one of the purposes referred to and not to pay dividends to its members. There was no compulsion on such a body to avail
30 itself of that process. Further, it was obviously envisaged that such a body might carry on activities that generated "profits".

32.5. English company law (which was broadly adopted by the Australian colonies)[63] thus distinguished for some purposes between companies and other associations formed for purposes of gain and those formed for other purposes; but there was no fundamental difference of legal capacity or

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56 *New South Wales v Commonwealth* (2006) 229 CLR 1, 90-96 [97]-[118] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

57 *Work Choices* (2006) 229 CLR 1, 90 [97].

58 Cf WA Submissions at [21].

59 WA Submissions at [22].

60 See eg Smith, *The Handy Book of the Law of Joint Stock Companies* (2nd ed 1889), 7.

61 WA Submissions at [25].

62 WA Submissions at [26].

63 WA Submissions at [32] n 39.

terminology between corporations formed for the purpose of gain and those formed for other purposes.

33. Early drafts of the Constitution included a head of power dealing only with the cross-jurisdictional "status" of corporations, and in 1891 suggestions for a broader power were not supported.[64] In 1897, the Convention was ready to grant to the Commonwealth a much broader power (presumably in light of the economic setbacks of the early 1890s involving corporate collapses).[65] The phrase "trading corporations" had been adopted in the draft clause presented for debate, and Mr Barton observed that this had been done so as not to include "municipal corporations". After a short discussion (and without any real controversy), an amendment added the words "or financial", apparently in order to capture the whole range of corporations formed under the Companies Acts.[66]

34. The approach which best reflects the subject to which s 51(xx) was directed[67] is thus one which regards the composite expression "trading or financial corporations" as referring to all corporations which, by reason of their corporate personality, may cause harm if not properly regulated: that is, corporations which have the *capacity* to trade or to engage in financial activities. Corporations are artificial persons which, to the extent that they have an essential character, derive that character from the capacities with which their creators endow them (except possibly where the power of a corporation to engage in trading activities is both ancillary to some other object and limited in scope). *Corporate purpose*, as reflected in a corporation's founding documents, was the key to a company's capacities until the reform of the Companies Acts in 1984, which gave companies the powers of an individual,[68] and was relevant for that reason. On the other hand, the *subjective purpose* of a company's founders and controllers from time to time is less satisfactory, as a test of the company's constitutional status, as the company's activities from time to time.

35. It may be objected that the consequence of accepting the capacities test is that all corporations formed under ordinary company law are now "trading corporations", and the adjectives "trading" and "financial" in s 51(xx) thus have little work to do. One answer to such an objection is that this result accords closely with the intention of the framers (to the extent that it can be discerned from the brief debate in 1897). Another answer is that any expansion which occurred with the 1984 reforms is merely a case of changes in State legislation[69] bringing additional bodies within the existing connotation of the constitutional language.

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64 *Official Report of the National Australasian Convention Debates*, Sydney, 3 April 1891, 685-686 . This reflected the *Federal Council of Australasia Act 1885* (Imp) 48 & 49 Vict, c 60.

65 Cf *Work Choices* (2006) 229 CLR 1, 95 [114] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

66 *Official Report of the National Australasian Convention Debates*, Adelaide, 17 April 1897, 793-794.

67 Cf *Cole v Whitfield* (1988) 165 CLR 360, 385.

68 *Companies and Securities Legislation (Miscellaneous Amendments) Act 1983* (Cth), s 34, which inserted ss 67 and 68 into the *Companies Act 1981* (Cth).

69 Together with corresponding reforms to the companies legislation of the Territories (which, to the extent that they are beyond s 51(xx), find support in s 122).

36. On this test, also, SUQ is clearly a "trading corporation". It is incorporated under the *Corporations Act 2001* as a public company limited by guarantee[70] and therefore has the powers of a natural person.[71] Its constitution does not contain any express limitation on those powers;[72] and even if it did, that would not render any acts of SUQ invalid.[73] It therefore clearly has the capacity to engage in trading activities.

37. As to the *second issue*, it is important to bear in mind that the exercises of power in question here are the making of a particular contract and particular payments, rather than the creation of criteria or the imposition of a rule. The issues that arise are thus different to those posed by a law which might apply both to corporations and to other persons;[74] the particular executive acts affect only the rights of the Commonwealth and SUQ. The character of these executive acts flows, relevantly, from the character of the legal persons to whom they relate; it is not dependent on any rules found in the Guidelines (which have no legal status) or on the expression of any selection criteria in the Agreement.[75]

38. It is sufficient that the person with whom the Commonwealth contracts, or the person to whom money is paid (as the case may be), is a trading corporation.

38.1. Where the relevant executive act is the formation of a contract, that act has the necessary connection with the corporations power if the other party is a trading corporation. Entry into the contract is thus within power (and the contract is valid), even if the corporation later ceases to be a "trading corporation".

38.2. Where the relevant executive act is a payment of money, that act has the necessary connection with the corporations power if the recipient of the money is a trading corporation. A payment would also be within power if made pursuant to a valid contract (even if, by the time the payment was made, the other contracting party had ceased to be a trading corporation).

39. This is so at least where the agreement is made with, or the money is paid to, an existing trading corporation and secures the continuation or extension of its existing activities. In such cases it can properly be said that the subject-matter of the relevant exercise of power is the corporation. (The position might be different if a trading corporation were brought into existence purely to serve as the recipient of moneys paid under the executive power; but that possibility does not need to be canvassed, given SUQ's history.)[76]

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70 SCB Vol 1, 2 [5].

71 *Corporations Act 2001* (Cth) s 124(1).

72 SCB Vol 1, 63-93, esp at 69.

73 *Corporations Act 2001* (Cth), s 125.

74 Cf *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323, 338-339 (Brennan J).

75 Cf Plaintiff's Submissions at [34].

76 SUQ's Articles of Association indicate that they were originally adopted in 1952 (SCB Vol 1, 42) and the Special Case records that it has provided chaplaincy services for reward in schools since at least 1991 (SCB Vol 1, 2 [6]).

40. Both the Commonwealth's entry into the Agreement and the payment of money to SUQ pursuant to that agreement are within the executive power of the Commonwealth, by reason of SUQ's character as a trading corporation.

Broad basis: no relevant limit on executive power to spend

41. It may be accepted that executive powers of a governmental nature and special privileges enjoyed by the Crown (ie, powers and privileges which would formerly have been described as aspects of the "prerogative" in its narrower sense,[77] and powers of the kind identified in *Ruddock v Vadarlis*)[78] fall to be exercised or enjoyed by the executive governments of the Commonwealth and the States only to the extent that is consistent with the division of legislative powers effected by the Constitution. Thus, for example, the power to declare war and make peace has always been understood to be exercisable only by the Commonwealth; while rights to royal minerals and treasure trove vest in the States (there being no grant of legislative power pointing to the Commonwealth having responsibility for such matters, and no relevant implication arising from its position as a national government).[79] However, there is no principled reason why the same approach should be adopted in relation to the *capacities* which the executive government possesses in common with other legal persons,[80] including the capacity to obtain information,[81] to spend money lawfully available to be spent or to enter into a contract. These capacities do not involve interference with what would otherwise be the legal rights and duties of others. Nor does the Commonwealth, when exercising such a capacity, assert or enjoy any power to displace the ordinary operation of the laws of the State or Territory in which the relevant acts take place.[82] The exercise of the capacity does not of itself impose any obligation or purport to displace any rights or obligations existing under the ordinary law.

Expenditure of appropriated money

42. The majority Justices in *Pape* did not need to chart the outer limits of the spending power of the executive government of the Commonwealth to spend money.[83] The

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77 Ie, as defined by Blackstone (*Commentaries on the Laws of England* (1st ed 1765-1769), 232) rather than by Dicey (*An Introduction to the Study of the Law of the Constitution* (5th ed 1897), 355). These powers and privileges were categorised by Dr Evatt as "executive powers" (eg the conduct of foreign relations), "immunities and preferences" (eg priority of Crown debts) and "proprietary rights" (eg treasure trove): *The Royal Prerogative* (1987), 30-31, and see *Federal Commissioner of Taxation v Official Liquidator of EO Farley Ltd* (1940) 63 CLR 278, 320-321 (Evatt J).

78 (2001) 110 FCR 491, 540-541 [183]-[185] (French J, Beaumont J agreeing), and see *Pape* (2009) 238 CLR 1, 60 [127] (French CJ), 83 [214] (Gummow, Crennan and Bell JJ).

79 Zines, *The High Court and the Constitution* (5th ed 2008), 348.

80 Referred to by Professor Zines as "non-prerogative capacities": *The High Court and the Constitution* (5th ed 2008), 349.

81 *Clough v Leahy* (1904) 2 CLR 139, 156-157: *Lockwood v Commonwealth* (1954) 90 CLR 177, 182.

82 A State law, however, may not restrict or modify the executive capacities of the Commonwealth but may regulate the activities which the Commonwealth executive chooses to engage in exercising those capacities; see *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410.

83 *Pape* (2009) 238 CLR 1, 60 [127], 63 [133] (French CJ), 87 [227], 89 [234], 91 [241] (Gummow, Crennan and Bell JJ).

issue raised by any attempt to identify limits was framed by the plurality in the following way:

> Express provision was made in s 109 respecting the exercise of concurrent legislative powers. But what are the respective spheres of exercise of executive power by the Commonwealth and State governments? We have posed the question in that way because *it is only by some constraint having its source in the position of the Executive Governments of the States that the government of the Commonwealth is denied the power*, after appropriation by the Parliament, of expenditure of moneys raised by taxation imposed by the Parliament. Otherwise there appears no good reason to treat the executive power recognised in s 61 of the *Constitution* as being, in matters of the raising and expenditure of public moneys, any less than that of the executive in the United Kingdom at the time of the inauguration of the Commonwealth.[84]

43. On this approach (which is, with respect, correct), any relevant constraint is the "*position*" of the executive governments of the States – ie, the establishment of the States as essential elements of the federal compact[85] – rather than the exclusion of the Commonwealth from certain areas in order to leave the field clear for State activity. The former approach (appropriately) echoes the *Melbourne Corporation* doctrine,[86] by which Commonwealth legislation is invalid to the extent that it would destroy or curtail the existence of the States or their continuing to function as such, whereas the latter echoes pre-*Engineers* thinking concerning the scope of legislative power. While extreme cases can perhaps be imagined which would bring the analogy with the *Melbourne Corporation* doctrine directly into focus, no threat to the "position" (as opposed to the scope for effective action) of the executive governments of the States arises from the mere expenditure of Commonwealth money. Two points in particular should be noted.

43.1. First, the spending of public money is not a power "necessarily exercisable by the States" (in the sense of exercisable only by them) and spending by the Commonwealth (at least apart from the possible extreme cases mentioned above) "involves no real competition with State executive or legislative competence".[87] This is especially clear if the relevant power is understood to be the expenditure of moneys drawn from the Treasury of the *Commonwealth*, which cannot be effected by the States in any event.

43.2. Secondly, as the plurality noted in *Pape*, to say that the power of the executive government of the Commonwealth to spend moneys appropriated by the Parliament is constrained to areas of federal legislative power "gives insufficient weight to the significant place in s 51 of the power to make laws with respect to taxation (s 51(ii))".[88] The federal division of legislative powers permits the Commonwealth to impose taxes on any criteria and for any

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84 *Pape* 238 CLR 1, 85 [220] (Gummow, Crennan and Bell JJ) (emphasis added).

85 Hayne and Kiefel JJ put the issue in similar terms in *Pape* (2009) 238 CLR 1, 117-118 [333], although their Honours came to a different conclusion from the plurality as to the circumstances in which exercises of Commonwealth legislative power would threaten the continued existence of the States as separate polities.

86 *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31; *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188, eg at 227.

87 Cf *Davis* (1988) 166 CLR 79, 93-94 (Mason CJ, Deane and Gaudron JJ) (cited in *Pape* (2009) 238 CLR 1, 62 [131] (French CJ), 90 [239] (Gummow, Crennan and Bell JJ)).

88 *Pape* (2009) 238 CLR 1, 91 [240].

purpose. Logically, a similar breadth must be afforded to the capacity of Parliament to appropriate, and of the executive to spend, the moneys thereby raised.

44. Neither s 51(xxxix) nor s 96 requires a narrower view to be taken of the scope for spending pursuant to the executive power.

45. It can be accepted that any expansion of the executive power of the Commonwealth results in a corresponding expansion of legislative power under s 51(xxxix).[89] However, being incidental in nature, the power in s 51(xxxix) is limited by the requirement that laws enacted under it must be reasonably capable of being regarded as appropriate and adapted to giving effect to the relevant exercise of executive (or legislative or judicial) power.[90] The scope to enact coercive laws is therefore limited.[91] Where the relevant exercise of executive power consists only of expenditure, s 51(xxxix) would authorise laws regulating the expenditure itself, immunising its receipt from State taxation[92] and (perhaps) giving statutory force to conditions upon which money was accepted. But such laws (or the power to make them) could not relevantly affect the position of the States as separate polities separately organised, unless their effect was such as to infringe the *Melbourne Corporation* principle (in which event they would be invalid for that reason).

46. As to s 96,[93] the better view is that its function is simply to put beyond doubt the power of Parliament to attach conditions to grants made to the States.[94] In any event, s 96 provides for the making of grants, subject to conditions, by the Parliament. It has nothing to say about the circumstances in which the executive government may in its discretion make grants, to the States or other persons, out of money properly appropriated.

Commonwealth contracts

47. The considerations which support the absence of any relevant federal limitation on the capacity of the Commonwealth under s 61 of the Constitution to spend money must apply equally to the capacity of the Commonwealth to enter into a contract which does nothing more than govern the conditions under which the money spent by the Commonwealth is received.

48. The scenario of the Commonwealth by means of a contract in effect engaging in an activity[95] does not arise and do not need to be considered for present purposes. Views about the scope of the Commonwealth's power to contract expressed by

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89 Cf *Pape* (2009) 238 CLR 1, 119 [337], 120-121 [339]-[342] (Hayne and Kiefel JJ).

90 See *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 580 [122].

91 *R v Hughes* (2000) 202 CLR 535, 555 [39] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ), citing *Davis* (1988) 166 CLR 79, 102-103, 113; *Pape* (2009) 238 CLR 1, 92 [243]-[244] (Gummow, Crennan and Bell JJ).

92 Eg *Commonwealth v Queensland* (1920) 29 CLR 1.

93 Cf Plaintiff's Submissions at [24].

94 *AAP case* (1975) 134 CLR 338, 395 (Mason J).

95 Cf *AAP case* (1975) 134 CLR 338, 398, 399-400 (Mason J).

Isaacs J in the *Wooltops case*,[96] by the majority in *Commonwealth v Australian Commonwealth Shipping Board*,[97] and Rich and Starke JJ in the *Clothing Factory case*,[98] all of which concerned contracts going well beyond the payment of money by the Commonwealth (and which were in any event decided on other grounds) may therefore be put to one side. However, for the avoidance of doubt, were it necessary to defend a more general capacity of the Commonwealth to enter into contractual obligations, the Commonwealth would rely on the detailed analysis of Professor Campbell[99] and of Professor Winterton.[100]

SECTION 116

49. Chaplains engaged by SUQ to provide services at the School do not hold an "office under the ... Commonwealth".

50. The relevant limb of s 116 provides that "no religious test shall be required as a qualification for any office or public trust under the Commonwealth". The constitutional context does not suggest any broader concept of "office" than applies in s 44(iv) or s 75(v). The prohibition is directed to the "qualifications for" a particular office, a context which serves to confirm that "office ... under the Commonwealth" is to be understood as meaning a position in which there is a direct relationship between the Commonwealth and a potential officer of the kind which may be subject to "qualifications" applicable to individual candidates. This is consistent with the ordinary definition of "office" as given in the *Oxford English Dictionary* (2nd ed), as referred to with approval in *R v Boston* (1923) 33 CLR 386 at 402 per Isaacs and Rich JJ):

> "A position or place to which certain duties are attached, esp. one of a more or less public character; a position of trust, authority, or service under constituted authority; a place in the administration of government, the public service, the direction of a corporation, company, society, etc."[101]

51. The use of the word "under" in s 116, as opposed to "of" in s 75(v), does not indicate a broader meaning, let alone the significantly different meaning advanced by the plaintiff.[102] The use of "under" in s 116 is explained by the replication of the equivalent phrase in Article VI of the *United States Constitution*.[103] Nor does the

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96 (1922) 31 CLR 421, 441. (Knox CJ and Gavan Duffy JJ expressed a similar view at 432, but their Honours' reasoning was apparently limited to construing the reference in s 61 to the execution and maintenance of the Constitution.)

97 (1926) 39 CLR 1, 9-10 (Knox CJ, Gavan Duffy, Rich and Starke JJ).

98 (1935) 52 CLR 533, 562, 567.

99 Campbell, "Commonwealth Contracts" (1970) 44 ALJ 14; Campbell, "Federal Contract Law" (1970) 44 ALJ 580.

100 Winterton, *Parliament, the Executive and the Governor-General* (1983), 44-47.

101 The corresponding definition in the *Online Oxford English Dictionary* uses "post" rather than "place", but is otherwise in the same terms.

102 Paragraph 80 of the plaintiff's submissions.

103 Article VI relevantly provides that "The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."

absence of the qualifying words "of profit" from s 116 (in contrast to s 44(iv)) suggest that a different and broader sense of office was intended in s 116. The difference signifies only that an office under the Commonwealth which is not an office "of profit" may be caught by s 116, but not s 44(iv).

52. The phrase "office ... under the Commonwealth" includes at least positions within the public service where there is a relationship of employment between the Commonwealth and the individual concerned[104] as well as positions created by Commonwealth legislation.[105] It is unnecessary to consider whether s 116 also extends to contracts between the Commonwealth and individuals for the provision of personal services, given that there is no contractual relationship of such a kind between the Commonwealth and individuals who are engaged by SUQ. There is also little to be gained by speculation about the status of other putative offices if the Commonwealth were to contract out the provision of "whole swathes of governmental activity".[106]

53. The Commonwealth does not have any legal relationship, direct or indirect, with the individuals who are engaged by SUQ to provide services at the School in respect of the provision of such services: see SC [64], SCB Vol 1, 19. Nor does DEEWR have any role in selecting or approving the individuals who provide services at the School under the NSCP: see SC [63], SCB Vol 1, 19. The Commonwealth has no power under the Agreement or otherwise to direct the individuals who provide chaplaincy services in the performance of their duties or dismiss them in any circumstances. While the Commonwealth imposes certain standards affecting the provision of chaplaincy services, the particular services to be provided at any given school is a matter to be decided by the local school and its community, not the Commonwealth: see NSCP Guidelines at SCB Vol 2, 607. School principals are responsible for overseeing the delivery of chaplaincy services within a school: NSCP Guidelines at 3.2, SCB Vol 2, 612. The individuals in question are not paid by, do not report to and have no direct legal relationship with the Commonwealth. The Agreement contemplates that the nominated chaplain or chaplains may be removed or replaced by SUQ: Sch 1 cl C6, SCB Vol 2, 639.[107]

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104 *Sykes v Cleary* (1992) 176 CLR 77 at 95-96.

105 *Re Cram; Ex parte NSW Colliery Proprietors' Association Ltd* (1987) 163 CLR 117, 127, 131. While "officer of the Commonwealth" is a broad expression (e.g., *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 140 [161] (Hayne J)) it has long been understood as requiring, at least, appointment by the Commonwealth to an office to carry out a Commonwealth function or purpose: *Drake-Brockman; Ex parte National Oil Pty Ltd* (1943) 68 CLR 51, 58-59 (Starke J); *Lane's Commentary on the Australian Constitution* (2nd edn, 1997) 585. It may be that there must also be an identifiable office of some tenure and a salary: see *R v Murray and Cormie; Ex parte Commonwealth* (1916) 22 CLR 437, 452 (Isaacs J), 464 (Higgins J), 471 (Gavan Duffy and Rich JJ); *The Tramways Case (No 1)* (1914) 18 CLR 54, 62 (Griffith CJ), 66-67 (Barton J), 79 (Isaacs J), 82–83 (Gavan Duffy and Rich JJ). Be that as it may, an analogy can be drawn with the criteria for holding an "office" for the purpose of the tort of misfeasance in public office. In that context, it is not sufficient to hold an "office" that a person performs functions on behalf of the Commonwealth. A solicitor, for example, when acting in proceedings on behalf of a Minister, does not occupy a "public office": *Leerdam v Noori* (2009) 255 ALR 553, [19], [26] (Spigelman CJ), [48] (Allsop P), [102]-[104] (Macfarlan JA). See also *Tampion v Anderson* [1973] VR 715, 720; *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1, 191, 229.

106 Paragraph 81 of the plaintiff's submissions.

107 These are all powerful indicia that such individuals do not occupy any office under the Commonwealth: see, in the context of s 75(v) *R v Murray and Cormie; Ex parte Commonwealth* (1916) 22 CLR 437, 452-453 (Isaacs J), 464 (Higgins J); as to the significance of appointment by

54. On the plaintiff's approach, any situation in which the Commonwealth enters into a contract for the provision of services according to particular standards and imposes reporting obligations to ensure compliance with such standards will have the effect of creating offices under the Commonwealth, occupied by individuals with whom the Commonwealth has no relationship. There is no warrant in s 116 for such a broad notion of "office". The approach, if accepted, would also radically expand the scope of s 75(v).

CONCLUSION

55. The questions in the special case should be answered:

10 1 Yes in respect of the validity of the Darling Heights Funding Agreement and in respect of current and future payments under the Darling Heights Funding Agreement, but otherwise no.[108]

2 No.

3 Does not arise; alternatively yes.

4 To the extent that it arises, no.

5 Does not arise; alternatively declarations should be granted only in respect of current and future payments under the Darling Heights Funding Agreement.

6 The plaintiff.

20 Date of filing: 11 July 2011

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the Commonwealth see also *R v Drake-Brockman; Ex parte National Oil Pty Ltd* (1943) 68 CLR 51, 58-59 (Starke J).

[108] See paragraph 17 of these submissions.