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

BETWEEN

RONALD WILLIAMS
Plaintiff

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AND

COMMONWEALTH OF AUSTRALIA
First Defendant

MINISTER FOR SCHOOL EDUCATION, EARLY CHILDHOOD AND YOUTH
Second Defendant

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MINISTER FOR FINANCE AND DEREGULATION
Third Defendant

SCRIPTURE UNION QUEENSLAND
Fourth Respondent

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PLAINTIFF'S SUBMISSIONS IN REPLY

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Filed on behalf of Plaintiff by
Horowitz & Bilinsky
Level 1, 229-231 Macquarie Street
Sydney NSW 2000

DX 1050 SYDNEY
Tel: 02 9233 1777
Fax: 02 9223 3165
Reference: Claudius Bilinsky

Part I:

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

Part II:

Executive power generally

2. It is to misread what was said by the plurality in *Pape* to suggest, as the first, second and third defendants appear to do,[1] that Commonwealth executive power, relative to that of the States, is limited primarily to the extent that the exercise of such power might destroy or curtail the existence of the States or their continuing to function as such. Rather, the plurality's observations were directed towards negativing the proposition that the distribution of legislative power between the Commonwealth and the States exhaustively defined the respective spheres of exercise of executive power by those polities. Their Honours sought to emphasise that consideration must instead be given to the place of the Executive Governments of those polities within the constitutional arrangements established upon the formation of the Commonwealth; hence, the emphasis placed by the plurality upon, first, the circumstance that the Commonwealth Executive is, uniquely, the Executive Government of a nation,[2] and secondly, questions concerning the sufficiency of State power.[3] Were the submissions of the first, second and third defendants correct in this regard, there would have been no need for the plurality to demonstrate any sensitivity to the sufficiency of State power to engage in various activities or enterprises, simply because Commonwealth executive power would not have been fettered by those considerations.

3. As for the reliance of the first, second and third defendants upon the width of the taxation power,[4] it must be recalled that taxation is the subject of a placitum in s 51 which is itself required to be construed and applied in accordance with the principles articulated in the *Engineers' Case*,[5] by O'Connor J in *Jumbunna Coal Mine NL v Victorian Coal Miners' Association*[6] and by Kitto J in *Fairfax v Federal Commissioner of Taxation*.[7] However, there is no express power to spend conferred in the *Constitution*. One therefore cannot approach the exercise of determining the scope of the Commonweath Executive's spending power as if one were construing and applying a placitum in s 51. That exercise must necessarily accommodate the character of the Commonwealth Executive as a national government. But would it in any way detract from that character to contend that what was said by Mason J in the *AAP Case*[8] concerning "enterprises and activities peculiarly adapted to the government of a nation" applies also to spending by the Commonwealth? The emphasis placed upon his Honour's formulation by the plurality in *Pape*,[9] a case which concerned spending by the Commonwealth, as distinct from engagement in activities, would suggest that this question should be answered in the negative, despite their Honours' observations concerning s 51(ii) of the *Constitution*.[10]

4. Indeed, their Honours' reliance upon observations made by Sir Robert Garran concerning the utility of the taxation power as an instrument in dealing with political and national

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[1] Submissions of the First, Second and Third Defendants at [43].
[2] *Pape* (2009) 238 CLR 1 at 87 [228] per Gummow, Crennan and Bell JJ.
[3] *Pape* (2009) 238 CLR 1 at 90-91 [239] per Gummow, Crennan and Bell JJ.
[4] Submissions of the First, Second and Third Defendants at [43.2].
[5] *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.
[6] (1908) 6 CLR 309 at 367-368.
[7] (1965) 114 CLR 1 at 6-13.
[8] (1975) 134 CLR 338 at 398.
[9] *Pape* (2009) 238 CLR 1 at 87 [228] per Gummow, Crennan and Bell JJ.
[10] *Pape* (2009) 238 CLR 1 at 90 [236]-[237], 91 [240] per Gummow, Crennan and Bell JJ.

emergencies[11] would, in the plaintiff's submission, lend weight to the notion that Mason J's formulation in the *AAP Case* admits of sufficient conformity between the width of the taxation power and that of the Commonwealth Executive to spend sums appropriated by law.

5. To the extent then that the submissions of the fourth defendant demonstrate a greater degree of engagement with Mason J's test,[12] those submissions disclose a keener appreciation of the correct principles in this area. There is, of course, disagreement as to whether the NSCP satisfies that test, and the basis for the plaintiff's argument in this regard has sufficiently been outlined.[13] It remains only to note that it requires more to satisfy Mason J's test of "enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation" than the mere prefacing of every reference to the NSCP with the adjective "national". This, however, appears to be the primary basis upon which the fourth defendant attempts to establish satisfaction of that test in so far as the NSCP is concerned.

Section 51(xxiiiA) of the Constitution

6. It is, with respect, incorrect to suggest, as the defendants have done,[14] that s 51(xxiiiA) of the *Constitution* is sufficiently engaged by the Commonwealth merely funding the provision by another legal person of the benefits contemplated in that placitum. At issue in *British Medical Association v The Commonwealth*[15] was the validity of the *Pharmaceutical Benefits Act 1947* (Cth). Subsection 7(1) of that statute created in each person an entitlement to pharmaceutical benefits. This concept received elaboration in s 7(2), which relieved the recipient of such a benefit from what would otherwise have been his or her obligation to pay for certain pharmaceutical benefits provided to him or her. Section 14 then provided that the Commonwealth would pay the relevant chemist or doctor for the pharmaceutical benefits supplied. This was accordingly a scheme under which the Commonwealth did more than merely fund the provision of pharmaceutical products; rather, it assumed and discharged what would otherwise have been a payment obligation upon the recipients of those products, thus directly providing a benefit to those recipients.

7. Similarly, the Commonwealth, by providing the subsidy for nursing home care which was considered in *Alexandra Private Geriatric Hospital Pty Ltd v The Commonwealth*,[16] conferred a direct benefit upon the recipient of such care, namely, a partial discharge of the payment obligation owed by him or her to the proprietor of the relevant nursing home. Therefore, what was said by the Court concerning the characterisation of the relevant benefit[17] constituted no more than a recognition that the Commonwealth may, for the purposes of s 51(xxiiiA), provide nursing care in one of two ways – that is, by providing the relevant services itself or by relieving the recipients of that care of some or all of their obligation to pay for those services. In either case, that recipient would be receiving a benefit directly from the Commonwealth.

8. The mere provision of Commonwealth funding for a welfare program is thus insufficient to ground a successful invocation of s 51(xxiiiA). It must instead be possible to point to a benefit received from the Commonwealth – in this case, by students. However, under the

[11] *Pape* (2009) 238 CLR 1 at 90 [236] per Gummow, Crennan and Bell JJ.
[12] Submissions of the Fourth Defendant at [79]-[80].
[13] See Plaintiff's Submissions at [25]-[26].
[14] Submissions of the First, Second and Third Defendants at [22]; Submissions of the Fourth Defendant at [42].
[15] (1949) 79 CLR 201.
[16] (1987) 162 CLR 271.
[17] (1987) 162 CLR 271 at 280-281.

NSCP, the Commonwealth neither provides chaplaincy services itself nor relieves students of any liability that they might owe to the providers of such services. That being the case, there is no relevant provision *by* the Commonwealth of benefits *to* students. The Funding Agreement thus finds no support in the intersection of ss 51(xxiiiA) and 61 of the *Constitution*.

Section 51(xx) of the Constitution

9. The first, second and third defendants are correct in observing that the exercise of executive power with which this litigation is concerned is entry into a particular contract, rather than the creation of criteria or the imposition of a rule.[18] Nonetheless, the act of entering into a contract involves subjection of a party to its terms and conditions. It is therefore artificial to think that, in determining the validity of a contract entered into by the Commonwealth, one can separate the act of execution of the contract from its contents and focus exclusively upon the former.

10. Indeed, one may conceive of a situation in which the Commonwealth enters into a multi-partite agreement with other parties, only one of which is a trading corporation, in circumstances where that trading corporation has only a minimal role in the performance of the agreement's terms. Whether that minimal role discloses a sufficient connection with the subject matter of s 51(xx) of the *Constitution* must surely depend upon the terms of the agreement. And yet the first, second and third defendants would assign no significance whatsoever to those terms. This might account for the failure of those defendants to recognise that the NSCP Guidelines do have a legal status, namely, as terms incorporated into the Funding Agreement. And when one has regard to those terms, it becomes readily apparent that whether or not the fourth defendant was a trading corporation at the time of entry into the Funding Agreement was wholly fortuitous and bore no connection with the contractual terms to which the Commonwealth Executive subjected itself by such entry.[19]

11. Such a conclusion is not displaced by anything put in the submissions of the fourth defendant. Those submissions concentrate attention upon the power of the Commonwealth Parliament to regulate, or to protect the efficacy of, standard form contracts entered into by the Executive with trading corporations.[20] However, as the terms of the Funding Agreement make clear, the NSCP involves standard form contracts which are designed to be wholly indifferent as to whether a party is a trading corporation or not. Therefore, while the power described by the fourth defendant may be accepted as existing, it has not been engaged or exercised with respect to the NSCP.

12. Accordingly, on the plaintiff's case, the question of the correct test for identifying a trading corporation strictly does not arise. Nevertheless, to the extent that it falls for consideration in this proceeding, the "capacities test" proposed by the first, second and third defendants, and formulated without recourse to any previous authority, should be rejected. After all, even if one accepts the proposition, advanced on behalf of those defendants, that s 51(xx) was intended to capture corporations which, by reason of their corporate personality, may cause harm if not properly regulated,[21] it is difficult to see what harm could flow from a corporation which has the capacity to trade, but does not. Put simply, the justification proffered for the "capacities test" lacks cogency. Indeed, if anything, it favours the retention of the "activities test", but leaves unresolved the question whether that test should be qualified in the manner which appears to be proposed on behalf

[18] Submissions of the First, Second and Third Defendants at [37].
[19] See the Plaintiff's Submissions at [33]-[34].
[20] Submissions of the Fourth Defendant at [55]-[56].
[21] Submissions of the First, Second and Third Defendants at [34].

of the Attorney-General for Western Australia – that is, by mandating an additional inquiry into the purpose of a given entity's trading activities, as objectively disclosed in such materials as its constitution. For the reasons given in the submissions of the Attorney-General for Western Australia, that question should be answered in the affirmative.

Standing and relief

13. The fourth defendant appears to contend that the plaintiff, if otherwise successful, is not entitled to a declaration that the Funding Agreement is void. This is apparently on the basis that the plaintiff is not a party to the Funding Agreement and his interest in the question of its validity arose only after it had been entered into.[22] However, as cases such as *Adamson v New South Wales Rugby League Limited*[23] demonstrate, albeit in the context of restraint of trade, being a stranger to a contract does not, of itself, preclude one from obtaining a declaration that the contract is wholly or partly void, provided one can establish the requisite interest to support such relief. Moreover, in *Buckley v Tutty*,[24] again a restraint of trade case, a non-party to a contract (namely, the rules of a professional rugby league competition) was not prevented from obtaining declaratory and injunctive relief which was predicated upon the voidness of the contract merely because his interest in the question (as a professional rugby league player) had arisen after the contract was entered into. The matters pressed by the fourth defendant thus afford no grounds for withholding from the plaintiff a declaration that the Funding Agreement is void.

14. The fourth defendant seeks to ascribe some relevance to the circumstance that when the plaintiff commenced this proceeding, the Commonwealth had made all payments under the Funding Agreement in respect of the provision of chaplaincy services at the School under the NSCP.[25] However, there is no suggestion that the operation of the Funding Agreement has been exhausted or that, for example, the fourth defendant is no longer bound by the obligations set out in that document concerning compliance by the relevant school chaplain with the Code of Conduct. The Funding Agreement continues to have effect, and for as long as that effect persists, the plaintiff is, given his status as a parent of children enrolled at the School, entitled to declaratory relief in so far as it is void.

15. In addition, the fourth defendant resists the grant of any injunction to restrain the Commonwealth from giving effect to the Funding Agreement on the basis that whatever further effect the agreement might have would involve the rights of third parties and is not a matter in which the plaintiff has a "real interest".[26] The only third parties identified in the fourth defendant's submissions whose rights are said to be "involved" in the grant of such relief are the school community. However, no member of this community is a party to the Funding Agreement. And no property has passed under, or on the faith of, that agreement to any third party. Consequently, the only legal rights capable of being affected by the relief sought by the plaintiff are those of the first and fourth defendants, both of whom are parties to this proceeding.

16. As for the suggestion that the plaintiff lacks a "real interest" in the injunctive relief sought, this appears to proceed upon the assumption that notwithstanding that his children are enrolled at the School, the plaintiff can only have an interest in the future funding of chaplaincy services at the School, rather than the entirety of the operation of the NSCP in so far as the School participates in that program. It is not apparent why the question of

[22] Submissions of the Fourth Defendant at [22].
[23] (1991) 31 FCR 232 at 265-266 per Wilcox J, 287-288 per Gummow J.
[24] (1971) 125 CLR 353.
[25] Submissions of the Fourth Defendant at [22].
[26] Submissions of the Fourth Defendant at [20].

future funding is isolated for such privileged treatment in the fourth defendant's case. This is especially so, given that the interest of parents in the administration of their children's schools can hardly be said to be confined to matters of finance.

Appropriations

17. The submissions of the first, second and third defendants address in some detail the proper construction of the 2007-2008 Appropriation Act. However, those submissions fail to appreciate the extent to which that statute provided for a series of cascading – and in the plaintiff's submission, sequential – authorisations. At the first level was the appropriation – the "provisional setting apart" of funds – effected by s 14. Subsection 8(1) then authorised the issue by the Finance Minister of sums for an administered item for an outcome of an entity. Subsection 8(2) only had work to do following the issue of an amount pursuant to s 8(1), whereupon it authorised the application of that amount for the purpose of carrying out activities directed towards achievement of the relevant outcome. Crucially, s 4(2), which purported to link the activities identified in a PBS with the outcomes stated in Schedule 1, spoke only to this third level of authorisation in the 2007-2008 Appropriation Act. The first level – that is, the actual appropriation of money by s 14 – constituted an anterior step. It is that step which is the focus of the plaintiff's submissions, and properly so, it is submitted, given that s 54 of the *Constitution*, which is invoked as an aid to the construction of the 2007-2008 Appropriation Act, speaks of appropriation rather than the application of funds.

18. Finally, the first, second and third defendants contend that even on the narrowest reading of the Compact of 1965, payments made in implementing a policy following the initial year of the policy have been accepted as being a continuing government activity within the "ordinary annual services of the Government".[27] However, this can only be so if, in the initial year of the policy, spending in respect of it was authorised in an even-numbered Appropriation Bill. Were it otherwise, the policy would not be able to be described in the immediately subsequent year as a continuing activity "for which appropriations have been made in the past", within the meaning of the revisions to the Compact of 1965 favoured by the Senate Standing Committee on Appropriation and Staff in its Thirtieth Report [SC, Vol 4, 1512] and adopted by the Senate on 22 April 1999 [SC, Vol 4, 1515]. Consequently, if the 2006-2007 Appropriation Act (No. 3) is construed as not having authorised spending in respect of the NSCP, then the NSCP could not possibly have constituted part of the ordinary annual services for the purposes of the 2007-2008 Appropriation Act.

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Bret Walker

Phone (02) 8257 2527
Fax (02) 9221 7974
Email maggie.dalton@stjames.net.au

Gerald Ng

Phone (02) 9233 4275
Fax (02) 9221 5386
Email gng@selbornechambers.com.au

[27] Submissions of the First, Second and Third Defendants at [14].