IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S154 of 2013

BETWEEN:

RONALD WILLIAMS
Plaintiff

and

COMMONWEALTH OF AUSTRALIA
First Defendant

MINISTER FOR EDUCATION
Second Defendant

SCRIPTURE UNION QUEENSLAND
Third Defendant

ANNOTATED SUBMISSIONS OF THE ATTORNEY-GENERAL FOR SOUTH AUSTRALIA

Part I: Certification

1. This submission is in a form suitable for publication on the internet.

Part II: Basis for intervention

2. The Attorney-General for South Australia (**South Australia**) intervenes pursuant to s78A of the *Judiciary Act 1903* (Cth).

Part III: Leave to intervene

3. Not applicable.

Part IV: Applicable legislative provisions

4. South Australia adopts the Plaintiff's statement of the applicable legislative provisions.

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Part V: Submissions

Issues and Summary of Submissions

5. Putting aside there being an estoppel, and assuming the correctness of *Williams v Commonwealth*[1] ***(Williams (No 1))***, the issues in this case are whether either:

   a. s8 of each of the *Appropriation Act (No 1) 2011-2012* (Cth), the *Appropriation Act (No 3) 2011-2012* (Cth), the *Appropriation Act (No 1) 2012-2013* (Cth) and the *Appropriation Act (No 1) 2013-2014* (Cth) (**the Appropriation Acts**); or

   b. s32B of the *Financial Management and Accountability Act 1997* (Cth) (**FMA Act**),

   confers power upon the Commonwealth executive to enter into, vary and expend monies under the SUQ Funding Agreement as part of the National School Chaplaincy and Student Welfare Program (**NSCSWP**).

6. In short, South Australia's submission is that neither does because:

   a. the Appropriation Acts do not confer power to spend and contract;

   b. if the Appropriation Acts or the FMA Act do confer power to spend and contract they can do so only insofar as the Commonwealth has legislative power to so empower. For that reason they must be read down and can only operate to validly confer power to spend and contract with respect to an "outcome" (in the case of the Appropriation Acts) or "specify" "a program" (within the meaning of s32B FMA Act) that is within Commonwealth legislative power;

   c. so read down, neither the Appropriation Acts or FMA Act can validly authorise the entry into, or the making of payments under, the SUQ Funding agreement. That is because Outcome 2 in the Appropriation Acts, the NSCSWP in the Portfolio Statements, and the NSCSWP as described in the *Financial Management and Accountability Regulations 1997* (Cth) (**FMA Regs**), have an operation beyond legislative power and cannot be read down so as to fall within power.

7. South Australia makes no submission as to whether the First and Second Defendants are prevented by an estoppel from challenging the correctness of *Williams (No 1)*. Nor do these submissions deal with the correctness of that decision. Depending upon the submissions filed by the Defendants in relation to that issue, South Australia may seek permission to file submissions by way of a reply.

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1 (2012) 248 CLR 156.

Argument

8. Section 32B FMA Act is a source of power of last resort. Before it is engaged, it must be concluded that no other source of power supports the relevant arrangement or payments thereunder.

9. Thus, before considering the effect of s32B FMA Act, it is necessary to consider whether the Commonwealth has power to enter into the SUQ Funding Agreement, and make payments under it, from a source other than s32B FMA Act. In *Williams (No 1)* four Judges of this Court decided that, absent legislative provision, the Commonwealth did not have power to enter into or make payments under the Darling Heights Funding Agreement.[2] It is therefore necessary to consider whether any support for the SUQ Funding Agreement, or payment under it, is provided by a Commonwealth law other than the FMA Act. In this regard, the First and Second Defendants point to the Appropriation Acts.[3]

Construction and Validity of the Appropriation Acts

Construction of the Appropriation Acts

10. The First and Second Defendants submit that the Appropriation Acts supply power for the entry into, variation of, and making of payments under, the SUQ Agreement. The relevant section is s8(1) of each of the Appropriation Acts which provides that:

> (1) The amount specified in an administered item for an outcome for an Agency may be applied for expenditure for the purpose of contributing to that outcome.

11. The text of s8(1) might be suggested to have three possible meanings:

a. First, as only *enabling* the application of money for a particular purpose, in the sense of permitting the application of money for such purpose. That is, the section merely appropriates money by setting it aside, or quarantining it, for a particular purpose.

b. Second, as *enabling* the application of money for a particular purpose *and empowering* the Commonwealth to so apply the money. That is, the section appropriates money by setting it aside, or quarantining it for a particular purpose, and confers power upon the Commonwealth to spend the money for that purpose.

c. Third, as only *empowering* the application of money, with other provisions assuming the role of *enabling* the application of money. In support of this posited construction, it might be argued that s16 of the *Appropriation Act (No 1) 2011-2012* (Cth) and s15 of each of the *Appropriation Act (No 3) 2011-2012* (Cth), the *Appropriation Act (No 1) 2012-2013* (Cth) and

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2 (2012) 248 CLR 156 at [4], [83] (French CJ), [88], [138], [161] (Gummow and Bell JJ), [451], [457], [544] (Crennan J).

3 First and Second Defendants' Amended Defence, [30](b), [38](b), [43](b), [43](c), [48](b), [53](b), [62](b), [67](b), [72](b), [77](b), [82](b), [87](b), [88B](b), [88E](b), [88H](b) **[Core Special Case Book, Document 4]**.

the *Appropriation Act (No 1) 2013-2014* (Cth) is the operative provision that effects the appropriation.

12. The First and Second Defendants would also see the second and third constructions as implicitly containing all powers necessary and incidental to the power to spend, including the power to enter into a contract for the payment of money and the power to impose terms and conditions as part of such a contract.

13. South Australia submits that, having regard to matters of history and constitutional context, the first construction is the appropriate one. The construction of the Appropriation Acts is to be resolved by reference to text and context. As Gleeson CJ observed in *Combet v Commonwealth*, while the language is controlling "...the meaning of that language is to be understood in a context which includes the *Constitution*, parliamentary practice, accounting standards and principles and methods of public administration."[4] Parliamentary practice is a matter of considerable weight.[5]

14. Parliamentary practice is a product of history and convention. Since at least the English Revolution of 1688 the House of Commons has insisted on control of expenditures of the Crown.[6] The result has been the evolution of a fundamental rule of constitutional law that the Crown cannot expend money without the authorisation of Parliament.[7] In Australia, at the federal level, that principle is embodied in ss81 and 83 of the *Constitution*.[8] In the *Victoria v Commonwealth & Hayden* (*AAP Case*), Mason J said:[9]

> ...Section 83 in providing that "No money should be drawn from the Treasury of the Commonwealth except under appropriation made by law", gives expression to the established principle of English constitutional law enunciated by Viscount Haldane in *Auckland Harbour Board v The King*[10]: "no money can be taken out of the consolidated Fund into which the revenues of the State have been paid, excepting under a distinct authorization from Parliament itself". An Appropriation Act has a twofold purpose. It has a negative as well as positive effect. Not only does it authorize the Crown to withdraw moneys from the Treasury, it "restrict(s) the expenditure to the particular purpose", as Isaacs and Rich JJ observed in *The Commonwealth v Colonial Ammunition Co Ltd*[11].
>
> Their Honours, after noting that an Appropriation Act is "financial, not regulative", continued[12]: "It...neither betters nor worsens transactions in which the Executive engages within its constitutional domain, except so far as the declared willingness of Parliament that public moneys should be applied and that specified funds should be appropriated for such a purpose is a necessary legal condition of the transaction." An Appropriation Act therefore is something of a rara avis in the world of statutes; its effect is limited in the senses already explained; apart from this effect it does not create rights, nor does it impose duties.

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4 *Combet v Commonwealth* (2005) 224 CLR 494 at [4] (Gleeson CJ). See also [43] (McHugh J), [169] (Kirby J).

5 *Combet v Commonwealth* (2005) 224 CLR 494 at [90] (McHugh J); in this regard, at [155] Gummow, Hayne, Callinan and Heydon JJ, while not deciding the point, noted that no party submitted that the limited reliance placed on parliamentary practice in the reasons of the Court in *Brown v West* (1990) 169 CLR 195 at 211 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ) was inappropriate.

6 *Combet v Commonwealth* (2005) 224 CLR 494 at [230] (Kirby J).

7 *Combet v Commonwealth* (2005) 224 CLR 494 at [44] (McHugh J).

8 *Brown v West* (1990) 169 CLR 195 at 205 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).

9 *Victoria v Commonwealth and Hayden (AAP Case)* (1975) 134 CLR 338 at 392-393 (Mason J).

10 [1924] AC 318 at 326.

11 (1924) 34 CLR 198 at 224.

12 (1924) 34 CLR 224-225.

15. Thus, s81 prevents the application of money in the Consolidated Revenue Fund otherwise than in accordance with an appropriation by Parliament.[13] Section 83 ensures that any appropriation is made by law, and not by vote or resolution of the lower House alone.[14]

16. As to the manner of appropriation by law, under English constitutional convention, as early as the second half of the seventeenth century the House of Commons had resolved that money Bills should not be amended by the House of Lords and that such Bills could only originate in the House of Commons. In Australia, at the federal level, that convention, in a compromised form which gave greater control to the Senate, came to be embodied ss53, 54 and 55 of the *Constitution.*[15]

17. From the above, it may be seen that to appropriate means to enable the use of money in the sense of removing a prohibition that would otherwise apply, embodied in s83 of the *Constitution.* The appropriation is the legal segregation of money from the general mass of the Consolidated Fund and its dedication to the execution of some purpose.[16] An appropriation is not concerned with rights and liabilities, but merely concerns the relationship between Parliament and the executive in matters of finance.[17] It discloses Parliament's assent to the expenditure of moneys appropriated for the purposes stated in the appropriation.[18] To appropriate does not mean to empower the executive to apply money for a particular purpose. Thus in *New South Wales v Commonwealth (Surplus Revenue Case),* Griffith CJ said:[19]

> The appropriation of public revenue is, in form, a grant to the Sovereign, and the Appropriation Acts operate as an authority to the Treasurer to make the specified disbursements. A contractual obligation may or may not be added by some statutory provision or by authorised agreement, but it does not arise from the appropriation. The Appropriation Act does, however, operate as a provisional setting apart or diversion from the Consolidated Revenue Fund of the sum appropriated by the Act.

18. The point was helpfully summarised by Heydon J in *Pape v Commissioner of Taxation* (***Pape***):[20]

> *The important but narrow function of appropriation.* Statutory language effectuating an appropriation merely creates a capacity to withdraw money from the Consolidated Revenue Fund and set it aside for a particular purpose. The appropriation regulates the relationship between the legislature and the Executive. It vindicates the legislature's long-established right, in Westminster systems, to prevent the Executive spending money without legislative sanction. The appropriation of public revenue operates as a grant by the legislature to the Executive giving the Executive authority to segregate the relevant money issued from the Consolidated Revenue Fund and to dedicate it to the execution of some purpose which either the Constitution has itself declared, or Parliament has lawfully determined, shall be carried out[21]. It also operates so as to restrict any expenditure of the money appropriated to the particular purpose for

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13 *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555 at 580 (Brennan J).

14 *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at [209] (Gummow, Crennan and Bell JJ); *Victoria v Commonwealth and Hayden (AAP Case)* (1975) 134 CLR 338 at 386 (Stephen J).

15 *Combet v Commonwealth* (2005) 224 CLR 494 at [44]-[46] (McHugh J).

16 *New South Wales v Commonwealth (Surplus Revenue Case)* (1908) 7 CLR 179 at 200 (Isaacs J); Durell, *The Principles & Practice of the System of Control Over Parliamentary Grants* (1917), pp35-36.

17 *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at [291]-[292] (Hayne and Kiefel JJ).

18 *Victoria v Commonwealth and Hayden (AAP Case)* (1975) 134 CLR 338 at 411 (Jacobs J).

19 *New South Wales v Commonwealth (Surplus Revenue Case)* (1908) 7 CLR 179 at 190-191.

20 *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at [601] (Heydon J).

21 *The State of New South Wales v The Commonwealth* (1908) 7 CLR 179 at 190 and 200; [1908] HCA 68. See also *Attorney-General (Vict) v The Commonwealth* (1945) 71 CLR 237 at 248.

which it was appropriated[22]. That is, it creates a duty – a duty not to spend outside the purpose in question. Beyond that it creates no rights and it imposes no duties[23]. Nor does it create any powers. It fulfils one pre-condition to expenditure. It does not do away with other pre-conditions to expenditure. Of itself it gives no untrammelled power to spend.

> "[Appropriation] neither betters nor worsens transactions in which the Executive engages within its constitutional domain, except so far as the declared willingness of Parliament that public moneys should be applied and that specified funds should be appropriated for such a purpose is a necessary legal condition of the transaction. It does not annihilate all other legal conditions."[24]

10 One relevant legal pre-condition which must be satisfied is the existence of power to spend what has been appropriated. Whether the Executive has power to spend the money will depend on there being either a conferral of that power on it by legislation or some power within s 61 of the Constitution.

19. Thus, an appropriation is a necessary pre-condition to an executive power to spend,[25] but does not speak to the scope of the executive power to spend and contract.[26] It is this distinction, found in the historical context, which supported the conclusion in *Pape* that s81 of the *Constitution* is not a substantive source of power to expend public money.[27]

20. It cannot be said that the drafting of Commonwealth Appropriation Acts has historically reflected an assumption that s81 of the *Constitution* provides a power to spend. As was noted by French CJ in *Pape*, the view that s81 of the *Constitution* creates a spending power has not ever reached the status of
20 orthodoxy.[28]

21. Further, the first construction is consistent with an intention to affect rights and liabilities not generally being attributed to appropriations legislation in relevantly identical terms.[29]

22. Against the above history, as well as the assumed operation of the appropriations legislation in *Williams (No 1)* it may be noticed that the language of "apply" has appeared in Commonwealth appropriations legislation since Federation, until recently[30] found in the phrase "issue and apply". A suggestion that the language of "apply" found in s8 of the Appropriation Acts might supply a power for the executive to spend the monies appropriated is not borne out by an analysis of the meaning of that language in its historical context:

    a. Commonwealth Appropriation Acts in 1901 used the language of "*issue out of* the
30 Consolidated Revenue Fund and *apply* for the services" to describe the action of

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22 *The Commonwealth v Colonial Ammunition Co Ltd* (1924) 34 CLR 198 at 222 and 224-225.

23 *Victoria v The Commonwealth and Hayden* (1975) 134 CLR 338 at 386-387, 392-393 and 411.

24 *The Commonwealth v Colonial Ammunition Co Ltd* (1924) 34 CLR 198 at 224-225 per Isaacs and Rich JJ.

25 *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at [80] (French CJ).

26 Enid Campbell, "Parliamentary Appropriations" (1971) 4 Adelaide Law Review 145 at 161-164.

27 *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at [54]-[81] (French CJ), [176] (Gummow, Crennan and Bell JJ) [291]-[292], [320] (Hayne and Kiefel JJ), [601]-[603] (Heydon J).

28 *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at [111] (French CJ).

29 *Brown v West* (1990) 169 CLR 195 at 211 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ); *Commonwealth v Colonial Ammunition Company Ltd* (1924) 34 CLR 198 at 222-225 (Isaacs and Rich JJ).

30 *Appropriation Act (No 1) 2008-2009* (Cth).

appropriation.[31] That language has its origin in very old English statutes where Parliament appropriated funds for the English Crown by providing that "there shall be issued, and applied, a sum not exceeding…".[32] The model of "issue out of and apply for" was the model commonly used in Australian colonial appropriation Acts.[33]

b. The operative sections of the English and most Australian colonial Acts did not provide that sums were "appropriated". Rather, the "issuing out of" and "applying" was the appropriation. That is made clear in some of those Acts by the statements of purpose,[34] and marginal notes[35] which refer to "appropriation".

c. Since the *Appropriation Act 1902-3* (Cth), the language of "issue out of" and "apply" has been supplemented in a subsequent provision which provides that the "sums authorised" "by this Act to be issued" "are appropriated, and shall be deemed to be appropriated".

d. The relation between the two components can be seen to have continued in the *Appropriation Act (No 1) 1997-98* (Cth) where it is merged in the same section: see s3(1) and (2). From 2007, it is divided again with the provision concerning application being separated from a provision providing that the "Fund is appropriated as necessary for the purposes of the Act": see ss8 and 14 of the *Appropriation Act (No 1) 2008-2009* (Cth).

23. The notion of "issuing out of" means the notional transfer, in terms of accounting, of funds from the Consolidated Revenue Fund. It is also a communication to the Treasurer authorising him or her to make a disbursement for the identified purpose.[36]

24. Consistent with Barton J's construction of "applied…towards…expenditure" in s87 of the *Constitution*,[37] to "apply" for services or expenditure is the notional "separating out", or legal segregation, of funds for a nominated purpose. Applying for a service or expenditure in this sense does not mean to authorise actual expenditure.[38] It assumes a power to spend provided by some

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31 *An Act To Grant And Apply Out Of The Consolidated Revenue Fund The Sum Of Four Hundred And Ninety-One Thousand Eight Hundred And Eighty-Two Pounds To The Service Of The Period Ending The Thirtieth Day Of June One Thousand Nine Hundred And One (No 1 of 1901)* (Cth), s1.

32 See for example, *Anno decimo sexto Georgii II c25, An act for granting to his Majesty the sum of one million out of the sinking fund, and for applying a further sum therein mentioned, for the service of the year one thousand seven hundred and forty three; and for the further appropriating the supplies granted in this session of parliament* (1743).

33 See. e.g. *Appropriation Act (No 5 of 5 Vic, 1841)* (SA), *Appropriation Act 1832 (1832 No 15a)* (NSW), *An Act For Applying Certain Sums Arising From The Revenue Receivable In Van Diemen's Land To The Service Thereof For The Year One Thousand Eight Hundred And Thirty Four And For Further Appropriating The Said Revenue (4 Will IV, No 7)* (Tas), *Appropriation (5 Will. IV No. 6)* (WA). These Acts may be compared to *An Act for applying certain Sums arising from the Revenue receivable in the Colony of Victoria to the Service thereof, for the year One thousand eight hundred and fifty-two, and for further appropriating the said Revenue (1851)* (Vic) which used the language of "issue", "apply" and "appropriate".

34 See. e.g. *Appropriation Act (No 5 of 5 Vic, 1841)* (SA).

35 See e.g. *Appropriation Act 1832 (1832 No 15a)* (NSW).

36 *New South Wales v Commonwealth (Surplus Revenue Case)* (1908) 7 CLR 179 at 190 (Griffith CJ).

37 *New South Wales v Commonwealth (Surplus Revenue Case)* (1908) 7 CLR 179 at 194 (Barton J).

38 Durell, *The Principles & Practice of the System of Control Over Parliamentary Grants* (1917), pp35-36.

other source. If not grounded in statute, that power was found at least so far as it applied to the English executive, and in the colonial governments prior to Federation, in the prerogatives of the Crown as understood at that time.[39]

25. Accordingly, in relation to the possible argument that s15 or 16 of the Appropriation Acts are the operative provisions effecting appropriation, it may be seen that those provisions are predicated upon the operation of s8. Section 8 satisfies the requirement that an appropriation must designate the purpose or purposes for which the moneys appropriated are to be expended.[40] Sections 15 and 16 effect the appropriation for the purposes that s8 authorises.

26. There are two further reasons to reject the second or third suggested constructions of the Appropriation Acts referred to at [11] above. First, those constructions would open Commonwealth appropriations legislation to the scrutiny ordinarily associated with Commonwealth legislation to determine whether it is supported by a head of power, which to date has been assumed to be inappropriate and unnecessary.[41] However, as has been noted by this Court, the language of the Appropriation Acts provides insufficient textual basis for the determination of constitutional validity.[42]

27. Indeed, the fact that it has been said that it is a matter for Parliament to determine the level of generality with which appropriation purposes are expressed[43] is best accounted for on the basis that appropriation legislation governs the relationship between the executive and Parliament, not Parliament and the citizen. Thus it has been said, an appropriation does nothing to attract to its operation the principles which have been developed in respect of Commonwealth legislation creating rights, obligations and duties.[44] Likewise, whatever the location of the Commonwealth's legislative power to make laws appropriating money,[45] and whatever the limit imposed by the phrase "purposes of the Commonwealth" in s81 of the *Constitution*, it has been said that when a particular expenditure is challenged for validity, the resolution of that question will ordinarily not be resolved

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39 See *Victoria v Commonwealth and Hayden (AAP Case)* (1975) 134 CLR 338 at 404-405 (Jacobs J); *New South Wales v Bardolph* (1934) 52 CLR 455 at 474-475 (Evatt J), 496 (Rich J), 508 (Dixon J). (Here, the taxonomical question regarding whether the common law capacities are properly labelled as "prerogative" may be put to one side: see *Williams v Commonwealth* (2012) 248 CLR 156 at [25] (French CJ)). As to the Crown's prerogatives in the colonies, see Chitty, *Prerogatives of the Crown* (1820), p32.

40 *Brown v West* (1990) 169 CLR 195 at 208 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ); *Victoria v Commonwealth and Hayden (AAP Case)* (1975) 134 CLR 338 at 392 (Mason J); *New South Wales v Commonwealth (Surplus Revenue Case)* (1908) 7 CLR 179 at 200 (Isaacs J).

41 *Victoria v Commonwealth and Hayden (AAP Case)* (1975) 134 CLR 338 at 394 (Mason J).

42 *Victoria v Commonwealth and Hayden (AAP Case)* (1975) 134 CLR 338 at 394 (Mason J), 411 (Jacobs J); *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at [197] (Gummow, Crennan and Bell JJ).

43 *Combet v Commonwealth* (2005) 224 CLR 494 at [160] (Gummow, Hayne, Callinan and Heydon JJ).

44 *Victoria v Commonwealth and Hayden (AAP Case)* (1975) 134 CLR 338 at 410-411 (Jacobs J).

45 See *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555 at 601 (McHugh J).

by examining the limits of the phrase "purposes of the Commonwealth", but involves an inquiry of the ambit of the legislative or executive power said to be engaged if the expenditure is made.[46]

28. Second, those constructions mean that the Appropriation Acts, dealing as they do with the ordinary annual services of government, did not deal "only with such appropriation" contrary to s54 of the *Constitution*. That provision, inserted to prevent the practice of tacking[47] unrelated measures to appropriation bills to "coerce or embarrass the Senate"[48], prohibits other measures being attached, including those which would provide authority to create rights and liabilities in relation to the funds appropriated. While a breach of s54 would not render the Appropriation Acts invalid,[49] this Court should be slow to construe s8(1) as evidencing a decision by the Parliament to act in a manner contrary to s54.

29. If an Appropriation Act could include a power to spend without contravening s54, that would alter the balance of power between the House of Representatives and Senate.[50] If a power to spend and contract could form part of a law of appropriation, it follows that it would not be possible for the Senate to amend it by reason of the limits fixed in s53. That would mean that whether the Senate had power to amend the conferral of that power would depend not on the substance of the law, but whether it was contained in a law concerning appropriation or another Act.

Validity of the Appropriation Acts

30. If either of the second or third constructions identified in [11] above is adopted, and the Appropriation Acts are understood to provide a statutory authority to spend and contract, then that authority must be supported by a head of Commonwealth legislative power.[51]

31. The process of characterisation to determine whether a law is within power is well settled. As Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ said in *New South Wales v Commonwealth (Work Choices Case)*:[52]

> The general principles to be applied in determining whether a law is with respect to a head of legislative power are well settled. It is necessary, always, to construe the constitutional text and to do that "with all

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46 *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at [316]-[317] (Hayne and Kiefel JJ).

47 *Official Record of the Debates of the Australasian Federal Convention*, Second Session, Sydney (1897), p539-540; Third Session, Melbourne, p2075-6; See also Quick and Garran, *Annotated Constitution of the Australian Commonwealth*, p674.

48 Commonwealth, *Report of the Royal Commission on the Constitution*, p9; See also Odgers, *Australian Senate Practice* (10th ed), p297.

49 *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555 at 578 (Mason CJ, Deane, Toohey and Gaudron JJ); *Western Australia v Commonwealth (Native Title Case)* (1995) 183 CLR 373 at 482 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

50 Moore, *The Constitution of the Commonwealth of Australia*, (2nd ed, Sweet and Maxwell, 1910), p145.

51 So much must follow from the rejection of the broad view of the Commonwealth's power to spend and contract (a power to spend and contract unlimited by subject matter) in *Williams v Commonwealth* (2012) 248 CLR 156 at [37] (French CJ), [159] (Gummow and Bell JJ), [253] (Hayne J), [534] (Crennan J), [594] (Kiefel J).

52 (2006) 229 CLR 1 at [142] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

> the generality which the words used admit"[53]. The character of the law must then be determined by reference to the rights, powers, liabilities, duties and privileges which it creates[54]. The practical as well as the legal operation of the law must be examined[55]. If a law fairly answers the description of being a law with respect to two subject-matters, one a subject-matter within s 51 and the other not, it is valid notwithstanding there is no independent connection between the two subject-matters[56]. Finally, as remarked in *Grain Pool of Western Australia v The Commonwealth*[57], "if a sufficient connection with the head of power does exist, the justice and wisdom of the law, and the degree to which the means it adopts are necessary or desirable, are matters of legislative choice[58]".

32. Section 8 of the Appropriation Acts provides that an amount specified for an outcome for an Agency may be applied for expenditure for the purpose of contributing to achieving that outcome. The relevant outcome to be considered for the Education, Employment and Workplace Relations Portfolio is Outcome 2:

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

33. The meaning of Outcome 2 may be affected by matters contained in a Portfolio Statement because s4 provides that they are relevant documents for the purposes of s15AB *Acts Interpretation Act 1901* (Cth). Further, by force of s8(2), the inclusion of the NSCSWP, formerly the National School Chaplaincy Program (**NSCP**), in the Portfolio Statements in a manner that indicates that is to be treated as an activity in respect of Outcome 2,[59] deems that expenditure to be for the purpose of contributing to Outcome 2.

34. In order to be valid s8 must be supported by a head of power. There are two routes that require analysis:

    a. first, by considering s8(1) and Outcome 2; and

    b. second, by considering s8(1), relying on the deeming provision in s8(2), combined with the Portfolio Statements.

35. The analysis via the first route is as follows. Section 8(1) of the Appropriation Acts does not limit the manner in which Outcome 2 is to be achieved other than by indicating that it is through funding for certain matters and objectives. The terms of Outcome 2 are very broad. It authorises spending on a very broad range of possible programs or grants that would be in furtherance of "[i]mproved

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53 *R v Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways Pty Ltd* (1964) 113 CLR 207 at 225-226; *Grain Pool of Western Australia v The Commonwealth* (2000) 202 CLR 479 at 492 [16].

54 *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 352-353 [7], 372 [58]; *Grain Pool* (2000) 202 CLR 479 at 492 [16].

55 *Re Dingjan* (1995) 183 CLR 323 at 369; *Grain Pool* (2000) 202 CLR 479 at 492 [16].

56 *Re F; Ex parte F* (1986) 161 CLR 376 at 388; *Grain Pool* (2000) 202 CLR 479 at 492 [16].

57 (2000) 202 CLR 479 at 492 [16].

58 *Leask* (1996) 187 CLR 579 at 602.

59 Portfolio Budget Statements 2011-2011, Budget Related Paper NO. 1.6, Education, Employment and Workplace Relations Portfolio, **[Special Case Annexure 62, Vol 5, pp2082, 2105]**; Portfolio Additional Estimate Statements 2011-2012, Education, Employment and Workplace Relations Portfolio, **[Special Case Annexure 64, Vol 5, pp2183, 2191]**; Portfolio Budget Statements 2012-2013, Budget Related Paper NO. 1.6, Education, Employment and Workplace Relations Portfolio, **[Special Case Annexure 66, Vol 5, pp2271, 2283]**; Portfolio Budget Statements 2013-2014, , Education, Employment and Workplace Relations Portfolio Overview, **[Special Case Annexure 68, Vol 5, pp2379, 2387]**.

learning, and literacy, numeracy and educational attainment for school students" so long as they involve "funding for quality teaching and learning environments, workplace learning and career advice". Outcome 2 does not prescribe *who* may be funded to achieve the objectives it contains, or *how* those objectives will be attained. Nor does it prescribe *what* will be funded to achieve those objectives.

36. Thus whatever view is taken of the scope of s51(xxiiiA) of the *Constitution* as concerns "benefits to students",[60] Outcome 2, as picked up by s8(1), is so broad that it cannot be said to be supported by it.

37. The question then arises whether Outcome 2 can be read down so as to bring it within power, pursuant to s15A of the *Acts Interpretation Act 1901* (Cth) (**AIA**). The following points apply to the operation of s15A AIA:

    a. The opening words of s15A, "Every Act shall be read and construed subject to the *Constitution*, and so as not to exceed the legislative power of the Commonwealth" creates a rule of construction.[61] It has been explained to mean that all Commonwealth laws shall be held to be valid so far as possible.[62]

    b. That operation of the rule is explained by a statement of intent in s15A that if apart from the section the enactment were construed in excess, it shall nevertheless be valid to the extent to which it is not in excess. That rule needs to be applied bearing in mind the limits of judicial power.[63] Section s15A does not invite a choice between available limits by re-drafting. This means the impugned law itself must supply, by the identification of the subject matter, the relevant limit.[64]

    c. Section 15A AIA is subject to a contrary intention.[65] It may appear from the impugned law expressly, or by implication, that if it cannot have a full and complete application to all cases according to its terms, it should not apply to any individual case.[66]

    d. It would seem to be easier to apply s15A where separate words or phrases are used (which can be divided) leaving those that are within power.[67] It may also be applied to general words that can be confined to a more limited class: see, for example, the approach with

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60 *Williams v Commonwealth* (2012) 248 CLR 156 at [273]-[286] (Hayne J), [408]-[441] (Heydon J), [570]-[574] (Kiefel J).

61 *R v Poole; Ex parte Henry (No 2)* (1939) 61 CLR 634 at 656 (Evatt J).

62 *Pidoto v Victoria* (1943) 68 CLR 87 at 108 (Latham CJ).

63 *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at [251] (Gummow, Crennan and Bell JJ). See also *Western Australia v Commonwealth (Native Title Case)* (1995) 183 CLR 373 at 485-486 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

64 *R v Poole; Ex parte Henry (No 2)* (1939) 61 CLR 634 at 653 (Dixon J).

65 *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 at 339 (Brennan J), 371-372 (McHugh J).

66 *Pidoto v Victoria* (1943) 68 CLR 87 at 108 (Latham CJ).

67 *R v Commonwealth Court of Conciliation and Arbitration; ex parte Whybrow* (1910) 11 CLR 1 at 54 (Isaacs J).

respect to the phrases, "functions and powers",[68] "in any suit to which ... a State is a party",[69] "trade and commerce",[70] and the word "aerodrome".[71]

e. Section 15A AIA is less readily applied to preserve a law which has operation both within and beyond power that provides for a general scheme not comprised of discrete components. In that event, the law fails because it is either not textually possible to read the provision as defined by a certain limit, or a limit is not supplied by the law or the subject matter.[72]

38. It is not possible here to apply s15A AIA to Outcome 2 because its terms do not supply a relevant limit to which it should be read down.

10 39. As to the second route via s8(1) and the deeming provision in s8(2) of the Appropriation Acts, on its face, s8(2) is not in terms that expressly limit its operation to a head of power. However, s15 AIA may be applied to read it down in a manner similar to that suggested by this Court in *R v Hughes*.[73] On this approach, s8(2) can be read down by interpreting the word "activities" to mean only activities *in relation to a Commonwealth head of legislative power*. On this analysis, the question then becomes whether the NSCP/NSCSWP as described in the Portfolio Statements is an activity that is supported by a head of power.

40. The NSCP/NSCSWP was described in each of the relevant Portfolio Statements in slightly different terms:

a. In relation to the *Appropriation Act (No 1) 2011-2012* (Cth), the Portfolio Statement
20 provided:

> National School Chaplaincy Program - a voluntary program which provides up to $20 000 per year for schools to establish chaplaincy services, or enhance existing services, to provide pastoral care for students and the school community. This Budget extends and expands the Program with an additional $222 million.[74]

b. In relation to the *Appropriation Act (No 3) 2011-2012* (Cth), the Portfolio Statement provided:

> The National School Chaplaincy and Student Welfare Program (NSCSWP) replaced the National School Chaplaincy Program, which ceased on 31 December 2011.

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68 *R v Hughes* (2000) 202 CLR 535 at [43] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

69 *British American Tobacco Australia Ltd v Western Australia* (2003) 217 CLR 30 at [85]- [87] (McHugh, Gummow and Hayne JJ).

70 *Newcastle and Hunter River Steamship Co Ltd v Attorney-General for the Commonwealth* (1921) 29 CLR 357; *Huddart Parker Ltd v Commonwealth* (1931) 44 CLR 492.

71 *R v Poole; Ex parte Henry (No 2)* (1939) 61 CLR 634 at 652 (Dixon J).

72 *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at [251] (Gummow, Crennan and Bell JJ).

73 (2000) 202 CLR 535 at [43] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

74 Portfolio Budget Statements 2011-2011, Budget Related Paper NO. 1.6, Education, Employment and Workplace Relations Portfolio, **[Special Case Annexure 62, Vol 5, p2105]**.

> The NSCSWP is a voluntary program that provides up to $20,000 per year ($24,000 in remote areas) for schools to establish chaplaincy or secular student welfare services, or enhance existing services, to provide pastoral care for students and the school community.[75]

c. In relation to the *Appropriation Act (No 1) 2012-2013* (Cth), the Portfolio Statement provided:

> National School Chaplaincy and Student Welfare Program - a voluntary program that assists school communities to support the wellbeing of their students including strengthening values, providing pastoral care and enhancing engagement with the broader community. In the 2011-2012 Budget, the Government provided an additional $222 million to extend the scheme to up to an extra 1000 schools from 2012, with priority given to schools service disadvantaged areas or in regional and remote locations.[76]

d. In relation to the *Appropriation Act (No 1) 2013-2014* (Cth), the Portfolio Statement provided:

> National School Chaplaincy and Student Welfare Program - assists school communities to support the wellbeing of their students including strengthening values, providing pastoral care and enhancing engagement with the broader community.[77]

41. The following points may be made:

a. none of the descriptions are framed by reference to a Commonwealth head of legislative power;

b. in relation to the first and second descriptions, the pastoral care provided by the program is not only for students, but also for the "school community";

c. in relation to the third and fourth descriptions:

i. the program's assistance is not directed at students, but at "school communities", to support the wellbeing of their students;

ii. the program is described in purposive terms, describing an objective to assist school communities "to support the wellbeing of their students";

iii. the program lists certain matters as *included*, namely "strengthening values, providing pastoral care and enhancing engagement with the broader community". However, those matters do not limit the means by which the objective is to be achieved.

42. These descriptions of the NSCP/NSCSWP are of such breadth that the NSCP/NSCSWP cannot be said to be supported by a head of power. In particular, s51(xxiiiA) of the *Constitution* does not

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75 Portfolio Additional Estimate Statements 2011-2012, Education, Employment and Workplace Relations Portfolio, **[Special Case Annexure 64, Vol 5, p2191]**.

76 Portfolio Budget Statements 2012-2013, Budget Related Paper NO. 1.6, Education, Employment and Workplace Relations Portfolio, **[Special Case Annexure 66, Vol 5, p2283]**.

77 Portfolio Budget Statements 2013-2014, Education, Employment and Workplace Relations Portfolio Overview, **[Special Case Annexure 68, Vol 5, p2387]**.

support the program if for no other reason than the program is not limited to support to *students* and matters incidental thereto. As to any possible reliance on s51(xx) of the *Constitution*, nothing in the descriptions indicates that trading or financial corporations are to be involved in the delivery of the NSCP/NSCSWP. Prima facie, s8(2), construed in the manner explained above, cannot operate to deem the NSCP/NSCSWP as an authorised expenditure for the purposes of Outcome 2.

43. It is not possible for s8(2) to operate to deem *part* of the NSCP/NSCSWP as an authorised expenditure for the purposes of Outcome 2, for reasons analogous to those discussed above in the context of s15A AIA, namely, the description of the NSCP/NSCSWP does not supply any relevant limit. Its drafting provides for flexibility as to the program it authorises so as to permit that program to adapt as needed. Because of this, there is no relevant indication as to those components of the NSCP/NSCSWP that are considered integral, or whether Parliament would have intended an adapted version of the program to still operate if the whole of the program did not. Further, it cannot be said that Parliament would have dedicated the same amount of money for expenditure on the program had it contemplated a limited version of the program. As Gibbs J concluded in relation to the AAP:[78]

> It is not possible to sever the Plan into valid and invalid purposes, so as to save part of it. The Appropriation Act, in so far as it makes an appropriation for the purposes of the Plan, is invalid.

Construction and Validity of s32B FMA Act and item 407.013 of Part 4 of Schedule 1AA of the FMA Regs

44. The starting point for the analysis of whether the Commonwealth is authorised by s32B of the FMA Act, and a regulation made under it, to enter into, vary and expend money under the SUQ Agreement made as part of the NSCSWP is the text and structure of s32B itself.

Construction of s32B FMA Act

45. Though s32B is to be found within the wider financial management framework for the Commonwealth executive, it does not draw much of its meaning from that context. Aside from its relation to s44 and 65 FMA Act, it stands alone from the other provisions - in no small part due to the fact that it was inserted along with other consequential amendments in response to the decision in *Williams (No 1)*.[79]

46. In short, s32B purports to empower the Commonwealth to variously "make, vary or administer" prescribed arrangements or grants. It does so in the following way:

    a. as stated above, as a source of power, s32B FMA Act is not engaged if there is available another source of power. The expression, "If apart from this subsection", operates to mean

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78 *Victoria v Commonwealth and Hayden (AAP Case)* (1975) 134 CLR 338 at 378 (Gibbs J).

79 Explanatory Memorandum to the *Financial Framework Legislation Amendment Bill (No 3) 2012* (Cth).

that s32B will operate as a provision of last resort and requires other sources to have been exhausted before it will confer power;

b. it confers power that is executive in character. The two references to "power to make…" in s32B(1) are to power in the limited sense of Commonwealth "executive power". That is so bearing in mind that the purpose of s32B is a legislative conferral of authority to undertake acts, namely, to "make, vary or administer" arrangements or grants, that are carried out by the executive. That is reinforced by s32B(2) which identifies that those exercising the powers will be executive officers, being a Minister or Chief Executives: see also s44 FMA Act;

c. the limitation that the Commonwealth has power to make, vary or administer arrangements or grants "subject to compliance with this Act, the regulations, Finance Minister's Orders, Special Instructions and any other law" limits only the manner of exercise of the power conferred. That is, these matters operate not to limit the conferral of the power, but to limit the manner of exercise of the power once conferred;

d. the reference to "specified in regulations" empowers the making of regulations pursuant to s65 of the FMA "permitted by this Act to be prescribed".

47. The power conferred on the Commonwealth by s32B is not expressly limited by reference to any reason *why* the "Commonwealth does not have power, to make, vary or administer" the arrangement or grant. Further, s32B is not limited to the circumstances in *Williams (No 1)*, namely where the contract and payments under it are not supported by legislation. Thus, on its face, it will operate both where:

a. executive action to make, vary or administer a grant or arrangement has purportedly been authorised by an Act which has been held to exceed legislative power; and

b. executive action to make, vary or administer a grant or arrangement is not authorised by the *Constitution* or any Act, whether or not an Act could have been passed to make, vary or administer the grant or arrangement.

48. Thus, on its face, s32B FMA Act operates beyond the limits of Commonwealth legislative power.

Reading down of s32B and the effect on the power to make regulations

49. However, pursuant to s15A AIA, s32B should be read down in such a way as not to exceed Commonwealth legislative power.

50. The last two propositions referred to above at [37](d) and (e) above have particular implications for reading down s32B, and, as will be seen, for the FMA Regs.

51. As above in relation to the Appropriation Acts, the reading down required is similar to that in *R v Hughes*.[80] It is achieved by reading in the words "by reason of the absence of an Act the Commonwealth has legislative power to enact" such that s32B(1) reads:

> If:
>
> apart from this subsection, *by reason of the absence of an Act the Commonwealth has legislative power to enact* the Commonwealth does not have power to make, vary or administer:
>
> (i) an arrangement …

52. This gives s32B FMA Act an operation where Parliament could have enacted a law authorising the making, varying or administering of an arrangement or grant, but has not. If that is the appropriate reading down - and it is suggested it is one that gives the broadest possible operation to s32B that falls within power - then it also follows that the scope of the regulation making power provided by a combination of s32B and s65 to "specify" particular "grants", "arrangements" or "programs" is also to be limited by the full extent of Commonwealth legislative power. That is, the scope of Commonwealth legislative power delimits the boundary of "arrangements", "grants" and "programs" that may be the subject of valid regulations under the FMA Act.

53. The consequence is that the issues of constitutional validity and validity of the regulation collapse into a single question. If a regulation exceeds the regulation-making power, it will simultaneously be both invalid by reason of being contrary to the limits of Commonwealth legislative power and beyond the terms of the regulation-making power because it was not "permitted by the Act" to be specified.

54. At this point, comment should be made regarding the effect of Parliament, rather than the Governor-General, having enacted the impugned portions of the FMA Regs pursuant to s3(1) of the *Financial Framework Legislation Amendment Act (No 3) 2012* (Cth) (**FFL Amending Act**).

55. Parliament's action in enacting the impugned regulation means that it is unnecessary to consider the scope of s65 FMA Act for the purpose of considering item 407.013. It is sufficient to enquire whether item 407.013 of Part 4 of Schedule 1AA of the FMA Regs, in its operation with s32B FMA Act, is supported by a head of power. That requires the application of the ordinary process of construction and characterisation of item 407.013.

56. Alternatively, it could be argued that by amending the FMA Regs, rather than including the items within the FMA Act, Parliament has indicated an intention that those items be treated as regulations, such that in order to be valid, they must be within the scope of the regulation-making power in s65 FMA Act. This view is supported by the fact that under s3(2) of the FFL Amending Act, Parliament has indicated that the fact of amendment of the FMA Regs by Parliament does not prevent their further amendment or repeal by the Governor-General.[81] On this alternative approach,

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80 (2000) 202 CLR 535 at [43] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

81 That Parliament intended that the limits of s65 FMA Act be observed is further supported by the fact that the rule of construction in s13 LIA, which requires a "legislative instrument" to be construed by reference to the

the validity of the FMA Regs would need to be tested according to the ordinary process for determining the validity of regulations:

a. first, to determine the meaning of the words in the Act conferring the authority to legislate;

b. second, to determine the meaning of the subordinate legislation itself; and

c. finally to decide whether the subordinate legislation complies with the description in the Act.[82]

57. As to the first point ([56](a) above), the scope of the regulation making power is to be determined by reference to the character of the statute and the nature of the provisions it contains. Regulations which vary or depart from positive provisions of the Act or go outside the field of operation the Act marks out for itself will be beyond power.[83] As to the second point, the true scope of the regulation and its practical legal effect may be used to determine invalidity.[84]

58. If the alternative approach is adopted, one does not proceed to determine the validity of s32B FMA Act by first determining whether a particular item listed in the regulations is supported by a head of legislative power. That would reverse the order of inquiry. That approach would beg the question of the scope of the regulation-making power to include a certain matter in the regulations. The scope of the regulation-making power cannot be determined without an understanding of s32B of the FMA Act itself. Further, this approach would face the difficulty that a regulation-making power must itself be supported by Commonwealth legislative power in order to be valid.[85]

59. However, as noted, because in this case the question whether the regulation is within power turns on whether the regulation specifies a program that is with respect to a head of legislative power, a process of characterisation of the regulation, as would ordinarily be applied in relation to determining validity of Commonwealth legislation, is to be undertaken. In short, whether one approaches item 407.013 as legislation, or as a regulation, the inquiry will be the same.

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power conferred on the regulation-maker under the enabling legislation, applies notwithstanding that the FMA Regs were relevantly amended by Parliament. Although the FFL Amending Act is not a "legislative instrument" within the definition of s5(1) LIA, pursuant to s5(3) LIA an instrument that is registered in the Federal Register of Legislative Instruments is taken to be a "legislative instrument". This includes original legislative instruments and compilation instruments. A compilation of the FMA Regs, as amended by the FFL Amending Act, was registered, pursuant to s33(1) LIA on 3 July 2012 with Federal Legislative Register Code F2012C00412.

82 *McEldowney v Forde* [1969] 2 All ER 1039 at 1068 (Lord Diplock); *Esmonds Motors Pty Ltd v Commonwealth* (1970) 120 CLR 463 at 466 (Barwick CJ).

83 *Morton v Union Steamship Company of New Zealand* (1951) 83 CLR 402 at 410 (Dixon, McTiernan, Williams, Webb, Fullagar and Kitto JJ).

84 *Swan Hill Corporation v Bradbury* (1937) 56 CLR 746 at 757-759 (Dixon J).

85 *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 at 101 (Dixon J), 120 (Evatt J),

Construction of item 407.013 of Part 4 of Schedule 1AA of the FMA Regs

60. Here, the regulations, by specifying a number of programs purport to provide the Commonwealth with power to "make, vary or administer" an arrangement in relation to a program with a particular name and a stated objective.

61. Turning to this case, the regulation made is:

> 407.013 National School Chaplaincy and Student Welfare Program (NSCSWP)
>
> *Objective: To assist school communities to support the wellbeing of their students, including by strengthening values, providing pastoral care and enhancing engagement with the broader community.*

62. The question of construction that precedes characterisation turns on the significance of the name and the objective, and the relationship between the two.

63. It authorises a program with a particular label (which it may be observed has already changed) and with a stated objective. The label and objective are to be read together with the objective informing the character of the named program.

64. The listed examples appearing after the expression "including" do not limit the objective, "to assist school communities to support the wellbeing of their students". The scope of that expression can be gauged by understanding that "assist", "support" and "wellbeing" are words of considerable breadth. The regulation would apparently authorise funding for anything that aided a school community (parents, teachers, school councils and other interested bodies) to contribute to wellbeing (either physical, spiritual or scholastic) of students.

65. The regulation would apparently authorise any means of achieving the stated objective. The variety of possibilities authorised is not limited by understanding that the objective has been advanced under that name by a particular form of program. That is, the meaning of the regulation is not to be determined by consideration of how it has been implemented. Accordingly, it is irrelevant for the purposes of considering the validity of item 407.013 to resort to consideration of the NSCSWP Guidelines, or any specific agreement under the NSCSWP, such as the SUQ Funding Agreement.

Characterisation of item 407.013 of Part 4 of Schedule 1AA of the FMA Regs to determine if it is within power

66. In support of the validity of item 407.013, reliance is placed by the First and Second Defendants on:

    a. s51(xxiiiA) of the *Constitution*;

    b. s51(xx) of the *Constitution*; and

    c. s61 read together with s51(xxxix) of the *Constitution*.[86]

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[86] First and Second Defendants' Amended Defence, [92](b) **[Core Special Case Book, Document 4]**. The Third Defendant relies upon s51(xxiiiA) and s51(xx): Third Defendant's Amended Defence, [38] **[Core Special Case Book, Document 5]**.

67. As to the reliance placed upon s61 read together with s51(xxxix) of the *Constitution*, it is difficult to see how these sections are relevant. Given that s51(xxxix) only operates on executive power vested by the *Constitution*, it can have no relevant work to do in relation to s32B FMA Act which is only engaged once other possible sources of executive power have been exhausted.

68. It remains therefore to consider what support for item 401.013 might be provided by s51(xxiiiA) and s51(xx) of the *Constitution*.

69. While the FMA Regs, having relevantly been made by Parliament and not by the Governor-General are therefore not open to challenge on the basis of uncertainty,[87] the uncertainty of the language in the regulations gives rise to difficulties in characterising whether the regulation is within power:

10 a. item 401.013, (similarly with the immediately preceding regulation and many others) is not drafted in terms that expressly or implicitly suggest they are limited by the terms of a head of Commonwealth legislative power;

b. the regulation makes no express link to "trading or financial corporations", nor is any link to trading or financial corporations available by implication. It is no more than a possibility that a particular arrangement entered into for the purposes of the program will be with a trading or financial corporation, or that services provided under an arrangement for the purposes of the program will be delivered by a trading or financial corporation. The regulation cannot even be said to meet the long-rejected test of "touching and concerning"[88] the subject of trading and financial corporations;

20 c. the reference to students does not apparently limit the program to them so that it could be to provide services to that group alone. That is so because the reference to "students" in both the title and objective is not apparently limiting. The meaning of the program as a "School Chaplaincy and Student Welfare program" suggests the program may equally operate to assist schools. That is explained by the reference to the program operating to "assist school communities" including by "enhancing engagement with the broader community". Though the end may be said to benefit students, that end is to be achieved indirectly by assisting the school community at large. That is, it would appear the program will operate to aid parents, friends, and community groups;

d. the regulation is expressed in purposive terms, but the relevant heads of power which are
30 said to support it are expressed in terms of a subject matter;

e. the regulation expressed in terms of the achievement of an objective, that is in purposive terms, does not limit the means of achieving that objective. Though there is no reason in

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87 *King Gee Clothing Co Pty Ltd v Commonwealth* (1945) 71 CLR 184.

88 *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1 at 182-187 (Latham CJ).

principle why a regulation that provides for the achievement of a purpose cannot be limited by the specification of a subject matter, a hypothetical example being,

> Commonwealth Lighthouses Improvement Program
> *Objective: to paint and maintain all Australian lighthouses*

the failure to do so may mean that even if the program could be undertaken in a way that constitutes the provision of benefits to students, the regulation authorises a variety of ways of undertaking that program, that would not be.

Reading down item 407.013 of the FMA Regs

70. If the regulation has potential operation both within and beyond a head of power, as is submitted, the question arises whether the regulation can be read down in accordance with s15A AIA (which operates on a regulation by reason of s13 of the *Legislative Instruments Act 2003* (Cth)) so as to be within the regulation making power.

71. The difficulty is that there is no obvious means to do so that is suggested by the language of the regulation itself. Part of the difficulty in that respect is the generality of the language used which admits of a variety of possibilities - those possibilities are not able to be separated out by reference to a class because what is authorised is a program with a broad object. There is no way in which particulars words can be read so as to limit the provision to being a benefit to students, or to limit it such that it will be provided by trading or financial corporations.

Part VI: Oral argument

72. South Australia estimates it will require 30 minutes for presentation of its oral argument.

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