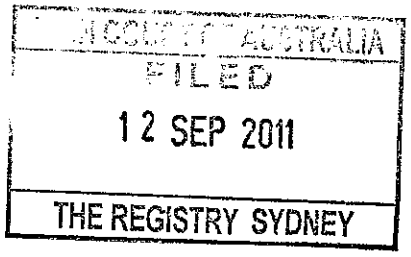
IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY **No. S307 of 2010**

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 Respondent

PLAINTIFF'S SUPPLEMENTARY SUBMISSIONS IN REPLY TO THE FURTHER SUBMISSIONS OF THE FIRST, SECOND AND THIRD DEFENDANTS

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Part I:

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

Part II:

The significance of the decision in *Pape*

2. Much reliance is placed by the first, second and third defendants ("**the Commonwealth defendants**")[1] upon the suggestion in *Pape v Federal Commissioner of Taxation*[2] that any constraint upon the power of the Commonwealth executive to spend money after appropriation by Parliament must have its source in "the position of the Executive Governments of the States". That reliance ignores the circumstance that the statement in question was directed towards answering a submission by New South Wales that the *Constitution* "split the executive and legislative power of the respective bodies politic", so that executive power, whether of the Commonwealth or of the States, would be subservient to Commonwealth or State legislative power.[3] It must also be borne in mind that the statement in question commenced a chain of reasoning which culminated in the acceptance by Gummow, Crennan and Bell JJ[4] of Brennan J's observations in *Davis v The Commonwealth*[5] concerning the scope of Commonwealth executive power.

3. That acceptance by their Honours is inconsistent with any attempt to attribute to them the view that the power of the Commonwealth executive with respect to expenditure is unbounded, subject only to considerations of the sort that underpin the *Melbourne Corporation* doctrine. Indeed, if, as the Commonwealth defendants contend, those considerations exhaust the ways in which the federal structure of the *Constitution* limits Commonwealth executive power, then one must ask why Gummow, Crennan and Bell JJ saw fit to reproduce, without disapproval,[6] the various statements made in *Davis* concerning first the need to avoid "real competition with State executive or legislative competence"[7] and secondly "the sufficiency of the powers of the States to engage effectively in the enterprise or activity in question".[8] It is true that those statements were then qualified by reference to the matters outlined in paragraph 240 of their Honours' reasons, but there was no disavowal of the principle embodied in the statements themselves – namely, that where the Commonwealth executive acts in areas beyond the reach of Commonwealth legislative power, that action, in order to be valid, must be "peculiarly adapted to the government of a nation".[9]

4. Their Honours' qualifications merely indicate that there is danger in speaking loosely of Commonwealth executive action "competing" with State executive or legislative competence. And if that is correct, then there must also be danger in asserting, as the Commonwealth defendants do, that because the entry into a contract by the Commonwealth does not effect an interference with legal rights, there can be no "clash" with State competence.[10] In one sense, this assertion is correct, but it is beside the point.

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[1] Submissions of the First, Second and Third Defendants in Response to the Further Written Submissions of Tasmania and South Australia ("**Further Commonwealth Submissions**") at [10].
[2] (2009) 238 CLR 1 at 85 [220].
[3] (2009) 238 CLR 1 at 85 [221].
[4] (2009) 238 CLR 1 at 87 [228].
[5] (1988) 166 CLR 79 at 110.
[6] (2009) 238 CLR 1 at 91 [239].
[7] (1988) 166 CLR 79 at 93-94.
[8] (1988) 166 CLR 79 at 111.
[9] (1975) 134 CLR 338 at 397.
[10] Further Commonwealth Submissions at [7.1].

5. This is so for two reasons. First, to assert in those terms is to assume that "competition" with State competence is, independent of any other consideration, the criterion by which the limits of Commonwealth executive power are to be discerned. That assumption would erroneously ascribe a doctrinal significance to State legislative and executive competence beyond what was contemplated in the formulation propounded by Mason J in the *AAP Case* and subsequently accepted by Brennan J in *Davis*. And secondly, it is the relationship between the Commonwealth executive and Parliament, rather than the relationship between the Commonwealth and the States, which is cast into bold relief by the manner in which issue has come to be joined in this litigation. In the plaintiff's submission, and for the reasons developed below, the light cast by what was said in *Pape* upon that relationship is fatal to the Commonwealth defendants' case.

The guidance to be found in previous authority

6. It should be observed that the earlier authorities concerning the scope of the executive power of the Commonwealth proceeded upon an assumption as to the importance of s 81 of the *Constitution* which cannot now be taken to have survived the decision in *Pape*, namely, that that provision affords the source of the Commonwealth's power to spend. Thus, in the *AAP Case*, the suggestion by Barwick CJ that "the executive may only do that which has been or could be the subject of valid legislation"[11] was proffered in the course of answering the question, "What then are the purposes of the Commonwealth within s 81?"[12] The point sought to be made by his Honour was that because the expression "the purposes of the Commonwealth" denotes only those purposes in respect of which Parliament has the power to make laws, the Commonwealth executive can engage in activities, for which money is to be spent, only if they serve those purposes.

7. In other instances, what was said, or given renewed emphasis, in *Pape* has served to clarify the doctrinal bases of previous decisions. Once it is understood, then, that the presence or absence of an appropriation casts no light upon the existence in the executive of a substantive power to spend, it must follow that, as was recognised in *New South Wales v Bardolph*,[13] the absence of an appropriation addressed to its performance cannot be fatal to the validity of a contract entered into by the executive government. Conversely, Dixon J's reference in that case to the "power to make a contract in the ordinary course of administering a recognized part of the government"[14] suggests that mere insistence upon the existence of certain capacities in the Crown is no reason to think that where the common law is engaged, the powers of the Commonwealth executive are unbounded, save only by reference to "the position of the Executive Governments of the States".[15]

8. It should also be observed that the focus of inquiry in this proceeding must be the power of the Commonwealth executive with respect to expenditure. To concentrate merely upon the power to enter into contracts is apt to distort analysis. Such distortion is apparent in the reliance placed by the Commonwealth[16] upon various statements made in *Ansett Industries (Operations) Pty Ltd v The Commonwealth*[17] and *A v Hayden*,[18] which were concerned

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[11] (1975) 134 CLR 388 at 362.
[12] (1975) 134 CLR 388 at 361.
[13] (1934) 52 CLR 455.
[14] (1934) 52 CLR 455 at 508.
[15] See *Federal Commissioner of Taxation v Official Liquidator of EO Farley Ltd* (1940) 63 CLR 278 at 308: "the general law of contract may regulate the formation, performance and discharge of the contracts which the Commonwealth finds it necessary to make *in the course of the ordinary administration of government*" (emphasis added)
[16] Further Commonwealth Submissions at [2.8].
[17] (1977) 139 CLR 54 at 113.

ultimately with the limits upon the general proposition that the executive may not fetter, by contract, the future exercise of its power. Those statements offer little, if any, guidance as to the scope of the power of the Commonwealth executive to spend public money, and thus to subject itself to obligations which involve such expenditure.

9. Accordingly, the starting point for analysis is not to be found in previous authority or in a recitation of the various salutary schemes initiated without enabling legislation by the Commonwealth executive in the past.[19] Indeed, the reliance of the Commonwealth defendants upon such a recitation, and upon the views of previous officers of the Commonwealth government, however esteemed,[20] appears to proceed upon an unspoken premise that the long-held opinions of the Commonwealth executive are somehow determinative of the scope of Commonwealth executive power. If that be so, then, at the very least, the Further Commonwealth Submissions should be seen as heterodox.[21]

10. Rather, the starting point must lie in the text and structure of the *Constitution*, as revealed with the benefit of the illumination provided in *Pape*.

The guidance to be found in the text and structure of the *Constitution*

11. Commencing in the manner described above, the following textual or structural features of the *Constitution*, none of which is sufficiently considered in the Further Commonwealth Submissions, should be noted.

12. First, Chapter II of the *Constitution*, which is headed "The Executive Government", follows Chapter I, which is headed "The Parliament". The nature and scope of the executive power of the Commonwealth must therefore be understood within, and be accommodated to, an anterior framework which speaks to the place and power of the respective Houses of Parliament, bearing in mind that it is the executive government of a nation for which the *Constitution* provides.

13. Secondly, it would be an error to conceive of the Commonwealth executive as something wholly separate from the Federal Parliament. This would, for one, be at odds with the language of ss 1 and 61 of the *Constitution*, both of which situate the Queen in the legislative and executive aspects of the Commonwealth. It is necessary to belabour this, because underpinning the Further Commonwealth Submissions is an erroneous assumption that the Commonwealth executive is a legal person separate from Parliament and, thus, like any other legal person, endowed with "capacities" that are subject to legislative control but which are otherwise exercisable without regard to the legislature. This fails to account for the fact that when the Commonwealth executive enters into a contract, it is the Commonwealth of Australia which is a party to that agreement, not some separate legal person called the Executive Government of the Commonwealth.

14. Thirdly, and moving to the anterior framework referred to above, an appropriation operates as a "provisional setting apart or diversion from the Consolidated Revenue Fund of the sum appropriated".[22] Accordingly, the expression "appropriation", as employed in ss 53, 54, 56, 81 and 83 of the *Constitution*, does not refer to the expenditure of such a sum.

15. Fourthly, notwithstanding the plurality's observation in *Combet v The Commonwealth*[23] that "[i]t is for the Parliament to identify the degree of specificity with which the purpose

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[18] (1984) 156 CLR 532 at 543.
[19] Further Commonwealth Submissions at [3].
[20] Further Commonwealth Submissions at [1.3]-[1.5].
[21] See *Australian Community Party v Commonwealth* (1951) 83 CLR 1.
[22] *Surplus Revenue Case* (1908) 7 CLR 179 at 190-191.
[23] (2005) 224 CLR 494 at 577 at [160]; see also *Pape* (2009) 238 CLR 1 at 78 [197].

of an appropriation is identified", s 56 confers upon the Governor-General the function of recommending by message the purpose of an appropriation and thus initiating the process by which an appropriation is made. This suggests that the Commonwealth executive has a large, if not the larger, role in identifying the degree of specificity with which the purpose of an appropriation is expressed. The extent of that role may be understood by reference to the Portfolio Budget Statements that, under current parliamentary practice, accompany annual Appropriation Bills. These are prepared by Departments of State, purport to give content to the purposes identified in the current form of annual Appropriation Bill, but are non-binding, and are beyond the capacity of either House of Parliament to amend.

16. Fifthly, under s 53 of the *Constitution*, proposed laws appropriating revenue or moneys, or imposing taxation, are not to originate in the Senate, and the Senate may not amend proposed laws either imposing taxation or appropriating revenue or moneys for the ordinary annual services of the Government, even though the power of the Senate in respect of all proposed laws is otherwise equal to that of the House of Representatives.

17. And finally, the purpose of s 54 of the *Constitution* is to afford the Senate some measure of protection from prejudice[24] by requiring that any proposed law which appropriates revenue or moneys for the ordinary annual services of the Government deal only with such appropriation. However, it is well settled that a breach of s 54 is neither justiciable nor capable of rendering a resulting appropriation act invalid.[25]

18. In the plaintiff's submission, two fundamental propositions emerge from the matters outlined above. The first is that, given, amongst other things, the limited effect of an appropriation, it is at best simplistic and at worst apt to mislead to point to the process of appropriation and to speak, without qualification, of parliamentary control of spending by the executive. That such control is qualified, if not heavily so, is well recognised.[26] As a result, the suggestion by the Commonwealth defendants that the matter presently being debated is an issue concerning the method, rather than the availability, of parliamentary control[27] does not sufficiently grasp, or expose, the complexities concealed by use of the phrase "parliamentary control".

19. The same might be said of the expression "responsible government". The Commonwealth defendants submit that parliamentary control over the executive is secured by the fact that "[r]esponsible government as reflected in the *Constitution* requires that the executive government retain the confidence of the House of Representatives, and persuade both Houses to pass its Appropriation Bills".[28] However, this appears to assume that in order to understand the relationship between the Houses of Parliament and their relationship with the Commonwealth executive, one is to begin with the concept of responsible government rather than the text of the *Constitution*. This is contrary to the currently prevailing principles of constitutional interpretation.[29]

20. Indeed, application of those principles discloses the second fundamental proposition to be drawn from the matters traversed above, namely, that the powers of the Senate are to be regarded, for the most part, as equivalent to those of the House of Representatives. There is little doubt that the provisions of the *Constitution* concerning appropriations were informed by what was referred to in *Pape* as "the received understanding in the United

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[24] J Quick and R R Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 674.
[25] *Northern Suburbs General Cemetery Reserve Trust v The Commonwealth* (1993) 176 CLR 555 at 578.
[26] *Pape* (2009) 238 CLR 1 at 78-79 [196]-[200].
[27] Further Commonwealth Submissions at [8.1].
[28] Further Commonwealth Submissions at [8.2].
[29] See *Work Choices Case* (2006) 229 CLR 1 at 119-120 [194].

Kingdom of the place of appropriations in the relationship between the executive and the legislature",[30] as described by Erskine May:

> "The Crown ... acting with the advice of its responsible ministers, makes known to the Commons the pecuniary necessities of the government: the Commons, in return, grant such aids or supplies as are required to satisfy these demands; and they provide by taxes, and by the appropriation of other sources of the public income, the ways and means to meet the supplies which they have granted. Thus the Crown demands money, the Commons grant it, and the Lords assent to the grant".

21. Significantly, the notion that it is the Commons who grant money, subject to the assent of the Lords, finds reflection in s 53. However, that section is the only provision in the *Constitution* that detracts from the position of equality as between the House of Representatives and the Senate, and again, given the limited effect of an appropriation, that detraction is itself limited in degree. Indeed, if one sets aside the question of appropriations and concentrates upon the power of Parliament to control activities which require the expenditure of public moneys by the Commonwealth executive, it becomes readily apparent that the *Constitution* does not contemplate any distinction between the House of Representatives and the Senate.

22. So much is confirmed by s 57 of the *Constitution*, which indicates, in the starkest of terms, that the Senate is no mere antipodean analogue to the House of Lords. Especially is that so when one considers that there is nothing to suggest that s 57 does not apply to proposed laws of the sort identified in ss 53, 54 and 56.

23. Moreover, the circumstance that the Senate's power to amend an appropriation bill is abridged only in respect of proposed laws that appropriate revenue or moneys for the ordinary annual services of the Government suggests, at the very least, that notwithstanding the inability of Courts to adjudicate upon alleged contraventions of s 54, the power of the Senate to control governmental activity that is neither "ordinary" nor "annual" is equal to that of the House of Representatives. This is with the caveat, of course, that it is for Parliament to give content to the expression "the ordinary annual services of the Government".

24. Crucially, however, it a well-recognised part of the nation's constitutional arrangements that the identity of those officers who are appointed to administer departments of State under s 64 of the *Constitution* and to be members of the Federal Executive Council (which is in turn established by s 62 and endowed with the function of advising the Governor-General "in the government of the Commonwealth") is ultimately determined by, and dependent upon command of, a majority in the House of Representatives.

25. Let it therefore be assumed, against the background of the two propositions articulated above, that there is simply no requirement, if the Commonwealth executive is to engage in the expenditure of public money, for enabling legislation to have been passed. The result of this would necessarily be that the authority derived from an ability to command a majority in the House of Representatives is capable, without any participation or assent on the part of the Senate, of being exercised for the purpose of initiating forms of governmental activity that involve the expenditure of money and which are neither "ordinary" nor "annual". In these circumstances, if the Senate held a different view as to the merits of such activity, it would have the power only to pass legislation in order to halt

[30] (2009) 238 CLR 1 at 76 [192].

the activity, not at the point of its being proposed, but possibly after its commencement, particularly if that has occurred in a period when the Senate is in recess.

26. However, if the Senate had power only to prevent the continuation, as distinct from the power to prevent the commencement, of governmental activity that is neither "ordinary" nor "annual", this would be at odds with the position of broad equality as between the House of Representatives and the Senate envisaged by the *Constitution*. It would be no answer to this to say that the position of the Senate is sufficiently accommodated by its role in the process of appropriating moneys for the use of the Commonwealth executive. The limited effect of an appropriation, the role of the executive in determining the degree of specificity with which the purposes of an appropriation are to be expressed, and the lack of any judicially enforceable sanction for a breach of s 54, all mean that if enabling legislation were not required for engagement by the executive in "non-ordinary" activities which involve spending, the executive government (which draws part of its authority from the House of Representatives) would be able to by-pass the Senate.

27. This is not to propound some simplistic notion that governmental activities that do not fall within "the ordinary annual services of the Government" require enabling legislation. Such a notion would obviously be in conflict with the proposition that it is for Parliament to determine what constitutes the ordinary annual services. However, if the executive government were permitted to engage in novel spending initiatives in the absence of enabling legislation, then given the limited protection afforded to the Senate by s 54 of the *Constitution*, that provision would not be a sufficient guarantee of the equality of the Senate and the House of Representatives.

28. It would similarly not be sufficient to highlight, in the manner of the Commonwealth defendants,[31] the constitutional requirement in s 97 for the "review and audit of ... the receipt of revenue and the expenditure of money on account of the Commonwealth" and the manner in which this has been given effect by both the *Financial Management and Accountability Act 1997* (Cth) (**"the FMA Act"**) and the *Auditor-General Act 1997* (Cth). That these matters are of relevance to the construction of an Appropriation Act was recognised in *Combet*.[32] They suggest that the work of ensuring accountability by the Commonwealth executive to Parliament in relation to the expenditure of public money is not to be performed solely by the process of appropriation. However, what is presently in issue is neither the place of appropriations in the relationship between the executive and the legislature nor the construction of an Appropriation Act. Rather, proceeding upon a premise that accepts the limited role and effect of appropriations, as revealed in *Pape*, what is truly in issue is the manner in which the ability of the Commonwealth executive to engage in activities which require spending is to be accommodated with the position of the Senate under the *Constitution*. On that issue, s 97 is silent, as are, tellingly, the Further Commonwealth Submissions.

The executive power of the Commonwealth

29. It is within the context of the textual and structural features of the *Constitution* discussed above, all of which favour a requirement for enabling legislation as a prerequisite for engagement by the Commonwealth executive in novel spending initiatives, that the executive power of the Commonwealth is to be understood. Invocations of the prerogatives and capacities of the Crown in this field of discourse[33] do not sufficiently recognise that "[i]n Australia, with questions arising in federal jurisdiction, one looks not

[31] Further Commonwealth Submissions at [10].
[32] (2005) 224 CLR 494 at 570-572 [144]-[147].
[33] Further Commonwealth Submissions at [9].

to the content of the prerogative in Britain, but rather to s 61 of the *Constitution*".[34] It is consequently an error to speak of the Commonwealth executive's capacity to enter into contracts or to engage in expenditure, as if it existed at large, without recognising that that capacity, if it can be so called, has its provenance in s 61, and that s 61 must be read in its context.

30. Therefore, it is one thing to say that the *Constitution* draws on common law conceptions of the Crown and its powers;[35] it is another – and an error, no less – to consider those conceptions without due regard for the precise nature of the bicameral legislature established by the *Constitution*.

10 31. During the course of oral argument, it was conceded on behalf of the plaintiff[36] that there are areas in relation to which the Commonwealth executive may act without the need for enabling legislation, most prominently in circumstances which attract the application of Mason J's formulation in the *AAP Case*. Emphasis has also been given[37] to the possibility of a dispensation from the requirement for enabling legislation for acts done, including contracts entered into, in "the ordinary course of administering a recognised part of government". This concept was said, by reference to the observations of Knox CJ and Gavan Duffy J in the *Wooltops* case,[38] to find a textual footing in s 64 of the *Constitution*[39] and perhaps also in the reference in s 61 to "the execution and maintenance ... of the laws of the Commonwealth".[40]

20 32. By way of rejoinder, the Commonwealth defendants now submit that to require the limits of Commonwealth executive power to be identified by reference to such notions is "constitutionally unsound".[41] This, of course, is to ignore the circumstance that by its use of the expression "the ordinary annual services of the Government", s 54 of the *Constitution* deploys concepts akin to those condemned by the Commonwealth defendants. That the application of s 54 to proposed laws has spared this Court the burden of having to construe that formula does not detract from the provenance in the *Constitution* of a distinction between what is ordinarily governmental and what is not. In any event, given the nature of the criteria required to be applied by courts from time to time in the past,[42] it can hardly be beyond the capacity of the judicial method to arrive at a determination that:

30 (a) a policy initiative is, on the one hand, sufficiently novel not to be part of the ordinary administration of the Government (or to involve the execution of the laws of the Commonwealth) and, on the other, not sufficiently adapted to the government of a nation to engage what was said by Mason J in the *AAP Case*; and

(b) the initiative should therefore properly have been put before the Parliament.

33. It follows then that the Commonwealth defendants' submissions as to the scope of the executive power of the Commonwealth should be rejected.

34. The Court should similarly reject the submission that by virtue of its having been the subject of the appropriations for the ordinary annual services of the Government (which

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[34] *Re Ditfort; Ex parte Deputy Commissioner of Taxation* (1988) 19 FCR 347 at 369 per Gummow J. See also *Ruddock v Vadarlis* (2001) 110 FCR 491 at 538-539 [179] per French J.
[35] Further Commonwealth Submissions at [9.1].
[36] Transcript, pp 218-219.
[37] Transcript, p 219, lines 9694-9695.
[38] (1922) 31 CLR 421 at 432.
[39] Transcript, p 220, lines 9731-9747.
[40] Transcript, p 219, lines 9689-9695.
[41] Further Commonwealth Submissions at [6].
[42] *Thomas v Mowbray* (2007) 233 CLR 307 at 345-347 [72]-[78].

the plaintiff does not accept), spending for the purposes of the NSCP falls within the ordinary administration of a well recognised part of the government.[43] There are two reasons for this. First, for the reasons already given, the words "the ordinary annual services of the Government" do not, and should not, provide the criterion for determining whether a policy initiative is required to be supported by enabling legislation. And secondly, if the Commonwealth's submission were correct, a policy which required enabling legislation in order to be implemented would, over time, cease to attract such a requirement, notwithstanding that such legislation was never enacted. That proposition needs only to be stated in order to be rejected.

The existence or otherwise of statutory authority

35. Finally, it is incorrect to suggest, as the Commonwealth defendants do,[44] that s 44(1) of the FMA Act is the source of the legislative authority (if such be needed) for the Commonwealth's entry into the Darling Heights Funding Agreement. After all, even if it were assumed that that provision confers upon the Chief Executive of an Agency the power to enter into contracts, on behalf of the Commonwealth, in relation to the affairs of that Agency, the Darling Heights Funding Agreement hardly qualifies as a contract relating to the affairs of either the Department of Education, Science and Training ("**DEST**") or the Department of Education, Employment and Workplace Relations ("**DEEWR**").

36. This is so, notwithstanding that the obligations assumed by the Commonwealth in that agreement were performed by means of the provisions of funds that had purportedly been appropriated with a view to achieving the outcomes of DEST and then of DEEWR. Indeed, one need only peruse, without considering in any detail, the terms of the Darling Heights Funding Agreement in order to recognise that that document is better described as a contract relating to the affairs of either the Darling Heights State School or Scripture Union Queensland. In particular, there is nothing in the agreement that can be said to appertain either to the management or to the internal administration of an Agency, as defined in s 5 of the FMA Act.

37. This last point is crucial, because on its face, s 44(1) imposes upon a Chief Executive an obligation to "*manage* the affairs of the Agency in a way that promotes proper use of the Commonwealth resources for which the Chief Executive is responsible" (emphasis added). The use of the term "manage" in this provision reflects the language of s 57(1) of the *Public Service Act 1999* (Cth), which provides that the Secretary of a Department is responsible, under the relevant Minister, for "managing the Department". In the plaintiff's submission, neither the purported entry by the Commonwealth into the Darling Heights Funding Agreement nor its performance occurred in the course of the Secretary of DEST, and then of DEEWR, performing a managerial function.

38. Rather, that agreement was an instrument of policy, directed towards regulating the affairs, not of an Agency, but of the recipients of funding grants from the Commonwealth Treasury. That being so, it must be borne in mind that the responsibility of ensuring the proper implementation of a policy initiative – which may be thought of as comprising items of expenditure, the purposes of which are set by the political branches of government – is better seen to lie in the relevant Minister (who is required by s 64 of the *Constitution* to be a member of Parliament) than in the Secretary of the Department with carriage for the administration of that initiative.

[43] Further Commonwealth Submissions at [6].
[44] Further Commonwealth Submissions at [11]-[14].

39. Accordingly, the expression "the affairs of the Agency" should be seen as denoting matters of the sort referred to as "departmental items" in the current form of annual Appropriation Act. Thus construed, s 44(1) of the FMA Act is simply incapable of supporting the Commonwealth's entry into the Darling Heights Funding Agreement.

40. In any event, the note that accompanies s 44(1) is no substitute for the relevant statutory language. If therefore that language were nonetheless read as conferring a power to enter into contracts, that power must be understood as limited by the words "in a way that promotes proper use of the Commonwealth resources for which the Chief Executive is responsible". Put simply, then, s 44(1) may well empower a Chief Executive to enter into contracts with a view to achieving efficiencies in the management of an Agency, but this is not to say that it empowers that same Chief Executive to enter into contracts, the purpose of which is merely to implement a given policy of the Commonwealth Government. That the Darling Heights Funding Agreement falls squarely within this latter category of contract should, in the plaintiff's submission, be fatal to any contention that there was legislative authority for the Commonwealth executive to enter into it.

41. The submissions of the Commonwealth defendants thus afford no answer to the plaintiff's claims for relief.

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