HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HAYNE, HEYDON, CRENNAN, KIEFEL AND BELL JJ

RONALD WILLIAMS PLAINTIFF

AND

COMMONWEALTH OF AUSTRALIA & ORS DEFENDANTS

Williams v Commonwealth of Australia [2012] HCA 23
20 June 2012
S307/2010

ORDER

The questions stated in the Amended Special Case dated 26 July 2011 be answered as follows:

Question 1

Does the plaintiff have standing to challenge:

(a) the validity of the Darling Heights Funding Agreement?

(b) the drawing of money from the Consolidated Revenue Fund for the purpose of making payments pursuant to the Darling Heights Funding Agreement during the following financial years:
(i) 2007-2008;
(ii) 2008-2009;
(iii) 2009-2010;
(iv) 2010-2011;
(v) 2011-2012?

(c) the making of payments by the Commonwealth to Scripture Union Queensland pursuant to the Darling Heights Funding Agreement during the following financial years:
(i) 2007-2008;
(ii) 2008-2009;
(iii) 2009-2010;
(iv) 2010-2011;
(v) 2011-2012?

Answer

(a) *Yes.*

(b) *Unnecessary to answer.*

(c) *Yes.*

Question 2

If the answer to Question 1(a) is Yes, is the Darling Heights Funding Agreement invalid, in whole or in part, by reason that the Darling Heights Funding Agreement is:

(a) *beyond the executive power of the Commonwealth under s 61 of the Constitution?*

(b) *prohibited by s 116 of the Constitution?*

Answer

(a) *Yes.*

(b) *No.*

Question 3

To the extent that the answer to Question 1(b) is Yes, was or is the drawing of money from the Consolidated Revenue Fund for the purpose of making payments under the Darling Heights Funding Agreement authorised by:

(a) *the 2007-2008 Appropriation Act?*

(b) *the 2008-2009 Appropriation Act?*

(c) *the 2009-2010 Appropriation Act?*

(d) *the 2010-2011 Appropriation Act?*

(e) *the 2011-2012 Appropriation Act?*

Answer

Unnecessary to answer.

Question 4

To the extent that the answer to Question 1(c) is Yes, was or is the making of the relevant payments by the Commonwealth to Scripture Union Queensland pursuant to the Darling Heights Funding Agreement unlawful by reason that the making of the payments was or is:

(a) beyond the executive power of the Commonwealth under s 61 of the Constitution?

(b) prohibited by s 116 of the Constitution?

Answer

(a) The making of the payments was not supported by the executive power of the Commonwealth under s 61 of the Constitution.

(b) No.

Question 5

If the answer to any part of Question 2 is Yes, the answer to any part of Question 3 is No, or the answer to any part of Question 4 is Yes, what, if any, of the relief sought in the statement of claim should the plaintiff be granted?

Answer

The Justice disposing of the action should grant the plaintiff such declaratory relief and make such costs orders as appear appropriate in the light of the answers to Questions 1-4 and 6.

Question 6

Who should pay the costs of this special case?

Answer

The first, second and third defendants.

Representation

B W Walker SC with G E S Ng for the plaintiff (instructed by Horowitz & Bilinsky)

S J Gageler SC, Solicitor-General of the Commonwealth with G R Kennett SC and S J Free for the first, second and third defendants (instructed by Australian Government Solicitor)

R Merkel QC with G A Hill and J A Thomson for the fourth defendant (instructed by Norton Rose Australia)

Interveners

M G Sexton SC, Solicitor-General for the State of New South Wales with N L Sharp intervening on behalf of the Attorney-General for the State of New South Wales (instructed by Crown Solicitor (NSW))

W Sofronoff QC, Solicitor-General of the State of Queensland with G P Sammon and G J D del Villar intervening on behalf of the Attorney-General of the State of Queensland (instructed by Crown Law (Qld))

G L Sealy SC, Solicitor-General of the State of Tasmania with S D Gates intervening on behalf of the Attorney-General of the State of Tasmania (instructed by Solicitor-General of the State of Tasmania)

M G Hinton QC, Solicitor-General for the State of South Australia with M J Wait intervening on behalf of the Attorney-General for the State of South Australia (instructed by Crown Solicitor (SA))

S G E McLeish SC, Solicitor-General for the State of Victoria with R J Orr and N M Wood intervening on behalf of the Attorney-General for the State of Victoria (instructed by Victorian Government Solicitor)

R M Mitchell SC, Acting Solicitor-General for the State of Western Australia with F B Seaward intervening on behalf of the Attorney-General for the State of Western Australia (instructed by State Solicitor (WA))

P D Quinlan SC with K E Foley appearing as amicus curiae on behalf of the Churches' Commission on Education Incorporated (instructed by Mallesons Stephen Jaques)

CATCHWORDS

Williams v Commonwealth of Australia

Constitutional law − Executive power of Commonwealth − Commonwealth entered funding agreement with private service provider for provision of chaplaincy services at State school ("Funding Agreement") − Funding Agreement made pursuant to National School Chaplaincy Program − Whether executive power of Commonwealth extends to matters in respect of which Parliament may legislate − Whether s 61 of Constitution or s 44(1) of *Financial Management and Accountability Act* 1997 (Cth) ("FMA Act") source of power to enter Funding Agreement − Whether s 61 of Constitution or s 44(1) of FMA Act source of power to pay service provider.

Constitutional law − Powers of Commonwealth Parliament − Whether law providing for payments in circumstances identical to Funding Agreement would be law with respect to s 51(xx) of Constitution − Whether law providing for payments in circumstances identical to Funding Agreement would be law with respect to s 51(xxiiiA) of Constitution.

Constitutional law − Freedom of religion − Prohibition on religious tests as qualification for any office under Commonwealth − Under Funding Agreement, "school chaplain" to provide services − Whether "school chaplain" holds office under Commonwealth − Whether Funding Agreement or payments to service provider prohibited by s 116 of Constitution.

Constitutional law − Appropriations of moneys from Consolidated Revenue Fund − Commonwealth paid appropriated moneys to service provider pursuant to Funding Agreement − Whether Appropriation Acts authorised appropriations of moneys for purpose of payments under Funding Agreement.

Constitutional law − Standing − Plaintiff's children attended State school party to Funding Agreement − Whether plaintiff has standing to challenge validity of Funding Agreement − Whether plaintiff has standing to challenge validity of appropriations to pay moneys pursuant to Funding Agreement − Whether plaintiff has standing to challenge validity of payments to service provider.

Words and phrases – "appropriation", "benefits to students", "capacity to contract", "execution and maintenance of this Constitution", "executive power of the Commonwealth", "office under the Commonwealth", "ordinary and well-recognised functions", "religious test".

Constitution, ss 51(xx), 51(xxiiiA), 61, 64, 81, 96 and 116.
Financial Management and Accountability Act 1997 (Cth), s 44(1).

FRENCH CJ.

Introduction

1 In 1901, one of the principal architects of the Commonwealth Constitution, Andrew Inglis Clark, said of what he called "a truly federal government"[1]:

> "Its essential and distinctive feature is the preservation of the separate existence and corporate life of each of the component States of the commonwealth, concurrently with the enforcement of all federal laws uniformly in every State as effectually and as unrestrictedly as if the federal government alone possessed legislative and executive power within the territory of each State."

In this case, that essential and distinctive feature requires consideration of the observation of Alfred Deakin, another of the architects of the Commonwealth Constitution and the first Attorney-General of the Commonwealth, that[2]:

> "As a general rule, wherever the executive power of the Commonwealth extends, that of the States is correspondingly reduced."

In particular, this case requires consideration of the executive power of the Commonwealth, absent power conferred by or derived from an Act of the Parliament, to enter into contracts and expend public money.

2 The plaintiff, Ronald Williams, calls into question the validity of a contract made by the Commonwealth with a private service provider, and expenditure under that contract, for the delivery of "chaplaincy services" into schools operated by the Queensland State Government. His claim concerns the provision of such services in the Darling Heights State School in Queensland, at which his children are students. Although the expenditure is said by the Commonwealth to have met the necessary condition of a parliamentary appropriation for each year in which it has been made, no Act of Parliament has conferred power on the Commonwealth to contract and expend public money in this way. The Commonwealth relies upon the executive power under s 61 of the Constitution. That section provides:

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1 Inglis Clark, *Studies in Australian Constitutional Law* (1901) at 12-13.

2 Deakin, "Channel of Communication with Imperial Government: Position of Consuls: Executive Power of Commonwealth", in Brazil and Mitchell (eds), *Opinions of Attorneys-General of the Commonwealth of Australia, Volume 1: 1901-14* (1981) 129 at 132.

> "The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth."

The extent to which the executive power authorises the Commonwealth to make contracts and spend public money pursuant to them is raised in these proceedings partly because, as this Court has recently held[3] contrary to a long-standing assumption, parliamentary appropriation is not a source of spending power[4].

3 Initially there was another common assumption underpinning the written submissions in this case that, subject to the requirements of the Constitution relating to appropriations, the Commonwealth Executive can expend public moneys on any subject matter falling within a head of Commonwealth legislative power. The unanimity of that assumption did not survive oral argument and further written submissions were filed by leave after oral argument had concluded.

4 For the reasons that follow, s 61 does not empower the Commonwealth, in the absence of statutory authority, to contract for or undertake the challenged expenditure on chaplaincy services in the Darling Heights State School. That conclusion depends upon the text, context and purpose of s 61 informed by its drafting history and the federal character of the Constitution. It does not involve any judgment about the merits of public funding of chaplaincy services in schools. It does not involve any conclusion about the availability of constitutional mechanisms, including conditional grants to the States under s 96 of the Constitution and inter-governmental agreements supported by legislation[5], which might enable such services to be provided in accordance with the Constitution of the Commonwealth and the Constitutions of the States. Nor does it involve any question about the power of the Commonwealth to enter into contracts and expend moneys:

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3 *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1; [2009] HCA 23.

4 An assumption reflected in the testimony of Sir Robert Garran to the Royal Commission on Child Endowment or Family Allowances that s 81 of the Constitution conferred "an absolute power of appropriation for general purposes": Australia, *Report of the Royal Commission on Child Endowment or Family Allowances* (1929) at 10; cf the opinions of Sir Edward Mitchell KC at 11, Mr Owen Dixon KC at 11-12 and Dr Evatt KC at 13.

5 See Saunders, "Intergovernmental Agreements and the Executive Power", (2005) 16 *Public Law Review* 294.

- in the administration of departments of State pursuant to s 64 of the Constitution;
- in the execution and maintenance of the laws of the Commonwealth;
- in the exercise of power conferred by or derived from an Act of the Parliament;
- in the exercise of powers defined by reference to such of the prerogatives of the Crown as are properly attributable to the Commonwealth;
- in the exercise of inherent authority derived from the character and status of the Commonwealth as the national government.

What is rejected in these reasons is the unqualified proposition that, subject to parliamentary appropriation, the executive power of the Commonwealth extends generally to enable it to enter into contracts and undertake expenditure of public moneys relating to any subject matter falling within a head of Commonwealth legislative power.

Procedural history

5 The plaintiff is the father of four children enrolled in the Darling Heights State School. On 21 December 2010 he commenced proceedings in the original jurisdiction of this Court challenging the authority of the Commonwealth to draw money from the Consolidated Revenue Fund ("CRF") and to make payments to Scripture Union Queensland ("SUQ") to provide chaplaincy services at the Darling Heights State School. The payments were made pursuant to the Darling Heights Funding Agreement ("DHF Agreement") between the Commonwealth and SUQ and were made for the purposes of the National School Chaplaincy Program ("NSCP"), established by the Commonwealth.

6 SUQ was incorporated under the *Corporations Act* 2001 (Cth) as a public company limited by guarantee and is registered in Queensland. It is designated in its Constitution as "the Mission". Its objects are "to make God's Good News known to children, young people and their families" and "to encourage people of all ages to meet God daily through the Bible and prayer". In furtherance of these objects, SUQ shall "undertake … a variety of specialist ministries", "shall preach the need of true conversion and of holiness in heart and life" and "shall aid the Christian Church in its ministries."

7 In an amended writ of summons filed in the Court on 12 July 2011, the plaintiff sought declarations to the effect that Appropriation Acts enacted for the years 2007-2008 to 2011-2012 inclusive did not validly authorise the drawing of funds, pursuant to the DHF Agreement or any like agreement, and did not authorise the payment of funds to SUQ. Declarations were also sought relating

to the issue of drawing rights purporting to authorise the payment of public moneys to SUQ under the DHF Agreement or other similar agreements. The plaintiff claimed injunctive relief to restrain officers of the Commonwealth from making such payments for chaplaincy services at the school.

8 On 26 July 2011, Gummow J referred an amended special case for the opinion of the Full Court.

9 A number of questions were posed for determination by the amended special case. Question 1 was whether the plaintiff had standing to challenge the DHF Agreement and, for each of the financial years from 2007-2008 to 2011-2012 inclusive, the drawing of money from the CRF and the payments by the Commonwealth to SUQ. For the reasons given by Gummow and Bell JJ[6], I agree that the plaintiff had the requisite standing to support his challenge to the DHF Agreement and the payments made under it. I agree that it is unnecessary to answer the question relating to the drawing of money from the CRF for the purpose of making payments under the agreement. On the basis that the plaintiff had the requisite standing, the remaining questions were:

2. is the DHF Agreement invalid, in whole or in part, by reason that the DHF Agreement is:

   (a) beyond the executive power of the Commonwealth under s 61 of the Constitution?

   (b) prohibited by s 116 of the Constitution?

3. is the drawing of money from the CRF for the purpose of making payments under the DHF Agreement authorised by:

   (a) the 2007-2008 Appropriation Act?

   (b) the 2008-2009 Appropriation Act?

   (c) the 2009-2010 Appropriation Act?

   (d) the 2010-2011 Appropriation Act?

   (e) the 2011-2012 Appropriation Act?

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6 Reasons of Gummow and Bell JJ at [112].

4. was or is the making of the relevant payments by the Commonwealth to SUQ pursuant to the DHF Agreement unlawful by reason that the making of the payments was or is:

   (a) beyond the executive power of the Commonwealth under s 61 of the Constitution?

   (b) prohibited by s 116 of the Constitution?

I agree, again for the reasons given by Gummow and Bell JJ, that neither the DHF Agreement nor the payments made under it were prohibited by s 116 of the Constitution[7]. The only limb of that provision relevant to this case was that which prohibits the Commonwealth from requiring any religious test "as a qualification for any office … under the Commonwealth." The persons providing chaplaincy services under the DHF Agreement did not hold offices under the Commonwealth. Questions 5 and 6 related to the relief sought, dependent upon the answers to questions 2, 3 and 4, and who should pay the costs of the special case.

Factual background

10 On 29 October 2006, Prime Minister Howard announced the introduction of the NSCP for the provision of chaplaincy services in schools. The initial level of funding announced was $90 million over a three year period. That level of funding was increased in 2007 to $165 million over three years. Prime Minister Rudd announced an extension of the NSCP in November 2009. That extension involved additional funding of $42 million over the 2010 and 2011 school years.

11 Following Prime Minister Howard's announcement the Department of Education, Science and Training ("DEST") issued NSCP Guidelines. The guidelines were administrative in nature. They did not have statutory force. Revised guidelines were issued on 19 January 2007. Responsibility for the administration of the NSCP was brought under the Department of Education, Employment and Workplace Relations ("DEEWR") on 3 December 2007[8]. Further revised guidelines were issued on 1 July 2008 and 16 February 2010. From July 2008 DEEWR made funds available under the NSCP for the provision of secular pastoral care workers in accordance with a Secular Service Providers Policy ("SSP Policy"). Where a school seeking funding under the NSCP had been unable to locate a suitable chaplain, it was given a copy of the SSP Policy.

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7 Reasons of Gummow and Bell JJ at [107]-[110].

8 By operation of an Administrative Arrangements Order.

12 At the time of the Prime Minister's announcement in 2006, the Queensland Government had in place a procedural policy, published in 1998, for the supply of chaplaincy services in Queensland State schools. The policy set out requirements to be met by Queensland State schools in providing such services. Revised versions were published in July 2007 and April 2011 ("the Queensland Procedure"). Compliance with the Queensland Procedure was a condition of State Government funding. The Queensland Procedure was applicable even if the funding for a particular school's chaplaincy service did not come from the Queensland Government. Pursuant to the Queensland Procedure, SUQ entered into an agreement with the State of Queensland which required chaplains provided by SUQ to State schools to comply with a code of conduct and also with the Queensland Procedure as in force from time to time.

13 On 9 November 2007, the Commonwealth entered into the DHF Agreement with SUQ for the provision of funding under the NSCP in respect of the Darling Heights State School. That agreement was varied in October 2008 and again in May 2010. It followed a standard form used for funding under the NSCP.

14 SUQ provided chaplaincy services at the Darling Heights State School and received payments under the DHF Agreement. Three payments of $22,000 each were made on or about 14 November 2007, 15 December 2008 and 2 December 2009. A further payment of $27,063.01 was made on or about 11 October 2010. It covered the provision of NSCP chaplaincy services at the school for the period until 31 December 2011. No further payments were due to be made by the Commonwealth pursuant to the DHF Agreement.

The Darling Heights Funding Agreement

15 On 4 April 2007 the Darling Heights State School lodged an application for funding under the NSCP for chaplaincy services. The application was made in the name of the Deputy Principal of the school. It was endorsed by the Principal and the President of the Darling Heights State School Parents' and Citizens' Association. It was also endorsed by SUQ as the proposed chaplaincy service provider.

16 The application was successful and led to the DHF Agreement. The stated purpose of that agreement was "the provision of funding under the National School Chaplaincy Programme on behalf of Darling Heights State School."

17 SUQ was required under the DHF Agreement to provide chaplaincy services in accordance with the application for funding under the NSCP. The chaplain employed under the project was required to deliver services to the school and its community. A key element of that service was the provision of "general religious and personal advice to those seeking it, [and] comfort and support to students and staff, such as during times of grief". The chaplain was

not to seek to "impose any religious beliefs or persuade an individual toward a particular set of religious beliefs". SUQ was required to ensure that the chaplain signed the NSCP Code of Conduct which formed part of the DHF Agreement.

18 The DHF Agreement provided for payments to be made in accordance with a payment schedule set out in Sched 1 to the agreement. The payments made to SUQ pursuant to the DHF Agreement have been set out earlier in these reasons.

19 The funding arrangements having been outlined, it is necessary now to refer to the legal bases for those payments, relied upon by the Commonwealth and challenged by the plaintiff.

Bases for validity – the Commonwealth contentions

20 The Commonwealth submitted that the power of the Executive Government to enter into the DHF Agreement and to make payments to SUQ pursuant to the agreement and the NSCP derived from s 61 of the Constitution.

21 It should be emphasised at the outset that the executive power of the Commonwealth is to be understood as a reference to that power exercised by the Commonwealth as a polity through the executive branch of its government. It is, as the plaintiff submitted, an error to treat the Commonwealth Executive as a separate juristic person. The character of the Executive Government as a branch of the national polity is relevant to the relationship between the power of that branch and the powers and functions of the legislative branch and, particularly, the Senate.

22 The Commonwealth submissions fall to be considered in relation to aspects of executive power identified in the decisions of this Court. Those decisions have been made in the context of particular controversies about specific applications of the power. They have not required a global account of its scope. Nevertheless, it can be said that the executive power referred to in s 61 extends to:

- powers necessary or incidental to the execution and maintenance of a law of the Commonwealth[9];

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9 *R v Kidman* (1915) 20 CLR 425 at 440-441 per Isaacs J; [1915] HCA 58; *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 464 per Gummow J; [1997] HCA 36.

- powers conferred by statute[10];
- powers defined by reference to such of the prerogatives of the Crown as are properly attributable to the Commonwealth[11];
- powers defined by the capacities of the Commonwealth common to legal persons[12];
- inherent authority derived from the character and status of the Commonwealth as the national government[13].

23 It is necessary to draw a distinction between that aspect of the executive power which derives its content from the prerogatives of the Crown and that aspect defined by reference to the capacities which the Commonwealth has in common with juristic persons.

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10 *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73 at 101 per Dixon J; [1931] HCA 34; *Davis v The Commonwealth* (1988) 166 CLR 79 at 108 per Brennan J; [1988] HCA 63; *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 55 [111] per French CJ, 121 [343]-[344] per Hayne and Kiefel JJ.

11 *Farey v Burvett* (1916) 21 CLR 433 at 452 per Isaacs J; [1916] HCA 36; *Barton v The Commonwealth* (1974) 131 CLR 477 at 498 per Mason J, 505 per Jacobs J; [1974] HCA 20; *Davis v The Commonwealth* (1988) 166 CLR 79 at 93-94 per Mason CJ, Deane and Gaudron JJ, 108 per Brennan J.

12 *New South Wales v Bardolph* (1934) 52 CLR 455 at 509 per Dixon J; [1934] HCA 74; *Davis v The Commonwealth* (1988) 166 CLR 79 at 108 per Brennan J; *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 60 [126] per French CJ. As noted in *In re KL Tractors Ltd* (1961) 106 CLR 318 at 335 per Dixon CJ, McTiernan and Kitto JJ; [1961] HCA 8: "The word 'powers' here really means 'capacity', for we are dealing with the 'capacity' or a 'faculty' of the Crown in right of the Commonwealth."

13 *Victoria v The Commonwealth and Hayden* (1975) 134 CLR 338 at 397 per Mason J; [1975] HCA 52; *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd* (1983) 158 CLR 535 at 560 per Mason J; [1983] HCA 29; *Davis v The Commonwealth* (1988) 166 CLR 79 at 93-94 per Mason CJ, Deane and Gaudron JJ, 110-111 per Brennan J; *R v Hughes* (2000) 202 CLR 535 at 554-555 [38] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ; [2000] HCA 22; *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 63 [133] per French CJ, 87-88 [228], 91-92 [242] per Gummow, Crennan and Bell JJ, 116 [328]-[329] per Hayne and Kiefel JJ.

24 The mechanism for the incorporation of the prerogative into the executive power is found in the opening words of s 61 which vests the executive power of the Commonwealth in "the Queen". This has been described as a "shorthand prescription, or formula, for incorporating the prerogative – which is implicit in the legal concept of 'the Queen' – in the Crown in right of the Commonwealth."[14] As Dixon J said in *Federal Commissioner of Taxation v Official Liquidator of EO Farley Ltd*[15]:

> "This consequence flows from the fact that the executive power of the Commonwealth is vested in the Crown, which, of course, is as much the central element in the Constitution of the Commonwealth as in a unitary constitution."

25 The taxonomical question whether the prerogatives incorporated in the executive power of the Commonwealth include the common law capacities of a juristic person has been given different answers. Blackstone said that "if once any one prerogative of the crown could be held in common with the subject, it would cease to be prerogative any longer"[16] and therefore that "the prerogative is that law in case of the king, which is law in no case of the subject."[17] Dicey thought the prerogatives extended to "[e]very act which the executive government can lawfully do without the authority of the Act of Parliament"[18]. Professor George Winterton considered the dispute sterile and concluded that[19]:

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14 Winterton, *Parliament, the Executive and the Governor-General* (1983) at 50.

15 (1940) 63 CLR 278 at 304; [1940] HCA 13. See also *The Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 437 per Isaacs J; [1922] HCA 62; *In re Foreman & Sons Pty Ltd; Uther v Federal Commissioner of Taxation* (1947) 74 CLR 508 at 514 per Latham CJ, 525-526 per Starke J, 531 per Dixon J; [1947] HCA 45; *The Commonwealth v Cigamatic Pty Ltd (In Liq)* (1962) 108 CLR 372 at 377 per Dixon CJ, Kitto J agreeing at 381, Windeyer J agreeing at 390; [1962] HCA 40.

16 *Commentaries on the Laws of England* (1765), bk 1, ch 7 at 232.

17 Blackstone, *Commentaries on the Laws of England* (1765), bk 1, ch 7 at 232. See also Chitty, *A Treatise on the Law of the Prerogatives of the Crown* (1820) at 4.

18 Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed (1959) at 425.

19 Winterton, *Parliament, the Executive and the Governor-General* (1983) at 112.

> "there is neither a rational basis nor any utility in distinguishing the 'prerogative' in Blackstone's sense from the other common law powers of the Crown".

In the United Kingdom that view has been said to be reflected in "the prevalence of judicial references to Dicey's definition of the prerogative and the relative marginalization of Blackstone's" indicating "a preference for the modern over the archaic, as Dicey's definition is read as functional and modern in emphasizing residuality and parliamentary supremacy."[20] There is, nevertheless, a point to Blackstone's distinction in this case. It avoids the temptation to stretch the prerogative beyond its proper historical bounds[21]. Moreover, as appears below, one of the Commonwealth submissions suggested that the exercise of the executive "capacities" was not subject to the same constraints as the exercise of the prerogative. It is necessary now to turn to the Commonwealth submissions.

26 In its written submissions, filed before the hearing, the Commonwealth made what was presented as a limiting assumption for the purpose of its argument. The assumption was that the breadth of the executive power of the Commonwealth, in all of its aspects, is confined to the subject matters of express grants of power to the Commonwealth Parliament in ss 51, 52 and 122 of the Constitution, together with matters that, because of their distinctly national character or their magnitude and urgency, are peculiarly adapted to the government of the country and otherwise could not be carried on for the public benefit. The "aspects" of executive power so limited were said to be the prerogative in the "narrower sense"[22], the powers that arise from the position of the Commonwealth as a national government, and the capacities which the Commonwealth has in common with other legal persons. The limiting negative assumption was linked to a broad positive proposition that the executive power in all of its aspects extends to the subject matter of grants of legislative power to the Commonwealth Parliament. In oral argument at the hearing the Commonwealth nevertheless disavowed the proposition that the "executive power authorises the Executive to do anything which the Executive could be authorised by statute to do, pursuant to one of the powers in section 51". In later written submissions, filed after the hearing, in response to submissions by Tasmania and South Australia, the Commonwealth appeared to revive its broad proposition and contended that the executive power supports executive action dealing at least with matters within the enumerated heads of Commonwealth legislative power.

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20 Cohn, "Medieval Chains, Invisible Inks: On Non-Statutory Powers of the Executive", (2005) 25 *Oxford Journal of Legal Studies* 97 at 104.

21 Cohn, "Medieval Chains, Invisible Inks: On Non-Statutory Powers of the Executive", (2005) 25 *Oxford Journal of Legal Studies* 97 at 108.

22 That is, in the sense used by Blackstone as outlined above.

27 The broad proposition in each of its manifestations should not be accepted. The exercise of legislative power must yield a law able to be characterised as a law with respect to a subject matter within the constitutional grant of legislative authority to the Parliament. The subject matters of legislative power are specified for that purpose, not to give content to the executive power. Executive action, except in the exercise of delegated legislative authority, is qualitatively different from legislative action. As Isaacs J said in *R v Kidman*[23]:

> "The Executive cannot change or add to the law; it can only execute it".

To say positively and without qualification that the executive power in its various aspects extends, absent statutory support, to the "subject matters" of the legislative powers of the Commonwealth is to make a statement the content of which is not easy to divine. Neither the drafting history of s 61 of the Constitution nor its judicial exegesis since Federation overcomes that difficulty.

28 In reliance upon its broad premise, the Commonwealth submitted that the making of the DHF Agreement and the payments to SUQ were within the executive power in that:

1. The DHF Agreement provided for, and its performance involved, the provision of benefits to students, a subject matter covered by s 51(xxiiiA) of the Constitution.

2. The DHF Agreement was entered into with, and provided for assistance to, a trading corporation formed within the limits of the Commonwealth, a subject matter covered by s 51(xx) of the Constitution.

29 The Commonwealth referred to a number of authorities in support of its broad proposition. The first of those was *Victoria v The Commonwealth and Hayden* ("the *AAP case*")[24]. The focus in that case, which concerned the validity of Commonwealth payments to regional councils to provide welfare services, was upon the term "purposes of the Commonwealth" in s 81 of the Constitution. Gibbs J said[25]:

> "We are in no way concerned in the present case to consider the scope of the prerogative or the circumstances in which the Executive may act without statutory sanction."

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23 (1915) 20 CLR 425 at 441.

24 (1975) 134 CLR 338.

25 (1975) 134 CLR 338 at 379.

Observations about the executive power made in the judgments in the *AAP case* were generally cast in a form reflecting the negative limiting assumption which stood at the threshold of the Commonwealth's initial written submissions in this case. Barwick CJ said that the Executive "may only do that which has been or could be the subject of valid legislation."[26] Gibbs J said that the Executive "cannot act in respect of a matter which falls entirely outside the legislative competence of the Commonwealth"[27]. The content of executive power as Mason J explained it "does not reach beyond the area of responsibilities allocated to the Commonwealth by the Constitution"[28]. His Honour did not define those responsibilities in terms of the subject matters of Commonwealth legislative competence. Rather, he described them as[29]:

> "ascertainable from the distribution of powers, more particularly the distribution of legislative powers, effected by the Constitution itself and the character and status of the Commonwealth as a national government."

This was no simplistic mapping of the executive power on to the fields of legislative competency. His Honour described his view of the executive power as confirmed by the decisions of this Court in *The Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* ("the *Wool Tops case*")[30] and *The Commonwealth v Australian Commonwealth Shipping Board*[31]. In relation to the *Wool Tops case* his Honour referred in his footnote[32] to the joint judgment of Knox CJ and Gavan Duffy J, in which the impugned agreements were held invalid for want of constitutional or statutory authority[33]. His footnoted reference[34] to *Commonwealth Shipping Board* was to a passage in the joint judgment of Knox CJ, Gavan Duffy, Rich and Starke JJ in which their Honours

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26 (1975) 134 CLR 338 at 362.

27 (1975) 134 CLR 338 at 379.

28 (1975) 134 CLR 338 at 396.

29 (1975) 134 CLR 338 at 396.

30 (1922) 31 CLR 421.

31 (1926) 39 CLR 1; [1926] HCA 39.

32 (1975) 134 CLR 338 at 397, fn 40.

33 (1922) 31 CLR 421 at 432.

34 (1975) 134 CLR 338 at 397, fn 41.

held that an activity unwarranted in express terms by the Constitution could not be vested in the Executive[35].

30 In *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd*[36], Mason J held that Commonwealth executive power extended to the making of inter-governmental agreements between the Commonwealth and the States "on matters of joint interest, including matters which require for their implementation joint legislative action", so long as the means used and the ends sought were consistent with the Constitution[37]. His Honour said that the executive power of the Commonwealth was not "limited to heads of power which correspond with enumerated heads of Commonwealth legislative power under the Constitution."[38] Referring back to what he had said in the *AAP case*, he added[39]:

> "Of necessity the scope of the power is appropriate to that of a central executive government in a federation in which there is a distribution of legislative powers between the Parliaments of the constituent elements in the federation."

These remarks are consistent with a concept of executive power in which the character and status of the Commonwealth as a national government is an aspect of the power and a feature informing all of its aspects, including the prerogatives appropriate to the Commonwealth, the common law capacities, powers conferred by statutes, and the powers necessary to give effect to statutes. His Honour's conception of executive power was consistent with that most recently discussed by this Court in *Pape v Federal Commissioner of Taxation*[40]. It does not afford support for the broad proposition that the Executive Government of the Commonwealth can do anything about which the Parliament of the Commonwealth could make a law.

31 In *Davis v The Commonwealth*[41] the Court was again concerned with the way in which the "character and status of the Commonwealth as the government

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35 (1926) 39 CLR 1 at 10.

36 (1983) 158 CLR 535.

37 (1983) 158 CLR 535 at 560.

38 (1983) 158 CLR 535 at 560.

39 (1983) 158 CLR 535 at 560.

40 (2009) 238 CLR 1 at 62-63 [131]-[132] per French CJ, 90-91 [239] per Gummow, Crennan and Bell JJ.

41 (1988) 166 CLR 79 at 94 per Mason CJ, Deane and Gaudron JJ.

of the nation" underpinned executive action and associated incidental legislation to celebrate the bicentenary of first European settlement in Australia. It was in the context of that question that Mason CJ, Deane and Gaudron JJ held the executive power to extend most clearly "in areas beyond the express grants of legislative power … where Commonwealth executive or legislative action involves no real competition with State executive or legislative competence."[42] It is necessary, in considering *Davis*, to have regard not only to the questions which fell for decision in that case, but also to the observation of Brennan J that[43]:

> "Section 61 refers not only to the execution and maintenance of the laws of the Commonwealth (*a function characteristically to be performed by execution of statutory powers*); it refers also to 'the execution and maintenance of this Constitution' (a function to be performed by execution of powers which are not necessarily statutory)." (emphasis added)

What his Honour said was not a prescription for a general non-statutory executive power to enter contracts and spend public money on any matter that could be referred to a head of Commonwealth legislative power or could be authorised by a law of the Commonwealth. What *Davis* was about is encapsulated in the observation by Wilson and Dawson JJ[44]:

> "In this case it is enough to say that, viewing its powers as a whole, the Commonwealth must necessarily have the executive capacity under s 61 to recognize and celebrate its own origins in history. The constitutional distribution of powers is unaffected by its exercise."

32 *R v Hughes*[45], also cited in the Commonwealth's submissions, concerned the validity of a State law conferring on the Commonwealth Director of Public Prosecutions the power to institute and carry on prosecutions for indictable offences against the law of the State. In the joint judgment, consideration was given to whether the provisions of the relevant Commonwealth Act authorising regulations conferring such functions on a Commonwealth officer could be supported as laws with respect to matters incidental to the executive power pursuant to s 51(xxxix)[46]. The underlying inter-governmental agreement was

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42 (1988) 166 CLR 79 at 93-94.

43 (1988) 166 CLR 79 at 109-110.

44 (1988) 166 CLR 79 at 104.

45 (2000) 202 CLR 535.

46 (2000) 202 CLR 535 at 554-555 [38] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ.

referred to in the joint judgment as a possible illustration of the propositions stated by Mason J in *Duncan* and referred to earlier in these reasons.

33 The Commonwealth also relied upon observations in the judgments of McHugh and Gummow JJ in *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority*[47]. As McHugh J correctly pointed out, much Commonwealth executive activity does not depend on statutory authorisation. He said[48]:

> "In the ordinary course of administering the government of the Commonwealth, authority is frequently given to Commonwealth servants and agents to carry out activities in the exercise of the general powers conferred by the Constitution."

Gummow J also said[49]:

> "The executive power of the Commonwealth enables the undertaking of 'all executive action which is appropriate to the position of the Commonwealth under the Constitution and to the spheres of responsibility vested in it by the Constitution'." (footnote omitted)

34 There are undoubtedly significant fields of executive action which do not require express statutory authority. As was accepted by the Attorney-General of Tasmania in further written submissions, filed after the oral hearing, the executive power of the Commonwealth extends to the doing of all things which are necessary or reasonably incidental to the execution and maintenance of a valid law of the Commonwealth once that law has taken effect. That field of action does not require express statutory authority, nor is it necessary to find an implied power deriving from the statute. The necessary power can be found in the words "execution and maintenance … of the laws of the Commonwealth" appearing in s 61 of the Constitution. The field of non-statutory executive action also extends to the administration of departments of State under s 64 of the Constitution and those activities which may properly be characterised as deriving from the character and status of the Commonwealth as a national government. To accept those propositions is not to accept the broad proposition for which the

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47 (1997) 190 CLR 410.

48 (1997) 190 CLR 410 at 455.

49 (1997) 190 CLR 410 at 464.

Commonwealth contended, nor does such a proposition have the authority of a decision of this Court[50].

35 The Commonwealth sought to support the challenged expenditure on two other bases. The first was that the Commonwealth possesses capacities, in common with other legal persons, including the capacity to obtain information, to spend money lawfully available to be spent or to enter into contracts. As initially formulated by the Commonwealth, these capacities were not limited in their exercise by reference to the subject matters of the legislative powers of the Commonwealth. The second basis, put in oral argument, was that:

> "a relevantly unlimited power to pay and to contract to pay money is to be found in the character and status of the Commonwealth as a national government just as it would be inherent in the character and status of the Commonwealth were it a natural person."

The Commonwealth accepted that, unlike a natural person, its power to pay and to contract to pay money was constrained by the need for an appropriation and by the requirements of political accountability.

36 In oral argument, the Commonwealth submitted that its capacity to contract, and to pay money pursuant to contract, extends at least to payments made on terms and conditions that could be authorised or required by an exercise of the legislative power of the Commonwealth under s 51. The metes and bounds of aspects of executive power, however, are not to be measured by undiscriminating reference to the subject matters of legislative power. Those subject matters are diverse in character. Some relate to activities, others to classes of persons or legal entities, some to intangible property rights and some to status. Some are purposive[51]. The submission invites the Court to determine whether there is an hypothetical law which could validly support an impugned executive contract and expenditure under such a contract. There might be a variety of laws which could validly authorise or require contractual or spending activity by the Commonwealth. The location of the contractual capacity of the Commonwealth in a universe of hypothetical laws which would, if enacted, support its exercise, is not a means by which to judge its scope.

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50 In a different context it was rejected in the Full Federal Court in *Ruddock v Vadarlis* (2001) 110 FCR 491 at 542 [192] per French J, Beaumont J agreeing at 514 [95].

51 As suggested by Dixon J in *Stenhouse v Coleman* (1944) 69 CLR 457 at 471; [1944] HCA 36. See also *Murphyores Incorporated Pty Ltd v The Commonwealth* (1976) 136 CLR 1 at 11-12 per Stephen J; [1976] HCA 20.

37 The Commonwealth submitted that the exercise by its Executive Government of its capacities does not involve interference with what would otherwise be the legal rights and duties of others, nor does the Executive Government thereby displace the ordinary operation of the laws of the State or Territory in which the relevant acts take place. This is correct as far as it goes but does not provide an answer to the question of validity. There are consequences for the Federation which flow from attributing to the Commonwealth a wide executive power to expend moneys, whether or not referable to a head of Commonwealth legislative power, and subject only to the requirement of a parliamentary appropriation. Those consequences are not to be minimised by the absence of any legal effect upon the laws of the States. Expenditure by the Executive Government of the Commonwealth, administered and controlled by the Commonwealth, in fields within the competence of the executive governments of the States has, and always has had, the potential, in a practical way of which the Court can take notice, to diminish the authority of the States in their fields of operation. That is not a criterion of invalidity. It is, however, a reason not to accept the broad contention that such activities can be undertaken at the discretion of the Executive, subject only to the requirement of appropriation.

38 That aspect of executive power, which has been described as the "mere capacities of a kind which may be possessed by persons other than the Crown"[52], is not open-ended. The Commonwealth is not just another legal person like a private corporation or a natural person with contractual capacity. The governmental contract "is now a powerful tool of public administration."[53] As Professor Winterton said of the capacities exercised by the Executive Government[54]:

> "Important governmental powers, such as the power to make contracts, may be attributed to this source, but the general principle must not be pressed too far. It can be applied only when the executive and private actions are identical, but this will rarely be so, because governmental action is inherently different from private action. Governmental action inevitably has a far greater impact on individual liberties, and this affects its character."

Relevantly for present purposes, there is also the impact of Commonwealth executive power on the executive power of the States.

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52 *Davis v The Commonwealth* (1988) 166 CLR 79 at 108 per Brennan J.

53 Seddon, *Government Contracts: Federal, State and Local*, 4th ed (2009) at 65.

54 Winterton, *Parliament, the Executive and the Governor-General* (1983) at 121.

39 The Commonwealth submitted that the necessary condition, imposed by s 83 of the Constitution, for the exercise of the Commonwealth power to spend, namely that it be under appropriation made by law, had been met by the enactment of Appropriation Acts in each of the relevant years. It was not in dispute that, although a necessary condition of the exercise of executive spending power, an appropriation under s 83 is not a source of that power[55]. For the reasons given by Gummow and Bell JJ[56] it is not necessary in this case to deal with the sufficiency of the parliamentary appropriations relied upon by the Commonwealth. No Act of Parliament existed which conferred power on the Executive Government of the Commonwealth to make the impugned payments to SUQ[57]. The lawfulness of the payments therefore depended critically upon whether s 61 of the Constitution supplied that authority. That question invites consideration of the construction of s 61 by reference to its drafting history and the concept of executive government which informed it.

Executive power – prehistory and drafting history

40 There were elements of the drafting history of s 61 of the Constitution which reflected some of the Commonwealth's arguments about its scope. It is helpful to consider that history.

41 In November 1890, a few months before the first National Australasian Convention, Sir Samuel Griffith, then Premier of Queensland for the second time, proposed, by way of motion in the Legislative Assembly, a federal constitution for the Colony of Queensland involving the creation of three provinces. The motion was a political response to a long-running separatist movement[58]. Relevantly, he proposed executive governments of the provinces and a central "United Provinces" Executive Government. Their functions, he said, "should correspond with the functions assigned to their respective

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55 *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 55 [111] per French CJ, 73-74 [178]-[180] per Gummow, Crennan and Bell JJ, 113 [320] per Hayne and Kiefel JJ, 210-211 [601], 211-212 [603], 212 [606] per Heydon J.

56 Reasons of Gummow and Bell JJ at [113]-[117].

57 The Commonwealth's submission that s 44 of the *Financial Management and Accountability Act* 1997 (Cth) provided such authority is dealt with later in these reasons and in the reasons of Gummow and Bell JJ at [102]-[103].

58 See Bernays, *Queensland Politics During Sixty (1859-1919) Years* (1919) at 506-524; Thomson, "Drafting the Australian Constitution: The Neglected Documents", (1986) 15 *Melbourne University Law Review* 533.

Legislatures."[59] Queensland did not become a federation but Griffith's delineation of executive powers was to have some resonance in the drafting process which led to s 61 of the Constitution of the Commonwealth.

42 On 18 March 1891, the National Australasian Convention resolved in Committee of the Whole to approve of the formation of the framing of a Federal Constitution which would establish, among other things[60]:

> "An Executive, consisting of a Governor-General, and such persons as may from time to time be appointed as his advisers."

A Constitutional Committee was created to draft a Bill. Sir Samuel Griffith, Edmund Barton, Alfred Deakin and Andrew Inglis Clark were among its members. A list of issues for decision by the Committee at its first meeting, probably prepared by Griffith[61], included an Executive with "[p]owers correlative to those of Legislature."[62] A framework document subsequently produced by the Committee proposed an Executive Government but made no reference to its powers[63].

43 Inglis Clark prepared a draft Constitution which, in effect, became a working document in the drafting process that ensued in the 1891 Convention and the 1897-1898 Conventions. The initial draft was based upon the Constitution of the United States in so far as it assigned enumerated legislative powers to the Federal Parliament[64]. In relation to the "location, nature and

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59 Queensland, Legislative Assembly, *Parliamentary Debates* (Hansard), 11 November 1890 at 1331.

60 *Official Record of the Proceedings and Debates of the National Australasian Convention*, (Sydney), 18 March 1891 at lxii.

61 Williams, *The Australian Constitution: A Documentary History* (2005) at 53.

62 "List of matters submitted to Constitutional Committee for decision preparatory to drafting Constitution. 19 March 1891" (Document 3) in Griffith, *Successive Stages of the Constitution of the Commonwealth of Australia* (1891, reprinted 1973).

63 "Memorandum of Decisions of Constitutional Committee. Printed from day to day" (Document 4) in Griffith, *Successive Stages of the Constitution of the Commonwealth of Australia* (1891, reprinted 1973).

64 Williams, *The Australian Constitution: A Documentary History* (2005) at 68; La Nauze, *The Making of the Australian Constitution* (1972) at 25-26; Buss, "Andrew Inglis Clark's Draft Constitution, Chapter III of the *Australian Constitution*, and the Assist from Article III of the *Constitution of the United States*", (2009) 33 *Melbourne University Law Review* 718. See generally,

(Footnote continues on next page)

exercise of the Executive power"[65] it followed the Constitution of Canada embodied in the *British North America Act* 1867 (Imp) ("the British North America Act")[66]. Section 9 of that Act provided:

> "The Executive Government and Authority of and over Canada is hereby declared to continue and be vested in the Queen."

Nevertheless, Inglis Clark, perhaps having in mind the power of the central government under the Canadian Constitution, warned the delegates, in the memorandum that accompanied his draft, against[67]:

> "an Executive having an immense number of provincial offices at its disposal, and the reduction of the present local Governments to the position of large Municipal Councils with a Governor and a Ministry attached to each of them."

A relevant contrast between the British North America Act and the Commonwealth Constitution was made by the Privy Council in *Attorney-General (Cth) v Colonial Sugar Refining Co Ltd*[68]. What was in the minds of those who agreed on the resolutions which gave rise to the British North America Act "was a general Government charged with matters of common interest, and new and merely local Governments for the Provinces", which were to have "fresh and much restricted Constitutions"[69]. The Constitution adopted by the Australian colonies was "federal in the strict sense of the term"[70], in which "States, while agreeing on a measure of delegation, yet in the main continue[d] to preserve their original Constitutions."[71]

Winterton, *Parliament, the Executive and the Governor-General* (1983) and Thomson, "Executive Power, Scope and Limitations: Some Notes from a Comparative Perspective", (1983) 62 *Texas Law Review* 559.

65 Williams, *The Australian Constitution: A Documentary History* (2005) at 67.

66 30 & 31 Vict c 3.

67 Williams, *The Australian Constitution: A Documentary History* (2005) at 68.

68 (1913) 17 CLR 644; [1914] AC 237.

69 (1913) 17 CLR 644 at 652; [1914] AC 237 at 253.

70 (1913) 17 CLR 644 at 651; [1914] AC 237 at 252.

71 (1913) 17 CLR 644 at 651-652; [1914] AC 237 at 253. See La Nauze, *The Making of the Australian Constitution* (1972) at 27.

44 Clause 5 of Inglis Clark's draft Constitution provided that the executive power and authority of the "Federal Dominion of Australasia" would continue and be vested, subject to the provisions of the Bill, in the Queen[72]. Clause 6 provided for the Queen to appoint a Governor-General to exercise such "executive powers, authorities, and functions" as the Queen might deem "necessary or expedient to assign to him."[73] Charles Kingston's draft Constitution was to broadly similar effect[74].

45 The Constitution produced by the Constitutional Committee of the 1891 Convention, and submitted to the Convention, followed the Inglis Clark and Kingston model in relation to executive power. Clause 5 of the Inglis Clark draft became cl 1 of Ch II of the proposed Constitution, entitled "THE EXECUTIVE GOVERNMENT". It provided[75]:

> "The Executive power and authority of the Commonwealth is vested in the Queen, and shall be exercised by the Governor-General as the Queen's Representative."

That clause was one of two precursors of s 61.

46 The second precursor of s 61, a new provision with respect to executive power which had not appeared in either of the Inglis Clark or Kingston drafts, was cl 8 of the proposed Ch II[76]:

> "The Executive power and authority of the Commonwealth shall extend to all matters with respect to which the Legislative powers of the Parliament may be exercised, excepting only matters, being within the Legislative powers of a State, with respect to which the Parliament of that State for the time being exercises such powers."

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72 Williams, *The Australian Constitution: A Documentary History* (2005) at 80.

73 Williams, *The Australian Constitution: A Documentary History* (2005) at 81.

74 "Mr Kingston's Draft of a Constitution Bill prepared before the Convention", 26 February 1891 (Document 6) in Griffith, *Successive Stages of the Constitution of the Commonwealth of Australia* (1891, reprinted 1973). See La Nauze, *The Making of the Australian Constitution* (1972) at 26.

75 Williams, *The Australian Constitution: A Documentary History* (2005) at 329.

76 Williams, *The Australian Constitution: A Documentary History* (2005) at 329.

In speaking to the draft Bill, Sir Samuel Griffith said[77]:

> "It is proposed that [the Commonwealth's] executive authority shall be co-extensive with its legislative power. That follows as a matter of course."

The 1891 draft Constitution contained a paramountcy provision, cl 3 of Ch V, in terms identical to those which became s 109 of the Constitution[78]. That circumstance, and the non-exclusive character of most Commonwealth legislative powers, was at least consistent with the proposition that cl 8 was directed to cases in which the Commonwealth had exercised its concurrent legislative power on a particular subject matter. The proposition is, to some degree, speculative because no explanation emerged at the time of what was meant by an executive power extending to matters with respect to which the legislative powers of the Parliament could be exercised.

47 In the course of consideration by the Convention in Committee in April 1891, cl 8 was amended, on Sir Samuel Griffith's motion, to read[79]:

> "The Executive power and authority of the Commonwealth shall extend to the execution of the provisions of this Constitution, and the Laws of the Commonwealth."

In moving the amendment, Griffith said that it did not alter the intention of cl 8 and added[80]:

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77 *Official Report of the National Australasian Convention Debates*, (Sydney), 31 March 1891 at 527.

78 Williams, *The Australian Constitution: A Documentary History* (2005) at 334.

79 "Copy Draft used in Committee of the Whole Convention. 1 April to 8 April, showing amendments made by the Committee" (Document 15) in Griffith, *Successive Stages of the Constitution of the Commonwealth of Australia* (1891, reprinted 1973). An identically worded provision was contained in a proposed Constitution for a federated Queensland submitted by Griffith to the Queensland Parliament in 1892. Clause 78 provided that the "Executive power and authority" of the United Provinces was to "extend to the execution of the provisions of this Constitution, and the laws of the United Provinces": Queensland Constitution Bill (No 2) 1892 (Q), cl 78. The Bill was defeated in the Legislative Council in October 1892.

80 *Official Report of the National Australasian Convention Debates*, (Sydney), 6 April 1891 at 777.

> "As the clause stands, it contains a negative limitation upon the powers of the executive; but the amendment will give a positive statement as to what they are to be."

With what has been described as "an optimism that history has shown to be misplaced"[81] he said[82]:

> "That amendment covers all that is meant by the clause, and is quite free from ambiguity."

The stated equivalence of the original and amended forms of cl 8 raised more questions than it answered. As amended, the clause did not, in terms or by any stretch of textual analysis, describe an executive power to do any act dealing with a subject matter falling within a head of Commonwealth legislative power.

48 The 1891 draft Constitution failed to secure support from the colonial legislatures[83]. Nevertheless, it became an important working document for the Drafting Committee of the Constitutional Committee of the National Australasian Convention which met in Adelaide in 1897. In debate at the Adelaide session, Edmund Barton, responding to a proposal to insert the words "in council" after "Governor-General" in s 61, described the executive power of the Crown as "primarily divided into two classes"[84]:

> "those exercised by the prerogative … and those which are ordinary Executive Acts, where it is prescribed that the Executive shall act in Council."

The latter class he described as "the offsprings of Statutes."[85] Quick and Garran summarised his observation as a statement that[86]:

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81 Crommelin, "The Executive", in Craven (ed), *The Convention Debates 1891-1898: Commentaries, Indices and Guide* (1986) 127 at 131.

82 *Official Report of the National Australasian Convention Debates*, (Sydney), 6 April 1891 at 778.

83 La Nauze, *The Making of the Australian Constitution* (1972) at 88-89.

84 *Official Report of the National Australasian Convention Debates*, (Adelaide), 19 April 1897 at 910.

85 *Official Report of the National Australasian Convention Debates*, (Adelaide), 19 April 1897 at 910.

86 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 701.

"Executive acts were either (1) exercised by prerogative, or (2) statutory."

The draft Constitution, recommended to the 1897 Convention by the Constitutional Committee, made no substantial changes to the provisions of Ch II dealing with the location and nature of executive power. Sir Samuel Griffith, having become Chief Justice of Queensland, was not a delegate to the 1897-1898 Conventions. Nor was Inglis Clark present. His journey in 1897 to the United States, and his appointment in 1898 to the Supreme Court of Tasmania, precluded his attendance at those Conventions[87]. Nevertheless, Griffith and Inglis Clark offered written critiques of the draft Constitution under consideration in 1897. They did not propose any alterations relating to the location and scope of the executive power[88]. Nor did the Colonial Office beyond the suggestion, which was accepted, that the words "is exercisable" be substituted for the words "shall be exercised" in cl 60[89], the provision which evolved into s 61. That change was adopted at the Sydney Convention of 1897[90], along with other changes to Ch II which are not material for present purposes.

49 After consideration by colonial legislatures, pursuant to enabling Acts establishing the 1897 Convention[91], the draft Constitution was revised by the Drafting Committee. As finally presented to the Melbourne Convention in 1898 the provisions which were to become s 61 of the Constitution were embodied in two clauses found in Ch II[92]:

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87 La Nauze, *The Making of the Australian Constitution* (1972) at 93.

88 Griffith, "Notes on the Draft Federal Constitution framed by the Adelaide Convention of 1897", June 1897, reproduced in Queensland, *Journals of the Legislative Council*, vol 47 pt 1; Inglis Clark, "Proposed Amendments to the Draft of a Bill to Constitute the Commonwealth of Australia", reproduced in Williams, *The Australian Constitution: A Documentary History* (2005) at 705.

89 Williams, *The Australian Constitution: A Documentary History* (2005) at 715.

90 *Official Record of the Debates of the Australasian Federal Convention*, (Sydney), 17 September 1897 at 782.

91 *The Australasian Federation Enabling Act (South Australia)* 1895, s 26; *Australasian Federation Enabling Act* 1895 (NSW), s 26; *Australasian Federation Enabling Act* 1896 (Vic), s 26; *The Australasian Federation Enabling Act (Tasmania)* 1896, s 26; *Australasian Federation Enabling Act* 1896 (WA), s 23.

92 Williams, *The Australian Constitution: A Documentary History* (2005) at 1090 and 1092.

> "60. The executive power of the Commonwealth is vested in the Queen, and is exercisable by the Governor-General as the Queen's representative.
>
> 67. The executive power of the Commonwealth shall extend to the execution of this Constitution, and of the laws of the Commonwealth."

Clauses 60 and 67, although not debated in Committee at the Melbourne Convention of 1898, were condensed into one clause by the Drafting Committee, namely cl 61, which became s 61 of the Constitution[93].

50 The two versions of cl 8 in the 1891 draft and Griffith's comment upon moving the amendment to the clause were relied upon in the "Vondel Opinion" signed by Alfred Deakin, as Attorney-General, in 1902. In that Opinion, Deakin gave a meaning to s 61 which, at least so far as the documentary record discloses, had not been exposed during the National Australasian Convention debates. He regarded executive power as existing "antecedently to, and independently of, legislation". Its scope was "at least equal to that of the legislative power – exercised or unexercised."[94] Later in his Opinion he concluded[95]:

> "the Commonwealth has executive power, independently of Commonwealth legislation, with respect to every matter to which its legislative power extends."

Deakin's Opinion reflected that of the Secretary to the Attorney-General's Department, Robert Garran, who may have contributed to its drafting[96]. Garran,

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93 "Bill as proposed to be further amended by the Drafting Committee", (Melbourne), March 1898 at 17, reproduced in Williams, *The Australian Constitution: A Documentary History* (2005) at 1091.

94 Deakin, "Channel of Communication with Imperial Government: Position of Consuls: Executive Power of Commonwealth", in Brazil and Mitchell (eds), *Opinions of Attorneys-General of the Commonwealth of Australia, Volume 1: 1901-14* (1981) 129 at 131.

95 Deakin, "Channel of Communication with Imperial Government: Position of Consuls: Executive Power of Commonwealth", in Brazil and Mitchell (eds), *Opinions of Attorneys-General of the Commonwealth of Australia, Volume 1: 1901-14* (1981) 129 at 131.

96 Garran would have played an important role in preparing drafts and settling opinions – see Brazil and Mitchell (eds), *Opinions of Attorneys-General of the Commonwealth of Australia, Volume 1: 1901-14* (1981) at ix.

however, was later to resile from that opinion in testimony to the Royal Commission on the Constitution of the Commonwealth. He told the Royal Commission[97]:

> "I used to have the view that some common law authority might be found for the executive; but, in view of those words in section 61, I think you must seek support for it either in the Constitution itself or in an act of Parliament."

Deakin's Opinion contrasted sharply with that of Inglis Clark, expressed in 1901, that[98]:

> "It is evident that the legislative power of the Commonwealth must be exercised by the Parliament of the Commonwealth before the executive or the judicial power of the Commonwealth can be exercised by the Crown or the Federal Judiciary respectively, because the executive and the judicial powers cannot operate until a law is in existence for enforcement or exposition."

It is not to be thought that Inglis Clark thereby took a narrow view of executive power. The power declared by s 61 of the Constitution to be vested in the Queen included "the discretionary authority of the Crown within the Commonwealth" and extended "to the maintenance and execution of the Constitution and of the laws of the Commonwealth."[99] So far as the section referred to the Queen it was to be read as a declaration of an existing fact and not as an original grant of executive authority to her within the Commonwealth[100].

51 The extension of the executive power in the closing words of s 61 was not the subject of any exegesis by Quick and Garran, beyond their observation that the execution and maintenance of the Constitution and of laws passed pursuant to it would be "foremost" among the powers and functions conferred upon the Governor-General[101].

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97 Australia, Royal Commission on the Constitution of the Commonwealth, *Report of Proceedings and Minutes of Evidence* (Canberra), 27 September 1927 at 89.

98 Inglis Clark, *Studies in Australian Constitutional Law* (1901) at 38.

99 Inglis Clark, *Studies in Australian Constitutional Law* (1901) at 64.

100 Inglis Clark, *Studies in Australian Constitutional Law* (1901) at 64.

101 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 702.

52 The similarity between the words of extension in s 61 and the language of s 101 of the Constitution, which provides for the establishment and functions of the Inter-State Commission, is striking[102]. In *New South Wales v The Commonwealth* ("the *Inter-State Commission case*")[103], which was concerned with s 101, Isaacs J, with whom Powers J agreed[104], described s 61 as according with Blackstone's observation that[105]:

> "though the making of laws is entirely the work of a distinct part, the legislative branch, of the sovereign power, yet the manner, time, and circumstances of putting those laws in execution must frequently be left to the discretion of the executive magistrate."

Barton J, dissenting in the result, equated the words "execute and maintain" with "enforce and uphold the laws of which they are the guardians."[106]

53 Professor W Harrison Moore, writing in 1910, noted that the colonial constitutions were "almost silent on the subject of the powers as of the organization of the Executive."[107] He identified as one function of the Executive the representation of the Commonwealth whenever necessary, "whether as a political organism, or as a juristic person making contracts and appearing as a party in Courts of justice."[108] That function required no express power. It flowed from the establishment of the Commonwealth as a new political community. The

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102 Section 101 provides:

> "There shall be an Inter-State Commission, with such powers of adjudication and administration as the Parliament deems necessary for the execution and maintenance, within the Commonwealth, of the provisions of this Constitution relating to trade and commerce, and of all laws made thereunder."

103 (1915) 20 CLR 54; [1915] HCA 17.

104 (1915) 20 CLR 54 at 106; Powers J also agreed with Griffith CJ.

105 (1915) 20 CLR 54 at 89, quoting *Commentaries on the Laws of England* (1765), bk 1, ch 7 at 261.

106 (1915) 20 CLR 54 at 72.

107 Harrison Moore, *The Constitution of the Commonwealth of Australia*, 2nd ed (1910) at 294.

108 Harrison Moore, *The Constitution of the Commonwealth of Australia*, 2nd ed (1910) at 295.

other functions were those conferred by the terms of s 61[109]. In relation to s 61, the Commonwealth Executive had more to do with the subject matters of Commonwealth legislative power than just giving effect to Commonwealth legislation[110]:

> "In relation to all such matters, the Commonwealth Executive does … represent the Commonwealth and all the States to the outside world, whether there has been any Commonwealth legislation or not".

Further, where a power or duty committed to "the Commonwealth" under the Constitution was of a kind exercisable at common law by the Executive, the Commonwealth Executive was empowered to take such action as the common law allowed[111].

54 Professor A Berriedale Keith, in the first edition, published in 1912, of *Responsible Government in the Dominions*, described the executive power of the Commonwealth as "very large", adding[112]:

> "It includes in addition to the power conferred by Commonwealth Acts the power sole and exclusive over the transferred departments."

In a subsequent edition, he also proposed that "[t]he executive power in the Commonwealth is little affected by considerations of the federal character of the Commonwealth."[113]

55 The Commonwealth submitted that it had been part of the accepted understanding of the Constitution, since the time of the National Australasian Convention debates, that the executive power of the Commonwealth supports executive acts dealing at least with matters within the enumerated heads of

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109 Harrison Moore, *The Constitution of the Commonwealth of Australia*, 2nd ed (1910) at 296.

110 Harrison Moore, *The Constitution of the Commonwealth of Australia*, 2nd ed (1910) at 296.

111 Harrison Moore, *The Constitution of the Commonwealth of Australia*, 2nd ed (1910) at 297. An example was the exercise of the discharge of the duty imposed by s 119 of protecting every State against invasion and, on the application of the executive government of the State, against domestic violence.

112 Berriedale Keith, *Responsible Government in the Dominions* (1912), vol 2 at 811.

113 Berriedale Keith, *Responsible Government in the Dominions*, 2nd ed (1928), vol 2 at 623.

Commonwealth legislative power. There is no doubt that at the time of the Convention debates, the statement that the distribution of executive powers in a federation would follow the distribution of legislative powers was not novel. However, its meaning appears to have been no clearer then than it is now.

56 There is little evidence to support the view that the delegates to the National Australasian Conventions of 1891 and 1897-1898, or even the leading lawyers at those Conventions, shared a clear common view of the working of executive power in a federation. The Constitution which they drafted incorporated aspects of the written Constitutions of the United States and Canada, and the concept of responsible government derived from the British tradition. The elements were mixed in the Constitution to meet the Founders' perception of a uniquely Australian Federation. In respect of executive power, however, that perception was not finely resolved.

57 Quick and Garran distinguished the "Federal Executive power" conferred by s 61 from "the Executive power reserved to the States."[114] The executive power of the Commonwealth as a united political community was divided into two parts: "that portion which belongs to the Federal Government, in relation to Federal affairs … and that portion which relates to matters reserved to the States"[115]. Nevertheless, federal executive power and State executive power were "of the same nature and quality"[116].

58 The tension between the operation of executive powers and functions under a system of responsible cabinet government and a federal constitution with a bi-cameral legislature**,** one element of which was a States' House, represented a difficulty for some leading figures in the Federation movement. Professor Winterton wrote that there was "a direct conflict between responsible government as practised in Britain and the federal model the framers adopted from the United States."[117] Quick and Garran attributed to Sir Samuel Griffith, Sir Richard Baker, Sir John Cockburn, Inglis Clark and Mr GW Hackett the view that "the Cabinet system of Executive is incompatible with a true Federation."[118]

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114 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 701.

115 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 701.

116 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 702.

117 Winterton, *Parliament, the Executive and the Governor-General* (1983) at 5.

118 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 706.

At the 1891 Convention at Sydney, Hackett said, in words which have frequently been quoted, "either responsible government will kill federation, or federation … will kill responsible government."[119] That sentiment was repeated by the Chair of Committees at the Convention, Sir Richard Baker, in a speech at Adelaide in 1897 in which he said[120]:

> "if we adopt this Cabinet system of Executive it will either kill Federation or Federation will kill it; because we cannot conceal from ourselves that the very fundamental essence of the Cabinet system of Executive is the predominating power of one Chamber."

As Quick and Garran observed, the views of the objectors were not accepted. The system of responsible government under the British Constitution was embedded in the federal Constitution and cannot now be disturbed without amendment to that Constitution[121]. This Court has acknowledged the centrality of responsible government in the Constitution[122]. Quick and Garran predicted correctly that the system of responsible government would "tend in the direction of the nationalization of the people of the Commonwealth, and [would] promote the concentration of Executive control in the House of Representatives."[123] To accept the correctness of that prediction is not to reflect upon the desirability or otherwise of the way in which the operation of our constitutional system of government has developed.

59 Quick and Garran characterised s 61 as grafting the "modern political institution, known as responsible government" onto the "ancient principle of the

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119 *Official Report of the National Australasian Convention Debates*, (Sydney), 12 March 1891 at 280.

120 *Official Report of the National Australasian Convention Debates*, (Adelaide), 23 March 1897 at 28. See also Baker, *The Executive in a Federation* (1897) at 3-4.

121 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 706-707.

122 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 275 per Dixon CJ, McTiernan, Fullagar and Kitto JJ; [1956] HCA 10. See also *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73 at 114 per Evatt J.

123 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 707.

Government of England that the Executive power is vested in the Crown"[124]. The difficulty, as they explained it, was[125]:

> "in a Federation, it is a fundamental rule that no new law shall be passed and no old law shall be altered without the consent of (1) a majority of the people speaking by their representatives in one House, and (2) a majority of the States speaking by their representatives in the other house; that the same principle of State approval as well as popular approval should apply to Executive action, as well as to legislative action; that the State should not be forced to support Executive policy and Executive acts merely because ministers enjoyed the confidence of the popular Chamber".

Much has changed in the expectations and practices of government since the time of the Conventions. The financial dominance of the Commonwealth Government in relation to the States was no doubt anticipated by some delegates, although almost certainly not to the degree which has eventuated, particularly in the field of taxation, the use of conditional grants under s 96 and the erroneous reliance upon the appropriations provisions of the Constitution as a source of spending power. Another important development has been the expansion of the functions of government into "activities of an entrepreneurial or commercial kind which, in general, were previously engaged in only by subjects of the Crown."[126]

60 There is no clear evidence of a common understanding, held by the framers of the Constitution, that the executive power would support acts of the Executive Government of the Commonwealth done without statutory authority provided they dealt with matters within the enumerated legislative powers of the Commonwealth Parliament. A Commonwealth Executive with a general power to deal with matters of Commonwealth legislative competence is in tension with the federal conception which informed the function of the Senate as a necessary organ of Commonwealth legislative power. It would undermine parliamentary control of the executive branch and weaken the role of the Senate. The plaintiff submitted that the requirement of parliamentary appropriation is at best a weak control, particularly given the power of the Executive to advise the Governor-General to specify the purpose of appropriations. The inability of the Senate under s 53 to initiate laws appropriating revenue and its inability to amend proposed laws appropriating revenue for "the ordinary annual services of the

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124 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 703.

125 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 706.

126 *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 438 per Dawson, Toohey and Gaudron JJ.

Government" also point up the relative weakness of the Senate against an Executive Government which has the confidence of the House of Representatives. As the Solicitor-General of Queensland put it in oral argument, the Senate has limited powers to deal with an Appropriation Bill, whereas it has much greater powers with respect to general legislation which might authorise the Executive to spend money in specific ways.

61 The function of the Senate as a chamber designed to protect the interests of the States may now be vestigial. That can be attributed in part to the predicted evolution whereby responsible government has resulted in a powerful Executive which, using the mechanisms of party discipline, is in a position to exert strong influence over the government party or parties in both Houses. The Executive has become what has been described as "the parliamentary wing of a political party" which "though it does not always control the Senate … nevertheless dominates the Parliament and directs most exercises of the legislative power."[127] However firmly established that system may be, it has not resulted in any constitutional inflation of the scope of executive power, which must still be understood by reference to the "truly federal government" of which Inglis Clark wrote in 1901 and which, along with responsible government, is central to the Constitution.

The executive capacity to contract and spend

62 The Commonwealth's principal submissions located the contractual and spending powers of the Executive in that aspect of executive power analogous to the capacities of a legal person. Those submissions invite reflection upon the way in which contractual and other "capacities" of the Executive have been considered by this Court in the past.

63 An early example of such consideration concerned the power of the Executive to undertake inquiries. It was described by Griffith CJ in *Clough v Leahy*[128] as "not a prerogative right" but "a power which every individual citizen possesses"[129]. That characterisation does not convey any coercive element in the

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127 Mantziaris, "The Executive – A Common Law Understanding of Legal Form and Responsibility", in French, Lindell and Saunders (eds), *Reflections on the Australian Constitution* (2003) 125 at 130.

128 (1904) 2 CLR 139 at 156, Barton and O'Connor JJ concurring at 163; [1904] HCA 38. The case did not concern the executive power of the Commonwealth but that of a State government to establish a royal commission of inquiry.

129 An analogy not accepted by Mason J in *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25 at 88-89; [1982] HCA 31.

power. However, coercion could be supported by statute. As O'Connor J said in *Huddart, Parker & Co Pty Ltd v Moorehead*[130]:

> "The right to ask questions, which, as was pointed out by this Court in *Clough v Leahy*, the Executive Government has in common with every other citizen, is of little value unless it has behind it the authority to enforce answers and to compel the discovery and production of documents." (footnote omitted)

Importantly, the extent of the "power" was not at large. It was at least constrained by the distribution of powers in the Constitution. In *Colonial Sugar Refining Co Ltd v Attorney-General (Cth)*[131] the Court divided equally on the question whether s 51(xxxix) of the Constitution authorises legislation, incidental to the executive power, compelling persons to give evidence on matters outside the constitutional authority of the Commonwealth[132]. Griffith CJ, who viewed the question from a federal perspective, rejected the proposition, as one which[133]:

> "implicitly denies the whole doctrine of distribution of powers between the Commonwealth and the States, which is the fundamental basis of the federal compact."

On appeal to the Privy Council, pursuant to s 72 of the Constitution, the view of the Chief Justice and Barton J prevailed[134].

64 Even within fields of activity referable to heads of legislative power, the capacities of the Commonwealth Executive analogous to those of a juristic

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130 (1909) 8 CLR 330 at 377; [1909] HCA 36. Moreover, the validity of a commission of inquiry was not conditioned upon the validity of a statute conferring coercive powers on the Commissioner: *McGuinness v Attorney-General (Vict)* (1940) 63 CLR 73 at 102 per Dixon J, 106 per McTiernan J; [1940] HCA 6; *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25 at 51 per Gibbs CJ, see also at 67 per Stephen J, 120 per Aickin J; cf at 131 per Wilson J.

131 (1912) 15 CLR 182; [1912] HCA 94.

132 Griffith CJ and Barton J answered the question in the negative; Isaacs and Higgins JJ dissented.

133 (1912) 15 CLR 182 at 194; see also at 207 per Barton J.

134 *Attorney-General (Cth) v Colonial Sugar Refining Co Ltd* (1913) 17 CLR 644; [1914] AC 237.

person did not give it free rein. In *Heiner v Scott*[135] Griffith CJ rejected the proposition that the carrying on of ordinary banking business was a function of the Executive Government of the Commonwealth conferred by the Constitution. He said[136]:

> "It may be that the carrying on of such a business is not unlawful in the sense of being forbidden by law, but the liberty to do so cannot be regarded as anything more than a permissive faculty, permitted only in the sense of not being prohibited by positive law."

Powers J also observed that it was "not seriously contended that the Constitution gave the Commonwealth special power to establish an ordinary trading bank for profit"[137]. The question was not considered by the other Justices. In any event it was not suggested by anyone in that case that the conferral upon the federal Parliament, by s 51(xiii), of a power to make laws with respect to banking, could support the existence of an executive power to carry on the business of banking.

65 Section 61 was invoked by the Commonwealth as a source of contractual power in the *Wool Tops case*[138]. The Commonwealth had made agreements, without statutory backing, under which it would give necessary regulatory consents[139] for the acquisition of wool and sheepskins and the manufacture and sale of wool tops by the Colonial Combing, Spinning and Weaving Co Ltd. Section 61, however, did not confer power directly on the Commonwealth to make or ratify the agreements. In so holding, Knox CJ and Gavan Duffy J accepted that Ministers could make contracts in the administration of their

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135 (1914) 19 CLR 381; [1914] HCA 82. The case concerned the application of Queensland stamp duty legislation to the Commonwealth Bank. The question whether the Bank exercised a function of the Executive Government of the Commonwealth was anterior to an invocation of the doctrine of immunity of instrumentalities, overturned in the *Engineers' case*: *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129; [1920] HCA 54.

136 (1914) 19 CLR 381 at 393-394.

137 (1914) 19 CLR 381 at 402.

138 (1922) 31 CLR 421.

139 The relevant regulations were the War Precautions (Wool) Regulations 1916 (Cth) and the War Precautions (Sheepskins) Regulations 1916 (Cth), made pursuant to the *War Precautions Act* 1914-1916 (Cth). They gave effect to a scheme underpinning an arrangement under which the Imperial Government would acquire the entire woolclip. The historical background is described in *John Cooke & Co Pty Ltd v The Commonwealth* (1922) 31 CLR 394 at 399-404; [1922] HCA 60.

departments pursuant to s 64[140]. The impugned agreements had not been made on that basis. Isaacs J held that the Crown's discretion to make contracts involving the expenditure of public money would not be entrusted to Ministers unless sanctioned either by direct legislation or by appropriation of funds[141].

66 An attempt by the Commonwealth to invoke s 61 in support of an agreement for the supply of plant made by a Commonwealth statutory authority was unsuccessful in *The Commonwealth v Australian Commonwealth Shipping Board*[142]. The primary debate was about the scope of the statutory powers conferred on the Shipping Board and their constitutional underpinning. Knox CJ, Gavan Duffy, Rich and Starke JJ, however, noted that the executive power of the Commonwealth had been touched on in submissions and said[143]:

> "it is impossible to say that an activity unwarranted in express terms by the Constitution is nevertheless vested in the Executive, and can therefore be conferred as an executive function upon such a body as the Shipping Board."

67 As a general rule the power of the Commonwealth to make agreements has always been regarded as subject to statutory constraints[144]. So much was explained in *The Commonwealth v Colonial Ammunition Co Ltd*[145]. The appropriation provisions of the Constitution could not be relied upon to support an exercise of executive power involving expenditure which was dependent for its validity upon the satisfaction of a statutory condition[146]. A general appropriation was sufficient to satisfy "one 'necessary legal condition of the transaction'"; it did not satisfy all other legal conditions[147].

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140 (1922) 31 CLR 421 at 432.

141 (1922) 31 CLR 421 at 451.

142 (1926) 39 CLR 1.

143 (1926) 39 CLR 1 at 10.

144 *Brown v West* (1990) 169 CLR 195 at 202; [1990] HCA 7. See also *The Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 450 per Isaacs J.

145 (1924) 34 CLR 198; [1924] HCA 5.

146 (1924) 34 CLR 198 at 222-225 per Isaacs and Rich JJ.

147 *New South Wales v Bardolph* (1934) 52 CLR 455 at 469 per Evatt J, commenting on the judgment of Isaacs and Rich JJ in *Colonial Ammunition*.

68 The question whether the Commonwealth required statutory authority to enter into contracts was discussed in testimony given at the Royal Commission on the Constitution of the Commonwealth by Owen Dixon KC, speaking on behalf of a Committee of Counsel of Victoria. He criticised the view that the words of extension in s 61 were words of limitation restricting the Executive in effect "to operating under and in pursuance of the laws made by Parliament."[148] While acknowledging that there was room for flexibility within that interpretation, he doubted whether the propounded restriction was intended or in practice observed[149]. The restrictive view, applied to the power of the Commonwealth to make contracts, would mean[150]:

> "that, unless a contract was in some way incidental to the administration of a statute it would be outside the power of the executive to make it."

Against a background of judicial decisions which required prior appropriation to support a Crown contract he said[151]:

> "We cannot help feeling, however, that the result is unduly to hamper the executive Government if it observes the restrictions, or to inflict great hardship upon the subject who contracts with the Crown if the executive fails to observe the restrictions."

On the other hand, he suggested that it would be competent for the Parliament to pass a General Contracts Act which would remove the difficulty unless it were desired to confer greater contractual power upon the Executive than the subjects of legislative power would permit Parliament to give[152]. It is not necessary for present purposes to express a concluded view on that suggestion. There is no such statute.

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148 Australia, Royal Commission on the Constitution of the Commonwealth, *Minutes of Evidence*, (Melbourne), 13 December 1927 at 781.

149 Australia, Royal Commission on the Constitution of the Commonwealth, *Minutes of Evidence*, (Melbourne), 13 December 1927 at 781.

150 Australia, Royal Commission on the Constitution of the Commonwealth, *Minutes of Evidence*, (Melbourne), 13 December 1927 at 781.

151 Australia, Royal Commission on the Constitution of the Commonwealth, *Minutes of Evidence*, (Melbourne), 13 December 1927 at 781.

152 Australia, Royal Commission on the Constitution of the Commonwealth, *Minutes of Evidence*, (Melbourne), 13 December 1927 at 781.

69 The Commonwealth looked for a general contracts statute in s 44(1) of the *Financial Management and Accountability Act* 1997 (Cth) ("FMA Act") which provides:

> "A Chief Executive must manage the affairs of the Agency in a way that promotes proper use of the Commonwealth resources for which the Chief Executive is responsible."

There is a note to that provision which reads:

> "A Chief Executive has the power to enter into contracts, on behalf of the Commonwealth, in relation to the affairs of the Agency. Some Chief Executives have delegated this power under section 53."

In the case of an agency that is a Department of State, the Chief Executive is the Secretary of that Department for the purposes of the FMA Act[153]. The Secretary of a Department is responsible, under s 57(1) of the *Public Service Act* 1999 (Cth), for "managing the Department".

70 The Commonwealth submitted that implicit in the obligation to promote "proper use" of "Commonwealth resources for which the Chief Executive is responsible" is the power to direct those resources to government policies identified in Portfolio Budget Statements as falling within the scope of an appropriation, and any applicable Administrative Arrangements Order made by the Governor-General. Performance of that function, it was said, is impossible unless in conferring it, Parliament is understood to have conferred on the Executive Government power to spend money that has been appropriated and to enter into contracts that relate to such expenditure. The note to s 44(1) was inserted by the *Financial Framework Legislation Amendment Act* 2008 (Cth). It was relied upon by the Commonwealth as extrinsic material, to which regard might be had pursuant to s 15AB(2)(a) of the *Acts Interpretation Act* 1901 (Cth). The note was said to confirm that s 44(1) confers a statutory "power" to enter into contracts on behalf of the Commonwealth in relation to the affairs of the agency that is capable of being delegated under s 53(1) of the FMA Act. The Commonwealth submitted that the DHF Agreement was signed for the State Manager (South Australia) of DEST, acting as a delegate of the Secretary of the Department, exercising the Chief Executive's power under s 44 of the FMA Act.

71 The plaintiff directed attention to the collocation "manage the affairs of the Agency" in s 44(1) and the similarity of its language to s 57(1) of the Public Service Act. The plaintiff submitted that neither the purported entry by the Commonwealth into the DHF Agreement nor its performance occurred in the

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153 FMA Act, s 5.

course of the Secretary of DEST and then of DEEWR performing a managerial function. That submission should be accepted. As is pointed out in the reasons of Gummow and Bell JJ[154], the provisions of the FMA Act are directed to the prudent conduct of financial administration. It is not a source of power to spend that which is to be administered.

72 Suffice it to say for present purposes, there was no statute, general or specific, identified by the parties, which could be invoked as a source of executive power to enter into the DHF Agreement and to undertake the challenged expenditure.

73 In *Attorney-General (Vict) v The Commonwealth* ("the *Clothing Factory case*")[155] the Commonwealth successfully argued that it had statutory authority to conduct a clothing factory providing uniforms for defence purposes and for public and private sector employees. Rich J accepted that the legislative power of the Parliament enabled it to authorise the Executive to establish and conduct a clothing factory to supply all the needs of the Commonwealth Government. However, his Honour was not prepared to accede to the argument that[156]:

> "without legislative power, the Commonwealth Executive can enter into business operations simply because it is a juristic entity, and in conducting business is not exercising governmental power over the subject."

That view seems to have been echoed in *Australian Woollen Mills Pty Ltd v The Commonwealth*[157]. The decision in that case turned on a finding that a contractual claim against the Commonwealth failed for want of a contract. Nevertheless the Court said[158]:

> "Questions of general constitutional law have … been excluded from consideration, but, if there was an intention on the part of the Government to assume a legal obligation, one would certainly have expected statutory authority to be sought".

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154 Reasons of Gummow and Bell JJ at [102]-[103].

155 (1935) 52 CLR 533; [1935] HCA 31.

156 (1935) 52 CLR 533 at 562.

157 (1954) 92 CLR 424; [1954] HCA 20.

158 (1954) 92 CLR 424 at 461. The Court appears to have proceeded upon the premise that a parliamentary appropriation itself would have provided the necessary statutory authority for the payment of the subsidy which was in issue in that case.

74 An important support for the exercise of contractual power by an executive government in advance of parliamentary appropriation was established by the decision of this Court in *New South Wales v Bardolph*[159]. The case is authority for the proposition, applicable to the Commonwealth, that the Executive Government of New South Wales could enter into a binding contract absent prior parliamentary appropriation for the expenditure of money under the contract. The case concerned a contract made by the Tourist Bureau of New South Wales for the provision of advertising services. The Tourist Bureau had been recognised for many years, both in Parliament and out, as part of the established service of the Crown[160]. Rich J characterised the making of the contract for advertising services as "an ordinary incident of this particular function of Government"[161]. Starke J made observations to similar effect[162]. Dixon J, with whom Gavan Duffy CJ agreed[163], made a similar point, saying that[164]:

> "No statutory power to make a contract *in the ordinary course of administering a recognized part of the government of the State* appears to me to be necessary in order that, if made by the appropriate servant of the Crown, it should become the contract of the Crown, and, subject to the provision of funds to answer it, binding upon the Crown." (emphasis added)

The words emphasised in the judgment of Dixon J reflect a characterisation of the contract in issue in *Bardolph* upon which all the members of the Court agreed. That characterisation suggests that the State executive power considered in *Bardolph* was analogous to the powers of Commonwealth Ministers, derived from s 64 of the Constitution, in relation to the administration of government departments. The case is not authority for the existence of a general contractual power derived from s 61 capable of exercise without statutory authority.

75 Professor Enid Campbell criticised the apparent discrimen in *Bardolph* which would confine its application to contracts "for the public service as are

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159 (1934) 52 CLR 455.

160 (1934) 52 CLR 455 at 496 per Rich J.

161 (1934) 52 CLR 455 at 496.

162 (1934) 52 CLR 455 at 502-503.

163 (1934) 52 CLR 455 at 493.

164 (1934) 52 CLR 455 at 508.

incidental to the ordinary and well recognized functions of Government"[165]. She made the point that a rule which made the validity of non-statutory Crown contracts dependent upon the normality of their subject matters as an aspect of public administration had "the effect of enlarging the area of executive authority by prescription."[166] In the context of s 61 of the Constitution and its relationship to s 64, she said[167]:

> "The Crown's power to contract is not, it is true, a prerogative power, but if the power to contract without statutory authorization has to be found within the terms of The Constitution, s 61 seems to provide just as defensible a constitutional basis as does s 64."

76 Professor Leslie Zines expressed his agreement with Professor Campbell, observing[168]:

> "What activities the government should engage in is the province of the executive. What is normal or not will depend partly on what policies and activities have in the past been pursued and for what length of time. Why should this matter to the issue of whether parliamentary authorisation is needed?"

Having regard to the sufficiency of parliamentary control of appropriations, it was "hard to see how the supposed distinction between types of contracts leads to any significant bolstering of responsible government."[169] Professor Zines pointed to a passage from the judgment of Dixon J in *Bardolph* where, without referring to any limitations, he said[170]:

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165 Campbell, "Commonwealth Contracts", (1970) 44 *Australian Law Journal* 14 at 15, quoting *New South Wales v Bardolph* (1934) 52 CLR 455 at 496 per Rich J.

166 Campbell, "Commonwealth Contracts", (1970) 44 *Australian Law Journal* 14 at 15.

167 Campbell, "Commonwealth Contracts", (1970) 44 *Australian Law Journal* 14 at 17. See also Campbell, "Federal Contract Law", (1970) 44 *Australian Law Journal* 580.

168 Zines, *The High Court and the Constitution*, 5th ed (2008) at 349-350.

169 Zines, *The High Court and the Constitution*, 5th ed (2008) at 350.

170 Zines, *The High Court and the Constitution*, 5th ed (2008) at 350, referring to *New South Wales v Bardolph* (1934) 52 CLR 455 at 509 per Dixon J.

> "the principles of responsible government do not disable the Executive from acting without the prior approval of Parliament, nor from contracting for the expenditure of moneys conditionally upon appropriation by Parliament and doing so before funds to answer the expenditure have actually been made legally available."

77 Doctor Nicholas Seddon has observed, in reflecting upon Professor Campbell's view, that in contrast to the executive power of New South Wales, the Commonwealth's power is limited. Further, as he has correctly pointed out, the assumption that the Commonwealth is not exercising powers that are peculiarly governmental when entering into a contract is increasingly unable to be justified[171]. Professor Winterton, who thought that the Commonwealth would have power to enter into contractual relations about matters outside the sphere of its legislative power, also observed that[172]:

> "bearing in mind the ability of governments to use their contract power to achieve *de facto* regulation of an activity, the significance of the federal contract power should not be underrated." (footnote omitted)

Professor Cheryl Saunders and Kevin Yam, in a paper published in 2004, pointed to the increasing use of government contracts for the performance of governmental functions and their use as a regulatory tool[173]. That is perhaps illustrated in this case by the quasi-regulatory setting in which the DHF Agreement was made. That setting included the NSCP Guidelines, issued by the responsible department. Under those guidelines, participating schools and their communities were required to "engage a school chaplain and demonstrate how the services provided by the school chaplain achieve the outcomes required by the [NSCP]." Funding provided under the program could "only be used for expenditure that directly relates to the provision of chaplaincy services." Funding was provided "subject to the provision of appropriate project performance reporting."

78 The DHF Agreement was itself prescriptive about the nature of the services to be delivered by SUQ in the Darling Heights State School and required SUQ chaplains used in the school to sign the NSCP Code of Conduct which formed part of the DHF Agreement. Its implementation was amenable to the grant of supervision and control appropriate to the delivery of a governmental service. The agreement provided that funding was conditional upon, inter alia,

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171 Seddon, *Government Contracts: Federal, State and Local*, 4th ed (2009) at 64-65.

172 Winterton, *Parliament, the Executive and the Governor-General* (1983) at 47.

173 Saunders and Yam, "Government Regulation by Contract: Implications for the Rule of Law", (2004) 15 *Public Law Review* 51 at 52.

the submission of "a detailed financial statement regarding all income and expenditure relating to the [NSCP]" and progress reports. It was also agreed that in the event of a breach of the NSCP Code of Conduct by the school chaplain, the Commonwealth might require SUQ to repay some or all of the funding provided.

79 In considering criticisms of the taxonomy of government contracts referred to in the judgments in *Bardolph*, it is necessary to bear in mind that that case concerned the power of the Executive in a setting analogous to that of a unitary constitution. It was not a case about the relationship between Commonwealth and State Executives and their contractual and spending powers under a federal constitution. Nor did it involve a consideration of the relationship between the executive power conferred by s 61 of the Constitution and the administration of departments of State of the Commonwealth for which s 64 of the Constitution provides. The latter section may give rise to questions of classification. Any consideration of its operation must recognise that it is a constitutional provision written to accommodate change in governmental practice. It is not a repository for bright line categories. As Gleeson CJ said in *Re Patterson; Ex parte Taylor*[174]:

> "The concept of administration of departments of State, appearing in s 64, is not further defined. This is hardly surprising. The practices and conventions which promote efficient and effective government administration alter over time, and need to be able to respond to changes in circumstances and in theory."

In similar vein, Gummow and Hayne JJ observed[175]:

> "The Court should favour a construction of s 64 which is fairly open and which allows for development in a system of responsible ministerial government."

Although both those comments were made in a case concerning the validity of the appointment of two persons to administer the same government department, they have a more general application relevant to the scope of the concept of departmental administration with which s 64 is concerned. It is sufficient for present purposes to say that the issue before the Court in *Bardolph* did not involve consideration of the powers of the Executive Government of the Commonwealth acting under ss 61 and 64 of the Constitution. Moreover, subsequent commentary about the application of that case to the Commonwealth Executive occurred in a setting in which parliamentary appropriations were thought to be a source of substantive power to spend public money.

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174 (2001) 207 CLR 391 at 403 [15]; [2001] HCA 51.

175 (2001) 207 CLR 391 at 460 [211].

80 A wide view of the executive power to make contracts pursuant to s 61 has been expressed by a number of academic writers[176], although not without misgivings[177]. Professor Winterton, in his seminal textbook *Parliament, the Executive and the Governor-General*, said[178]:

> "As the common law powers of the Crown have been incorporated into the executive power of the Commonwealth in s 61, the Crown in right of the Commonwealth has inherited this common law power; accordingly, the Commonwealth government has power to enter into contracts without prior parliamentary authorization." (footnotes omitted)

He cited in support a comment by Viscount Haldane in *Kidman v The Commonwealth*[179], and an observation by Aickin J, with which Barwick CJ agreed, in *Ansett Transport Industries (Operations) Pty Ltd v The Commonwealth*[180].

81 In *Kidman*, Viscount Haldane, in the course of argument in the Privy Council, referred to the decision of the Privy Council in *Commercial Cable Co v Newfoundland Government*[181] and said[182]:

> "In that case we distinctly laid it down … that the Governor-General, as representing the Crown, could enter into contracts as much as he liked, and even, if he made the words clear, to bind himself personally."

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176 Seddon, *Government Contracts: Federal, State and Local*, 4th ed (2009) at 61; Zines, *The High Court and the Constitution*, 5th ed (2008) at 349-351; Puri, *Australian Government Contracts: Law and Practice* (1978) at 44-46; Sawer, *Federation Under Strain: Australia 1972-1975* (1977) at 70-71; Campbell, "Commonwealth Contracts", (1970) 44 *Australian Law Journal* 14 at 16-17, 23.

177 See generally, Saunders and Yam, "Government Regulation by Contract: Implications for the Rule of Law", (2004) 15 *Public Law Review* 51, especially at 57-59.

178 Winterton, *Parliament, the Executive and the Governor-General* (1983) at 45.

179 [1926] ALR 1.

180 (1977) 139 CLR 54 at 113, Barwick CJ agreeing at 61; [1977] HCA 71.

181 [1916] 2 AC 610.

182 [1926] ALR 1 at 2.

In an obiter observation, Aickin J said in *Ansett Transport Industries*[183]:

> "It is plain that even without statutory authority the Commonwealth in the exercise of its executive power may enter into binding contracts affecting its future action."

82 *Ansett Transport Industries* was primarily a case about the power of the Executive to agree to exercise statutory powers in a particular way. The agreements in issue in that case had received parliamentary approval in a statute. The case did not raise for consideration the issues which have been raised in this case and particularly the federal dimension which this case raises. Viscount Haldane's remarks in *Kidman* harked back to a decision made in the somewhat different setting of the British North America Act. Neither of the quoted passages are, with respect, of assistance in the resolution of the matter now before this Court.

Conclusion

83 Neither the DHF Agreement nor the expenditure made under it was done in the administration of a department of State in the sense used in s 64 of the Constitution. Neither constituted an exercise of the prerogative aspect of the executive power. Neither involved the exercise of a statutory power, nor executive action to give effect to a statute enacted for the purpose of providing chaplaincy or like services to State schools. Whatever the scope of that aspect of the executive power which derives from the character and status of the Commonwealth as a national government, it did not authorise the contract and the expenditure under it in this case. The field of activity in which the DHF Agreement and the expenditure was said, by the Commonwealth, to lie within areas of legislative competency of the Commonwealth Parliament under either s 51(xxiiiA) or s 51(xx) of the Constitution. Assuming it to be the case that the DHF Agreement and expenditure under it could be referred to one or other of those fields of legislative power, they are fields in which the Commonwealth and the States have concurrent competencies subject to the paramountcy of Commonwealth laws effected by s 109 of the Constitution. The character of the Commonwealth Government as a national government does not entitle it, as a general proposition, to enter into any such field of activity by executive action alone. Such an extension of Commonwealth executive powers would, in a practical sense, as Deakin predicted, correspondingly reduce those of the States and compromise what Inglis Clark described as the essential and distinctive feature of "a truly federal government".

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183 (1977) 139 CLR 54 at 113.

84 I would answer the questions posed in the special case in the terms set out in the judgment of Gummow and Bell JJ[184].

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184 Reasons of Gummow and Bell JJ at [160]-[166].

GUMMOW AND BELL JJ.

Introduction

85 The plaintiff challenges, for lack of authority under the Constitution, the provision by the Commonwealth of funding pursuant to what is known as the National School Chaplaincy Programme ("the NSCP"). The action in the original jurisdiction of this Court has led to argument in the Full Court upon a Special Case. There have been interventions by all the States and the Court also received submissions, as amicus curiae, by the Churches' Commission on Education Incorporated.

86 On 5 October 2009, the three eldest of the plaintiff's four children were enrolled at the Darling Heights State Primary School in Queensland. The youngest child was enrolled there on 27 January 2010. As their father, the law gave the plaintiff parental responsibilities, including responsibilities for their education[185].

87 At the time of the enrolment of the four children, there was in force with respect to their school an agreement for funding under the NSCP between the Commonwealth (the first defendant) and Scripture Union Queensland ("SUQ") (the fourth defendant) with a term of three years from 8 October 2007 ("the Funding Agreement"). SUQ is incorporated under the *Corporations Act* 2001 (Cth) as a public company limited by guarantee. On 13 May 2010, the term of the Funding Agreement was extended to 31 December 2011.

88 The funding of the NSCP is not provided under any statute of the Parliament. There is no law enacted, for example, in reliance upon the power conferred by s 51(xxiiiA) of the Constitution to make laws with respect to "the provision of ... benefits to students". Nor is the funding provided by the Commonwealth under s 96 of the Constitution as the "grant [of] financial assistance to any State on such terms and conditions as the Parliament thinks fit". Rather, for its power to spend so as to fund the NSCP, the Commonwealth relies upon "the executive power of the Commonwealth", which is identified in Ch II of the Constitution, particularly in s 61.

89 It is important to bear in mind that, when ascertaining the limits of the executive power of the Commonwealth, attention is to be paid by the Court both to the position of the States in the federal system established by the Constitution

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185 *Family Law Act* 1975 (Cth), s 61C.

and to the powers of the other branches of the federal government established by Ch I (the Parliament) and Ch III (the Judicature) of the Constitution[186].

90 In that regard, it should be noted that, unlike the situation in *Pape v Federal Commissioner of Taxation*[187], where the validity of a statute, the *Tax Bonus for Working Australians Act (No 2)* 2009 (Cth), was in question, here there has been no engagement of the Parliament in supplementation of the exercise of the executive power by a statute supported by s 51(xxxix) of the Constitution. That paragraph confers upon the Parliament power to make laws with respect to "matters incidental to the execution of any power vested by this Constitution ... in the Government of the Commonwealth ... or in any department or officer of the Commonwealth". There has been no involvement by legislation of the Parliament in the NSCP beyond the passage of appropriation Acts. Hence the significance here of the positions both of the States and of the Parliament.

91 It also should be emphasised at the outset that a conclusion reached on this Special Case that spending upon the NSCP is not supported as an exercise of the executive power would not foreclose any issue whether further provision of the substance of the NSCP could be achieved either by grant pursuant to s 96 of the Constitution or by legislation of the Parliament said to be supported, for example, by s 51(xxiiiA). Nothing in these reasons should be taken as expressing any view upon the scope of s 51(xxiiiA) or any other head of legislative power.

The NSCP and the Funding Agreement

92 The Funding Agreement incorporated a document identified as the "National School Chaplaincy Programme Guidelines" ("the Guidelines"), first issued in December 2006 by the Department of Education, Science and Training.

93 The Funding Agreement was described on its title page as "For the provision of funding under the [NSCP] on behalf of Darling Heights State School". Under the heading "Your Obligations", the Funding Agreement stated that SUQ was to provide the chaplaincy services which it had described in its application and was to ensure that those services were "delivered" as they had been identified in the application and in accordance with the Guidelines. The only obligation imposed upon the Commonwealth by the Funding Agreement was to provide the funding for these services, subject to the availability of

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186 *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 60 [127] per French CJ; [2009] HCA 23; Winterton, *Parliament, the Executive and the Governor-General*, (1983) at 29-30.

187 (2009) 238 CLR 1.

sufficient funds and compliance by SUQ with the terms on which the Commonwealth provided the funding.

94 The section of the Funding Agreement entitled "Project description" stated that the purpose of the funding was "to contribute to the provision of chaplaincy services at [the] school", and "to assist [the] school and community in supporting the spiritual wellbeing of students". The services to be provided included the provision of "comfort and support to students and staff, such as during times of grief" and "being approachable by all students, staff and members of the school community of all religious affiliations". The width and generality of these statements should be noted.

95 The Guidelines which accompanied the Funding Agreement, under the heading "Overview", stated:

> "School chaplains are already making valuable contributions to the spiritual and emotional wellbeing *of school communities* across Australia, and the Australian Government has responded to the call that their services be made more broadly available.
>
> The [NSCP] aims to support schools and their communities that wish to establish school chaplaincy services or to enhance existing chaplaincy services.
>
> It is a voluntary [p]rogramme that will assist *schools and their communities* to support the spiritual wellbeing of their students. This might include support and guidance about ethics, values, relationships, spirituality and religious issues; the provision of pastoral care; and enhancing engagement with the broader community.
>
> Funding of up to $30 million per annum for three years will be available, commencing in the 2007 school year. Government and non-government schools and their communities can apply for up to $20,000 per annum (and a maximum of $60,000 over the life of the [NSCP]) to establish school chaplaincy services or to enhance existing chaplaincy services.
>
> [NSCP] funding will be appropriated annually by Parliament and administered by the Department of Education, Science and Training …
>
> The nature of chaplaincy services to be provided, including the religious affiliation of the school chaplain, is a matter which needs to be decided by the local school and its community, following broad consultation. However, students will not be obliged to participate, and parents and students will be informed about the availability and the voluntary nature of the chaplaincy services.

> Access to advice, support and guidance about ethics, values and relationships may already be available at schools through existing services, such as counsellors, youth workers, social workers and psychologists. While the [NSCP] complements these services, there are also clear differences between [the NSCP] and existing services, which include the focus on spiritual and religious advice, support and guidance.
>
> *It is not the Australian Government's intention that this initiative will in any way diminish or replace existing careers advice and counselling services funded by state and territory governments*." (emphasis added)

96 On 21 November 2009, the Prime Minister announced an extension of the NSCP to December 2011, with additional funding of $42 million over the 2010 and 2011 school years.

97 The plaintiff emphasises that the Guidelines do not require that a recipient of funding under the NSCP have the character of a trading corporation. Rather, the Guidelines stipulate that payments will not be made to schools without entry into agreements with either a "School Registered Entity", a State or Territory education authority or a "Project sponsor". The term "School Registered Entity" applies to a "Government School Community Organisation" for certain government schools, and to the "legal entity for any Independent and Catholic school". Payments may also be made to a "Project sponsor" nominated by a school to manage the chaplaincy service, being "a legal entity, affiliated with or working with a religious institution to provide a school chaplain and deliver chaplaincy services in schools".

98 The plaintiff refers to these provisions in the Guidelines to emphasise that the implementation of the NSCP was so designed as to be indifferent to the corporate nature of recipients of funding, and that had the Commonwealth sought to implement the NSCP by legislation s 51(xx) of the Constitution would not have provided a basis for doing so. The point was developed by Victoria by emphasising that a law permitting the Commonwealth to enter contracts for the payment of moneys to entities, indifferent to whether those entities be trading corporations, would not be a law supported by s 51(xx).

99 It should be noted that at least since 1998 the Queensland Department of Education and Training has specified requirements for the provision of chaplaincy services in Queensland State schools. Since 2007 it has operated a funding programme for those chaplaincy services. On 24 January 2011, the State of Queensland entered into an agreement with SUQ for the provision by SUQ for the term of one year of "Chaplaincy Services"; this involves support (which may have a religious or spiritual component) to students attending Queensland State schools, regardless of religious or non-religious beliefs, and it is to be provided

"through the delivery of inclusive religiously and culturally respectful activities and programs". In the year 2010, SUQ received $781,000 in "chaplaincy funding" by Queensland; in the same year it received $11,012,000 from the Commonwealth under the NSCP. SUQ employs approximately 500 school chaplains in Queensland.

100 For many years the Parliament has legislated for the provision of financial assistance to the States on the condition that the funds be applied for educational purposes. The *Schools Assistance Act* 2008 (Cth) provides for the provision of financial assistance to the States for non-government schools. The *Nation-building Funds Act* 2008 (Cth)[188] provides for the grant of financial assistance for educational purposes on terms agreed between the Commonwealth and the States.

101 However, as noted above, the NSCP is not the creature of statute. Rather, the NSCP is administered by the second defendant, the Minister for School Education, Early Childhood and Youth. The NSCP is given effect by a series of funding arrangements for particular schools, of which the Funding Agreement is an example. On 14 November 2007, 15 December 2008 and 2 December 2009, SUQ received from the Commonwealth three payments each of $22,000 (inclusive of GST), upon invoices from SUQ for the provision of services under the Funding Agreement. On 11 October 2010, SUQ received a payment of $27,063.01 for the period until 31 December 2011.

102 The third defendant, the Minister for Finance and Deregulation, administers the *Financial Management and Accountability Act* 1997 (Cth) ("the FMA Act"). Part 7 (ss 44-53) of the FMA Act imposed "special responsibilities" upon the Secretary (as "Chief Executive") of the Department of Education, Employment and Workplace Relations ("the Department") administered by the second defendant. These included the implementation of a fraud control plan (s 45), the establishment of an audit committee (s 46) and ensuring that the accounts and records of the Department were kept as required by Orders made by the third defendant under s 63 of the FMA Act (s 48). These specific requirements were directed to the efficient, effective and ethical use of the Commonwealth resources for which the Secretary was made responsible by s 44 in managing the affairs of the Department.

103 The Commonwealth contended that Pt 7 of the FMA Act, and in particular s 44, went further. It was said that s 44 conferred upon the Department power to expend appropriated moneys and, in that regard, to enter into and make payments under the Funding Agreement. The structure of Pt 7 indicates that its provisions

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188 Sections 186, 198.

are directed elsewhere, to the prudent conduct of financial administration, not to the conferral of power to spend that which is to be so administered. There is applicable here the statement made by Mr Dennis Rose QC with respect to the predecessor of the FMA Act, the *Audit Act* 1901 (Cth), and the Finance Regulations made thereunder. He wrote that[189] these were "drafted on the basis that the power is derived elsewhere, and [were] concerned only with regulating the exercise of that power".

104 The payments to SUQ were made in exercise of drawing rights issued by the third defendant to the Secretary of the Department pursuant to Pt 4, Div 2 (ss 26, 27) of the FMA Act. The Secretary had delegated the exercise of those drawing rights, pursuant to s 53 of the FMA Act, to a departmental officer.

105 The effect of regs 8 and 9 of the Financial Management and Accountability Regulations 1997 ("the Regulations"), at the time the NSCP was entered, had been to oblige the second defendant, the Secretary of the Department, or an authorised person to give approval to the expenditure proposed under the Funding Agreement before entry into it. No distinct issue arises with respect to compliance with the Regulations.

106 The plaintiff challenges the legality of the payments to SUQ under the NSCP on various grounds. One of these may be dealt with immediately.

Section 116 of the Constitution

107 Section 116 of the Constitution states that "no religious test shall be required as a qualification for any office or public trust under the Commonwealth". The plaintiff contends that the "school chaplain" is an "office ... under the Commonwealth" and that the definition of "school chaplain" in the Guidelines imposes a religious test for that office. To qualify as a "school chaplain", a person must be recognised "through formal ordination, commissioning, recognised qualifications or endorsement by a recognised or accepted religious institution or a state/territory government approved chaplaincy service".

108 However, the plaintiff's case under s 116 fails at the threshold. Questions 2(b) and 4(b) presented by the Special Case should be answered accordingly.

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189 Rose, "The Government and Contract", in Finn (ed), *Essays on Contract*, (1987) 233 at 245.

109 The chaplains engaged by SUQ hold no office under the Commonwealth. The chaplain at the Darling Heights State Primary School is engaged by SUQ to provide services under the control and direction of the school principal. The chaplain does not enter into any contractual or other arrangement with the Commonwealth. That the Commonwealth is a source of funding to SUQ is insufficient to render a chaplain engaged by SUQ the holder of an office under the Commonwealth.

110 It has been said in this Court that the meaning of "office" turns largely on the context in which it is found[190], and it may be accepted that, given the significance of the place of s 116 in the Constitution[191], the term should not be given a restricted meaning when used in that provision. Nevertheless, the phrase "office ... under the Commonwealth" must be read as a whole. If this be done, the force of the term "under" indicates a requirement for a closer connection to the Commonwealth than that presented by the facts of this case. The similar terms in which the "religious test clause" is expressed in Art VI, cl 3 of the United States Constitution was emphasised by the plaintiff but there is no clear stream of United States authority on this provision which points to any conclusion contrary to that expressed above.

Standing of the plaintiff

111 The plaintiff also asserts both the lack of any appropriation to fund the drawing of money from the Consolidated Revenue Fund under s 83 of the Constitution, and the absence of power in the Executive Government to spend, giving rise to the invalidity of the Funding Agreement and of payments which have been made thereunder to SUQ.

112 The Commonwealth parties (which hereafter refers to the first, second and third defendants) and SUQ to varying degrees contest the standing of the plaintiff. But, in exercise of the right of intervention given by s 78A of the *Judiciary Act* 1903 (Cth), Victoria and Western Australia extensively support that part of the plaintiff's case which challenges the existence of the spending power and the validity of the Funding Agreement. In this respect, the questions of standing may be put to one side. Even without s 78A, any State would have a sufficient interest in the observance by the Commonwealth of the bounds of the

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190 *Sykes v Cleary* (1992) 176 CLR 77 at 96-97; [1992] HCA 60; *Kendle v Melsom* (1998) 193 CLR 46 at 60-61 [32]-[33]; [1998] HCA 13. See also *Edwards v Clinch* [1982] AC 845 at 860, 864-867, 870-871.

191 *Kruger v The Commonwealth* (1997) 190 CLR 1 at 85-87, 121-124, 130-134, 160-161, 166-167; [1997] HCA 27.

executive power assigned to it by the Constitution to give the State standing[192]. It should be added that New South Wales, Queensland, South Australia and Tasmania also intervene in support of the plaintiff, but on grounds more limited than those of Victoria and Western Australia.

The absence of appropriations

113 The plaintiff challenges the payments to SUQ on the ground that the drawing rights relied upon appropriations for the ordinary annual services of the Government[193], which did not in their terms refer to the implementation of the NSCP as a new policy[194].

114 Several points should be made. First, the following passage in the reasons of French CJ, Gummow and Crennan JJ in *ICM Agriculture Pty Ltd v The Commonwealth*[195] should be noted. With reference to *Pape*, their Honours said:

> "[I]t is now settled that the provisions … in s 81 of the Constitution for establishment of the Consolidated Revenue Fund and in s 83 for Parliamentary appropriation, do not confer a substantive spending power and that the power to expend appropriated moneys must be found elsewhere in the Constitution or the laws of the Commonwealth." (footnote omitted)

115 Secondly, the Commonwealth parties correctly submit that the issue of the validity of the Funding Agreement is not determined by the presence (or absence) during its term of appropriations by the Parliament to satisfy the obligations thereunder of the Commonwealth to make payments to SUQ. Rather, as Rich J explained in *New South Wales v Bardolph*[196]:

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192 *Victoria v The Commonwealth and Hayden* ("the *AAP Case*") (1975) 134 CLR 338 at 401-402; [1975] HCA 52.

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

194 See *Combet v The Commonwealth* (2005) 224 CLR 494 at 572-577 [148]-[161]; [2005] HCA 61; *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 40 [64]-[65].

195 (2009) 240 CLR 140 at 169 [41]; [2009] HCA 51.

196 (1934) 52 CLR 455 at 498; [1934] HCA 74.

> "[I]t is no more than a condition implied in the contract that before payment is made Parliament must appropriate the necessary money, but that a contract otherwise within the authority of Government is binding subject to that condition. [Part IX, especially s 65, of the] *Judiciary Act* is designed to give effect to the condition."

Dixon J added[197]:

> "Parliament is considered to retain the power of enforcing the responsibility of the Administration by means of its control over the expenditure of public moneys. But the principles of responsible government do not disable the Executive from acting without the prior approval of Parliament, nor from contracting for the expenditure of moneys conditionally upon appropriation by Parliament and doing so before funds to answer the expenditure have actually been made legally available."

116 Thirdly, whether the payments which have been made to SUQ under the Funding Agreement are, by reason of the absence of an appropriation, moneys had and received by SUQ to the use of the Commonwealth and recoverable as such by the Commonwealth[198] is not the subject of any contest between the parties to the Special Case. Fourthly, any failure in supply by the Parliament of the necessary appropriations, if established, could be put right by subsequent appropriation[199].

117 In these circumstances, two considerations are presented. First, even if the plaintiff made good his case as to the absence of an appropriation, that would not impeach the Funding Agreement, which is the focus of his case. Secondly, there is a real issue as to the existence of a sufficient interest in the plaintiff to found a claim by him to declaratory relief upon the alleged absence of appropriations by the Parliament[200]. The Commonwealth parties accept only that the plaintiff has a

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197 (1934) 52 CLR 455 at 509. See also *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 39-40 [62].

198 See *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516; [2001] HCA 68.

199 *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 39 [61].

200 *Bateman's Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 265-266 [46]-[47], 284 [105]; [1998] HCA 49.

sufficient interest with respect to the final payment made to SUQ on 11 October 2010 in reliance upon the appropriation Act for the financial year 2010-2011, but this acceptance is limited to the plaintiff's standing to challenge the satisfaction of the conditions precedent to that payment and does not extend to any challenge by the plaintiff to the underlying appropriation. Moreover, the interventions by the States in support of the plaintiff do not extend to this aspect of the litigation. Hence, it is preferable to proceed immediately to the alleged absence of power for the Commonwealth to enter into the Funding Agreement and to make the payments to SUQ.

The validity of the Funding Agreement

118 Question 2(a) of the Special Case asks whether the Funding Agreement is invalid, in whole or in part, by reason that entry into it was beyond the executive power of the Commonwealth. This must be read with Question 4(a), which asks whether the making of the payments under the Funding Agreement was "unlawful" by reason of the absence from the executive power of the Commonwealth of the power to pay those moneys to SUQ. This issue would be presented whether the payments were made to SUQ as grants or in discharge of contractual obligations. It will be necessary to return to this, the essential aspect of the litigation, but it is convenient first to say something respecting contracts made by the Commonwealth.

119 Where the efficacy of a contract entered into by the Commonwealth, other than in exercise of authority conferred by or under a law made by the Parliament[201], is challenged, two issues may arise. The first is the authority to bind the Commonwealth which was vested in those who purported to act on its behalf[202]. The Funding Agreement was expressed to be signed on behalf of the Commonwealth by a named officer of the Department of Education, Science and Training, the predecessor of the Department. No challenge is made to the authority of that officer to execute the Funding Agreement[203].

120 It is the second issue which is in contention. This is the existence of the power of the Executive Government to enter into the Funding Agreement and to

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201 See, for example, *Placer Development Ltd v The Commonwealth* (1969) 121 CLR 353 at 365-366; [1969] HCA 29; *Ansett Transport Industries (Operations) Pty Ltd v The Commonwealth* (1977) 139 CLR 54 at 61, 64, 90; [1977] HCA 71.

202 Hogg and Monahan, *Liability of the Crown*, 3rd ed (2000) at 225-226.

203 cf *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 38 per Mason J; [1986] HCA 40.

spend moneys in its performance. It appears to be accepted that entry into the Funding Agreement and spending thereunder must be supported, if at all, as an exercise of the executive power of the Commonwealth.

The Commonwealth executive power

121 This Court has eschewed any attempt to define exhaustively the content of the "executive power" which is identified but not explicated in s 61 of the Constitution[204]. Hence the attention in these reasons to partial but not necessarily complete descriptions of the executive spending power. To some degree this state of affairs in the analysis of s 61 may reflect the considerations expressed by Professor Crommelin in a passage in his study of the drafting of the sparse provisions of Ch II of the Constitution, which was quoted in *Re Patterson; Ex parte Taylor*[205]. The passage reads[206]:

> "The reasons were understandable, if not entirely convincing. The executive branch of government was shrouded in mystery, partly attributable to the uncertain scope and status of the prerogative. The task of committing its essential features to writing was daunting indeed. Moreover, the price of undertaking that task would be a loss of flexibility in the future development of the executive. Politicians who were the beneficiaries of half a century of colonial constitutional development placed a high value upon such flexibility."

Further, in *Melbourne Corporation v The Commonwealth*[207], Dixon J observed that the framers of the Constitution, chiefly by the text of ss 51, 52, 107, 108 and 109, had performed the task of distributing power between State and Commonwealth by reference to legislative powers.

122 The immediate issues in this litigation require, among other matters, consideration of the relationship between the federal Executive and the

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204 *Johnson v Kent* (1975) 132 CLR 164 at 169 per Barwick CJ; [1975] HCA 4; *AAP Case* (1975) 134 CLR 338 at 362-363 per Barwick CJ; *Davis v The Commonwealth* (1988) 166 CLR 79 at 92-94 per Mason CJ, Deane and Gaudron JJ; [1988] HCA 63; *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 60 [126] per French CJ, 87 [227], 89 [234] per Gummow, Crennan and Bell JJ.

205 (2001) 207 CLR 391 at 462-463 [216]; [2001] HCA 51.

206 Crommelin, "The Executive", in Craven (ed), *The Convention Debates 1891-1898: Commentaries, Indices and Guide*, (1986), vol 6, 127 at 147.

207 (1947) 74 CLR 31 at 82; [1947] HCA 26.

legislative powers of the federal Parliament. A distinction is to be made here. The distinction is between the capacity of the Parliament to qualify or abrogate at least some aspects of the executive power, and the scope of the executive power in respect of matters which could be the subject of legislation. The Commonwealth parties rely on the latter to support the Funding Agreement. But something should be said to contrast the former.

123 In *Cadia Holdings Pty Ltd v New South Wales*[208] Gummow, Hayne, Heydon and Crennan JJ said:

> "The executive power of the Commonwealth of which s 61 of the Constitution speaks enables the Commonwealth to undertake executive action appropriate to its position under the Constitution and to that end includes the prerogative powers accorded the Crown by the common law[209]. Dixon J spoke of common law prerogatives of the Crown in England, specifically the prerogative respecting Crown debts, as having been 'carried into the executive authority of the Commonwealth'[210]."

In *Federal Commissioner of Taxation v Official Liquidator of E O Farley Ltd*[211], Evatt J distinguished what he classified as the "executive prerogatives" from those "common law prerogatives" conferring certain preferences, immunities and exceptions which were denied to the subject. The latter, particularly with respect to fiscal matters[212], from time to time have been qualified or abrogated by the Parliament[213]. When a prerogative power is directly regulated by statute, the Executive Government must act in accordance with the statutory regime[214].

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208 (2010) 242 CLR 195 at 226 [86]; [2010] HCA 27.

209 *Barton v The Commonwealth* (1974) 131 CLR 477 at 498; [1974] HCA 20; *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 61-62 [130], 83 [214].

210 *Federal Commissioner of Taxation v Official Liquidator of E O Farley Ltd* (1940) 63 CLR 278 at 304; [1940] HCA 13.

211 (1940) 63 CLR 278 at 320-321.

212 See *Ling v The Commonwealth* (1994) 51 FCR 88 at 92-94.

213 See, for example, the *Taxation Debts (Abolition of Crown Priority) Act* 1980 (Cth).

214 *Northern Territory v Arnhem Land Aboriginal Land Trust* (2008) 236 CLR 24 at 58 [27]; [2008] HCA 29.

124 The present case concerns not these "common law prerogatives" but rather the submission that the scope of the executive power with respect to spending may be measured by that of the legislative power but in the absence of legislation conferring any authority upon the Executive Government.

The executive power of the Commonwealth with respect to spending

125 As the plaintiff framed his written submissions he accepted the proposition which at that stage had been advanced by the Commonwealth parties that the executive power of the Commonwealth extends at least to engagement in activities or enterprises which could be authorised by or under a law made by the Parliament, even if there be no such statute. That broad proposition as to the scope of s 61 of the Constitution, which had the support of Sir Robert Garran[215], appears to have had a source in the Opinion given on 12 November 1902 by Alfred Deakin as Attorney-General[216], that:

> "It is impossible to resist the conclusion that the Commonwealth has executive power, independently of Commonwealth legislation, with respect to every matter to which its legislative power extends."

The width of that proposition requires consideration before it could be accepted by this Court. Its correctness was challenged, particularly by Queensland in oral submissions, and by Tasmania in written submissions filed, by leave, after the hearing.

126 Upon the assumption that the proposition is correct the defendants rely upon the powers of the Parliament with respect to "trading … corporations" (s 51(xx)) and "the provision of … benefits to students" (s 51(xxiiiA)). The argument by the defendants appears to involve the proposition that a law authorising entry into and performance of the Funding Agreement would be supported by those heads of power, even if not also by s 51(xxxix) in its operation with respect to matters incidental to the execution of the executive power of the Commonwealth. In response, the plaintiff, New South Wales,

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215 See *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 90 [236]-[237].

216 Reprinted in Brazil and Mitchell (eds), *Opinions of Attorneys-General of the Commonwealth of Australia*, (1981), vol 1, 129 at 131. See also Winterton, *Parliament, the Executive and the Governor-General*, (1983) at 30-31, 226-227. See further the statements to the same effect in the House of Representatives by Mr Higgins, Sir John Forrest and Sir John Quick, collected by Hayne and Kiefel JJ in *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 108 [306].

Victoria, South Australia, Western Australia and Tasmania deny that SUQ is a trading corporation in the constitutional sense; and the plaintiff, Victoria and Western Australia also deny that the Funding Agreement provides "benefits to students", rather than merely to SUQ, which is obliged by the Funding Agreement to provide the "chaplaincy services" at the Darling Heights State Primary School.

127 However, in the course of argument the plaintiff resiled from, and asserted the contrary to, the general proposition that because s 61 empowers the executive branch of government to engage in activities authorised by or under a law made by the Parliament, the executive power extends to engagement in activities or enterprises which could be authorised by or under a law made by the Parliament, even though they have not yet been and may never be so authorised. Support for that view of s 61 which the plaintiff now disavows was based primarily upon a reading of *Victoria v The Commonwealth and Hayden* ("the *AAP Case*")[217]. But that decision does not provide a sufficient basis for such a broad proposition.

The *AAP Case*

128 The *AAP Case* was argued on demurrer by Victoria to the defence of those who were the Commonwealth parties in that case and was decided on what, since *Pape*, can be seen to have been the false assumption that the spending power of the Executive Government of the Commonwealth was to be found in Ch IV of the Constitution, in particular in ss 81 and 83. Hence the attention given in the submissions in the *AAP Case* and in the reasons of the Court to the phrase in s 81 "the purposes of the Commonwealth".

129 Barwick CJ[218] reasoned that this phrase was "a reasonable synonym" for the expression in s 51(xxxi) "for any purpose in respect of which the Parliament has power to make laws", and concluded[219]:

> "With exceptions that are not relevant to this matter and which need not be stated, the executive may only do that which has been or could be the subject of valid legislation. Consequently, to describe a Commonwealth purpose as a purpose for or in relation to which the Parliament may make a valid law, is both sufficient and accurate."

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217 (1975) 134 CLR 338.

218 (1975) 134 CLR 338 at 363.

219 (1975) 134 CLR 338 at 362-363.

130 Gibbs J[220], after stating that "the whole question is whether the purposes of the [Australian Assistance] Plan are 'purposes of the Commonwealth'", said:

> "According to s 61 of the Constitution, the executive power of the Commonwealth 'extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth'. Those words limit the power of the Executive and, in my opinion, make it clear that the Executive cannot act in respect of a matter which falls entirely outside the legislative competence of the Commonwealth. A view consonant with that which I have expressed has previously received acceptance in this Court: see *The Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd*[221]; *The Commonwealth v The Australian Commonwealth Shipping Board*[222]. The Constitution effects a distribution between the Commonwealth and the States of all power, not merely of legislative power. We are in no way concerned in the present case to consider the scope of the prerogative or the circumstances in which the Executive may act without statutory sanction. Once it is concluded that the Plan is one in respect of which legislation could not validly be passed, it follows that public moneys of the Commonwealth may not lawfully be expended for the purposes of the Plan."

The last sentence in this passage is expressed in negative terms. Gibbs J did not say that public moneys could lawfully be expended on any purpose for which legislation might be passed. It was sufficient for his Honour's decision that the Australian Assistance Plan could not have been supported by legislation.

131 Mason J[223] concluded that the phrase "for the purposes of the Commonwealth" had the meaning "for such purposes as Parliament may determine". His Honour, prescient of what was to be decided in *Pape*, went on to say that an appropriation "does not supply legal authority for the Commonwealth's engagement in the activities in connexion with which the moneys are to be spent", and added that, no legislation having been enacted with respect to the Australian Assistance Plan, it was necessary to look to the executive power[224]. His Honour then responded to the opposing submissions by

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220 (1975) 134 CLR 338 at 378-379.

221 (1922) 31 CLR 421 at 431-432, 437-441; [1922] HCA 62.

222 (1926) 39 CLR 1 at 10; [1926] HCA 39.

223 (1975) 134 CLR 338 at 396.

224 (1975) 134 CLR 338 at 396.

the Commonwealth parties (that the devotion of an appropriation to its purpose may be secured by legislation or executive action[225]) and by Victoria (that s 61 of the Constitution does not confer executive power beyond the execution of laws made by the Parliament[226]). Mason J did so in these qualified terms[227]:

> "Although the ambit of the power is not otherwise defined by Ch II it is evident that in scope it is not unlimited and that its content does not reach beyond the area of responsibilities allocated to the Commonwealth by the Constitution, responsibilities which are ascertainable from the distribution of powers, more particularly the distribution of legislative powers, effected by the Constitution itself and the character and status of the Commonwealth as a national government. The provisions of s 61 taken in conjunction with the federal character of the Constitution and the distribution of powers between the Commonwealth and the States make any other conclusion unacceptable."

132 However, in referring to the distribution of responsibilities between the Commonwealth and the States, Mason J was speaking in general terms and, like Gibbs J, his Honour was not adopting any broad proposition that moneys may be spent by the Executive Government upon what answers the description of any head of legislative power found in s 51 of the Constitution. That this is so is apparent from the earlier rejection by Mason J[228], along with Barwick CJ[229], of the application to s 51(ii) of the Constitution[230] of the United States doctrine, exemplified in *United States v Butler*[231], that because the power of Congress to tax is "unlimited" the power to spend is also "unlimited".

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225 (1975) 134 CLR 338 at 342-343.

226 (1975) 134 CLR 338 at 341.

227 (1975) 134 CLR 338 at 396-397.

228 (1975) 134 CLR 338 at 395-396.

229 (1975) 134 CLR 338 at 359-360.

230 Section 51(ii), consistently with the federal character of the Constitution, cannot be "construed as a power over the whole subject of taxation throughout Australia": *Victoria v The Commonwealth* ("the *Second Uniform Tax Case*") (1957) 99 CLR 575 at 614; [1957] HCA 54.

231 297 US 1 (1936).

133 On the other hand, Murphy J[232] appears to have accepted the application in Australia of *Butler*, and Jacobs J[233] said that "the purposes of the Commonwealth" spoken of in s 81 "certainly include all the purposes comprehended within the subject matters of s 51 in respect of which the Commonwealth may legislate, including the subject matter comprised in s 51(xxxix)".

134 As the argument on the Special Case proceeded it became apparent that the *AAP Case* does not support any proposition that the spending power of the executive branch of government is co-extensive with those activities which could be the subject of legislation supported by any head of power in s 51 of the Constitution.

135 First, any such proposition is too broad. Reference has been made to s 51(ii), the taxation power; it is well settled that there can be no taxation except under the authority of statute[234]. Many other of the heads of power in s 51 are quite inapt for exercise by the Executive. Marriage and divorce, and bankruptcy and insolvency by executive decree, are among the more obvious examples. These heads and other heads of legislative power in Ch II are complemented by the power given to the Parliament by Ch III to make laws conferring upon courts federal jurisdiction in matters arising under federal laws. Further, while heads of power in s 51 carry with them the power to create offences[235], the Executive cannot create a new offence[236], and cannot dispense with the operation of any law[237].

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232 (1975) 134 CLR 338 at 420.

233 (1975) 134 CLR 338 at 413. McTiernan J decided the case on the basis that the dispute was "within the field of politics not of law" and was non-justiciable: at 370; and Stephen J, emphasising the limited nature of an appropriation statute, held that Victoria lacked the standing to bring the action: at 390-391.

234 *The Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 433-434.

235 *R v Kidman* (1915) 20 CLR 425; [1915] HCA 58.

236 *Davis v The Commonwealth* (1988) 166 CLR 79 at 112.

237 *Port of Portland Pty Ltd v Victoria* (2010) 242 CLR 348 at 357-358 [5]-[8]; [2010] HCA 44. See also the remarks of Lord Hoffmann in *Higgs v Minister of National Security* [2000] 2 AC 228 at 241-242.

136 Secondly, such a proposition would undermine the basal assumption of legislative predominance inherited from the United Kingdom and so would distort the relationship between Ch I and Ch II of the Constitution. No doubt the requirement of s 64 of the Constitution that Ministers of State be senators or members of the House of Representatives has the consequence that the Minister whose department administers an executive spending scheme, such as the NSCP, is responsible to account for its administration to the Parliament[238]. This is so whether the responsibility is to the chamber of which the Minister is a member or to the other chamber, in which the Minister is "represented" by another Minister[239]. But there remain considerations of representative as well as of responsible government in cases where an executive spending scheme has no legislative engagement for its creation or operation beyond the appropriation process. And that appropriation process requires that the proposed law not originate in the Senate, and that the proposed law appropriating revenue or moneys "for the ordinary annual services of the Government" not be amended by the Senate[240].

137 The questions on the Special Case are not to be answered through debate as to what legislation could have been passed by the Parliament in reliance upon pars (xx) or (xxiiiA) of s 51 of the Constitution.

The determinative question

138 The Commonwealth parties make the general submission that the executive power extends to entry into contracts and the spending of money without any legislative authority beyond an appropriation. The determinative question on this Special Case thus becomes whether the executive power is of sufficient scope to support the entry into and making of payments by the Commonwealth to SUQ under the Funding Agreement. For the reasons which follow this question should be answered in the negative.

139 In his reply, the plaintiff submitted that the relevant aspect of the executive power was that concerned with the ordinary course of administering a recognised part of the Government of the Commonwealth or with the incidents of

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238 *Ansett Transport Industries (Operations) Pty Ltd v The Commonwealth* (1977) 139 CLR 54 at 87. See also *Egan v Willis* (1998) 195 CLR 424 at 451-452 [42]; [1998] HCA 71.

239 *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 464 [218].

240 Constitution, s 53.

the ordinary and well-recognised functions of that Government[241]. These functions would vary from time to time[242], but would include the operation of the Parliament[243], and the servicing of the departments of State of the Commonwealth, the administration of which is referred to in s 64 of the Constitution, including the funding of activities in which the departments engage or consider engagement[244]. The plaintiff accepted that this aspect of the executive power encompassed expenditure without legislative backing beyond an appropriation and the Commonwealth parties appeared to accept that concession.

140 However, the plaintiff contended that expenditure upon the NSCP does not fall within any ordinary and well-recognised functions of the Government of the Commonwealth. The Commonwealth parties submitted that the expenditure at least now had that quality because expenditures under the NSCP had commenced in the 2007 school year and had continued thereafter. That submission assumes the determination of the issue on which the Special Case turns and should not be accepted.

141 The plaintiff agrees that the ordinary and well-recognised functions of the Government of the Commonwealth include the Commonwealth entering into agreements with the States, particularly with reference to the referral by State Parliaments of matters pursuant to s 51(xxxvii), and to the engagement of s 96 of the Constitution. No doubt a range of agreements and understandings between the Commonwealth and State Executive Governments, recently exemplified in *ICM Agriculture*[245], would be supported upon the plaintiff's thesis.

142 The plaintiff did not support the outcome in *Pape* as having rested upon an ordinary and well-recognised activity of the Government of the Commonwealth. Rather, *Pape* was said by the plaintiff to have been decided in a "different universe of discourse" to that of the NSCP because the expenditure with which *Pape* was concerned was effected with legislative support. Several points should be made in response.

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241 cf *New South Wales v Bardolph* (1934) 52 CLR 455 at 496 per Rich J, 507 per Dixon J; Selway, *The Constitution of South Australia*, (1997) at 93-94.

242 cf *Ex parte Professional Engineers' Association* (1959) 107 CLR 208 at 274-275 per Windeyer J; [1959] HCA 47.

243 *Brown v West* (1990) 169 CLR 195 at 201; [1990] HCA 7.

244 cf *AAP Case* (1975) 134 CLR 338 at 362 per Barwick CJ.

245 (2009) 240 CLR 140.

143 First, while the engagement of the legislative branch of government marked off *Pape* from cases where there is, by reason of the absence of such engagement, a deficit in the system of representative government, there remains in common with any assessment of the NSCP the considerations of federalism, stimulated by the by-passing by the Executive of s 96. Secondly, the outcome in *Pape* indicates that although the plaintiff's submission is satisfactory as a partial description of the executive power to spend, it does not mark any outer limit of universal application. Thirdly, fuller attention to *Pape* nevertheless yields support to the conclusion sought by the plaintiff: that the executive power does not go so far as to support the entry by the Commonwealth into the Funding Agreement, and the making of payments by the Commonwealth to SUQ.

144 In *Pape*[246], approval was given to the statement by Mason CJ, Deane and Gaudron JJ in *Davis v The Commonwealth*[247] that:

> "the existence of Commonwealth executive power in areas beyond the express grants of legislative power will ordinarily be clearest where Commonwealth executive or legislative action involves no real competition with State executive or legislative competence".

In *Davis*, Brennan J invited consideration of "the sufficiency of the powers of the States to engage effectively in the enterprise or activity in question"[248]. This consideration reflects concern with the federal structure and the position of the States.

145 Further, as noted above, the NSCP contracts, such as the Funding Agreement, present an example where within the Commonwealth itself there is a limited engagement of the institutions of representative government. The Parliament is engaged only in the appropriation of revenue, where the role of the Senate is limited. It is not engaged in the formulation, amendment or termination of any programme for the spending of those moneys.

146 The present case, unlike *Pape*, does not involve a natural disaster or national economic or other emergency in which only the Commonwealth has the

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246 (2009) 238 CLR 1 at 62-63 [131]-[133] per French CJ, 90-91 [239] per Gummow, Crennan and Bell JJ.

247 (1988) 166 CLR 79 at 93-94.

248 (1988) 166 CLR 79 at 111.

means to provide a prompt response[249]. In *Pape*, the short-term, extensive and urgent nature of the payments to be made to taxpayers necessitated the use of the federal taxation administration system to implement the proposal, rather than the adoption of a mechanism supported by s 96. However, the States have the legal and practical capacity to provide for a scheme such as the NSCP. The conduct of the public school system in Queensland, where the Darling Heights State Primary School is situated, is the responsibility of that State. Indeed, Queensland maintains its own programme for school chaplains.

147 Section 96 of the Constitution gives to the Parliament a means for the provision, upon conditions, of financial assistance by grant to Queensland and to any other State. This is subject to the qualification stated in *ICM Agriculture*[250] that the legislative power conferred by s 96 and s 51(xxxvi) does not extend to the grant of financial assistance to a State on terms and conditions requiring the State to acquire property on other than just terms.

148 With respect to the significance of s 96 in the federal structure, the following passage from the reasons of Barwick CJ in the *AAP Case* is in point[251]:

> "Section 96 ... has enabled the Commonwealth to intrude in point of policy and perhaps of administration into areas outside Commonwealth legislative competence. No doubt, in a real sense, the basis on which grants to the claimant States have been quantified by the Grants Commission has further expanded the effect of the use of s 96. But a grant under s 96 with its attached conditions cannot be forced upon a State: the State must accept it with its conditions. Thus, although in point of economic fact, a State on occasions may have little option, these intrusions by the Commonwealth into areas of State power which action under s 96 enables, wear consensual aspect. Commonwealth expenditure of the Consolidated Revenue Fund to service a purpose which it is not constitutionally lawful for the Commonwealth to pursue, is quite a different matter. If allowed, it not only alters what may be called the financial federalism of the Constitution but it permits the Commonwealth effectively to interfere, without the consent of the State, in matters

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249 cf the scheme the subject of the *Appropriation (HIH Assistance) Act* 2001 (Cth), which was considered but not challenged in *HIH Claims Support Ltd v Insurance Australia Ltd* (2011) 244 CLR 72; [2011] HCA 31.

250 (2009) 240 CLR 140 at 170 [46] per French CJ, Gummow and Crennan JJ, 198 [136]-[137] per Hayne, Kiefel and Bell JJ.

251 (1975) 134 CLR 338 at 357-358.

> covered by the residue of governmental power assigned by the Constitution to the State."

149 What then was said by the defendants for the conclusion contrary to that which would follow from the above?

The Commonwealth parties' ultimate submission

150 With the support of SUQ, and the qualified support of South Australia, the Commonwealth parties presented their ultimate submission. This was that because the capacities to contract and to spend moneys lawfully available for expenditure do not "involve interference with what would otherwise be the legal rights and duties of others" which exist under the ordinary law, the Executive Government in this respect possesses these capacities in common with other legal persons. The capacity to contract and to spend then was said to take its legal effect from the general law.

151 A basic difficulty with that proposition is disclosed by the observation by Dixon CJ, Williams, Webb, Fullagar and Kitto JJ in *Australian Woollen Mills Pty Ltd v The Commonwealth*[252] that:

> "the position is not that of a person proposing to expend moneys of his own. It is public moneys that are involved."

The law of contract has been fashioned primarily to deal with the interests of private parties, not those of the Executive Government. Where public moneys are involved, questions of contractual capacity are to be regarded "through different spectacles"[253].

152 One example of what may be seen through those spectacles is the debate (which does not fall for consideration here) as to the extent to which by contract the Commonwealth may fetter future executive action in a matter of public interest[254]. Other examples are given in the reasons of Crennan J[255].

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252 (1954) 92 CLR 424 at 461; [1954] HCA 20.

253 cf *The Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39 at 51; [1980] HCA 44.

254 See the discussion of the authorities by Gibbs CJ in *A v Hayden* (1984) 156 CLR 532 at 542-543; [1984] HCA 67.

255 At [519]-[523].

153 Consideration of the issues which the Commonwealth parties' submission presents (contrary to what is put in support by South Australia) is not assisted by reference to the position of the Sovereign in the United Kingdom of Great Britain and Ireland at the time of the framing of the Constitution. It was, as explained in *Sue v Hill*[256], then well understood that the term "the Crown" was used in a number of metaphorical senses. Five of these were considered in *Sue v Hill*[257]. The first concerned the use of "the Crown" in English law as a device to dispense with the recognition of the State as a juristic person. In his doctoral thesis, which was presented some years after Federation and only published in 1987, Dr H V Evatt referred to the failure in English constitutional theory "to separate the personal rights of the monarch from the legal authority of the State"[258].

154 To this may be added the point made by the plaintiff that the Commonwealth parties' ultimate submission appears to proceed from the assumption that the executive branch has a legal personality distinct from the legislative branch, with the result that the Executive is endowed with the capacities of an individual. The legal personality, however, is that of the Commonwealth of Australia, which is the body politic established under the *Commonwealth of Australia Constitution Act* 1900 (Imp)[259], and identified in covering cl 6.

155 The assimilation of the executive branch to a natural person and other entities with legal personality was said by the Commonwealth parties to be supported by statements by Brennan CJ and by Gummow and Kirby JJ in *The Commonwealth v Mewett*[260]. These were to the effect that s 75(iii) of the Constitution denies any operation of doctrines of executive immunity which might be pleaded to any action for damages in respect of a common law cause of action. The absence from the Constitution of doctrines of executive immunity assists those private parties who have dealings with the executive branch of government. Different considerations arise where the question is one of executive capacity to enter into such dealings. In that situation there arise the considerations referred to at the outset of these reasons, respecting both the federal structure and the relationship between Ch I and Ch II of the Constitution.

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256 (1999) 199 CLR 462 at 497-498 [83]; [1999] HCA 30.

257 (1999) 199 CLR 462 at 498-503 [84]-[94].

258 Evatt, *The Royal Prerogative*, (1987) at 7.

259 63 & 64 Vict c 12.

260 (1997) 191 CLR 471 at 491, 550-551; [1997] HCA 29. See also at 530 per Gaudron J.

156 In oral submissions the Commonwealth Solicitor-General resisted the suggestion that the references made in earlier submissions to the character and status of the Commonwealth as a national government, in support of his submission as to the assimilation of the capacities of the Commonwealth to contract and to spend to those of other legal persons, may conflate the capacities to contract and to spend with the distinct and special financial privileges associated with the prerogative; the latter have been referred to earlier in these reasons[261].

157 Rather, the Commonwealth parties' assimilation submission was said to draw support as constitutionally coherent from (i) the relationship between s 61 and the appropriation provisions in s 81 and s 83, and (ii) the extent of the power to tax. The first consideration understates the significance of the holding in *Pape* respecting the relationship between the provision of an appropriation and the spending power. The second shows the tenacity of his successors to the views of Sir Robert Garran, noted earlier in these reasons[262]. Further, for the reasons already given, considerations of constitutional coherence point away from the existence of an unqualified executive power to contract and to spend.

158 The Commonwealth Solicitor-General also distinguished on the one hand attempts by the Executive to conscript or command individuals and entities such as trading corporations, and on the other hand the conferral of rights or benefits upon parties with the attachment of conditions to be observed by the recipient, such as those imposed upon SUQ by the Funding Agreement. The latter was within the executive power but the former was not. But the distinction rests upon what appears to be a false assumption as to the non-coercive nature of the attachment of conditions. Financial dealings with the Commonwealth have long had attached to them the sanctions of the federal criminal law. For example, the provisions added respectively as s 29A(1) and s 29B to the *Crimes Act* 1914 (Cth) by s 16 of the *Crimes Act* 1926 (Cth) created offences of obtaining from the Commonwealth, with intent to defraud, "any chattel, money, valuable security or benefit" by any false pretence, and also of imposing or endeavouring to impose upon the Commonwealth any untrue representation with a view to obtain money or any other benefit or advantage[263].

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261 At [122]-[124].

262 At fn 204.

263 See now the extensive provision made by Div 135 of Pt 7.3 of the *Criminal Code* (Cth).

159 These submissions by the Commonwealth parties as to the scope of the executive power to contract and to spend should not be accepted.

Conclusions

160 Question 1(a) asks whether the plaintiff has standing to challenge the validity of the Funding Agreement. It should be answered "Yes". Question 1(c) asks the same question with respect to the making of payments by the Commonwealth to SUQ pursuant to the Funding Agreement for the financial years beginning 2007-2008 and ending 2011-2012. This also should be answered "Yes". Question 1(b) is directed to the drawing of money from the Consolidated Revenue Fund for the purpose of making those payments. It should be answered: "Unnecessary to answer".

161 Question 2(a) asks whether the Funding Agreement is invalid as beyond the executive power of the Commonwealth under s 61 of the Constitution, and should be answered "Yes". Question 2(b) asks the same question but with respect to s 116 of the Constitution and should be answered "No".

162 Question 3 asks questions with respect to the authorisation of payments by appropriation Acts beginning with that for 2007-2008 and ending with that for 2011-2012. It should be answered: "Unnecessary to answer".

163 Question 4(a) asks whether the making of the relevant payments by the Commonwealth to SUQ was "unlawful" by reason of the lack of the executive power under s 61 of the Constitution to make those payments. It should be answered: "The making of the payments was not supported by the executive power of the Commonwealth under s 61 of the Constitution".

164 Question 4(b) asks the same question with respect to s 116 of the Constitution. It should be answered: "No".

165 Question 5 asks what relief sought in the statement of claim should be granted to the plaintiff. This should be answered: "The Justice disposing of the action should grant the plaintiff such declaratory relief and make such costs orders as appear appropriate in the light of the answers to Questions 1-4 and 6".

166 Question 6, as to the costs of the Special Case, should be answered: "The first, second and third defendants". We would not make a costs order against SUQ, the fourth defendant.

167 HAYNE J. The facts and circumstances which give rise to the questions of law that have been stated by the parties for the opinion of the Full Court, in the form of a Special Case, are described in the reasons of Gummow and Bell JJ. They need not be repeated.

168 I agree with the reasons given by Gummow and Bell JJ for answering Question 1 (concerning the standing of the plaintiff) and Questions 2(b) and 4(b) (concerning s 116 of the Constitution) as they propose. I agree that it is not necessary to answer Question 3 (concerning whether identified Appropriation Acts authorised the drawing of money from the Consolidated Revenue Fund for the purpose of making the disputed payments). I also agree with the answers Gummow and Bell JJ propose to Questions 5 and 6.

169 These reasons are directed to the issues about executive power that are raised in the matter. It is necessary to begin consideration of those issues (raised by Questions 2(a) and 4(a) of the Special Case) by identifying the question which is raised by the complaint that the plaintiff makes.

The question

170 The plaintiff alleged that there was no power for the Executive Government of the Commonwealth to pay Scripture Union Queensland ("SUQ") moneys which the Commonwealth had agreed with SUQ should be paid under the Darling Heights Funding Agreement. The central issue in the matter is the ambit of the Commonwealth Executive's power to spend money.

171 The spending in question was in satisfaction of an obligation which the Commonwealth had undertaken by making a contract with SUQ, the Darling Heights Funding Agreement. The obligation to pay money was the only obligation which the Commonwealth undertook by that contract as made and later varied. The Darling Heights Funding Agreement made detailed provisions regulating how SUQ was to apply the moneys it received from the Commonwealth. The Commonwealth thus agreed to pay money to SUQ on terms. But to ask only whether the Commonwealth had power to make the particular *contract* which it made with SUQ is to obscure the more fundamental question which the arrangement presented: did the Commonwealth have power to *spend* money on terms? The particular legal framework by which the Commonwealth chose to provide for the payments, or to provide for the terms on which they were made, is beside the point if, as the plaintiff asserted, the Executive Government had no power to spend the money.

172 The ultimate question in this matter is: did the Executive Government of the Commonwealth, with no authority other than whatever authority was given

by the relevant Appropriation Acts[264], have power to make the impugned payments to SUQ in accordance with the Darling Heights Funding Agreement? The broader question whether the Executive Government of the Commonwealth, with no authority other than whatever authority is given by an Appropriation Act, may spend money for a purpose that is identified in that Appropriation Act is cast at a level of generality that presents issues that need not be decided in this case.

Three fundamental propositions

173 Nonetheless, the question that has been identified as the ultimate question in this matter directs attention to, and requires consideration of, three fundamental propositions, each of which is necessarily expressed at a high level of abstraction and each of which must be given more particular content before it is capable of application to a particular case. First, the expenditures in issue (the disputed payments) are expenditures made by the executive government of a polity – an artificial legal person – and are expenditures of public moneys – not moneys which are in any relevant sense the polity's "own" moneys. Second, the legislative branch of the federal polity, the Parliament, is the branch of government that controls the raising and expenditure of public moneys. Third, the legislative branch has limited legislative powers; the Constitution distributes legislative power by giving the Federal Parliament only limited legislative powers.

174 Other equally fundamental observations about accounting for and control of public expenditures hover in the background of the issues that must be decided. They include such matters as the requirements of ss 53, 54 and 56 of the Constitution, which regulate parliamentary practice in relation to money Bills. They include the (relatively recent) adoption by the Parliament and the Executive of output accounting practices. They include the (now long-standing) practice of identifying the purposes for which the Consolidated Revenue Fund is appropriated at a very high level of abstraction. But despite the importance of these and other like considerations which loom in the background, some of which will later be considered, chief attention must be directed, at least for the most part, to the three fundamental propositions that have been identified. Attention to those propositions is required by the way in which the first, second and third defendants ("the Commonwealth parties") put their arguments about the extent of the Executive's power to spend.

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264 The Acts in respect of which relief was sought were *Appropriation Act (No 1)* 2007-2008 (Cth), *Appropriation Act (No 1)* 2008-2009 (Cth), *Appropriation Act (No 1)* 2009-2010 (Cth), *Appropriation Act (No 1)* 2010-2011 (Cth) and *Appropriation Act (No 1)* 2011-2012 (Cth).

The arguments of the Commonwealth parties

175 The Commonwealth parties submitted that "[w]hat is truly in issue [in this case] is whether the executive power of the Commonwealth extends to making the payments". That submission proceeded on the basis that this Court decided in *Pape v Federal Commissioner of Taxation*[265] that s 81 of the Constitution is not to be treated as an "appropriations power" that implicitly authorises the expenditure of money "for the purposes of the Commonwealth". Rather, the Commonwealth parties' submissions continued, "s 81 (with s 83) merely confirms that parliamentary appropriation is a prerequisite for the lawful availability of money for expenditure. *Authority to spend such money must be found in the executive power or in legislation enacted under a head of power in ss 51, 52 or 122*[266]." (emphasis added) In this case the Commonwealth parties submitted, at least initially, that the authority to spend was found in the executive power, not in any legislation.

176 The Commonwealth parties proffered alternative submissions about the relevant ambit of the executive power: what was described as a "narrow basis" and a "broad basis". The narrow basis was that the executive power of the Commonwealth, in all its aspects, is:

> "limited to the subject-matters of the express grants of legislative power in ss 51, 52 and 122 of the Constitution (together with matters that, because of their distinctly national character[267] or their magnitude and urgency[268], are peculiarly adapted to the government of the country and otherwise could not be carried on for the public benefit)".

On that basis the making of the Darling Heights Funding Agreement and the payments to SUQ were submitted to be within the executive power of the Commonwealth in that:

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265 (2009) 238 CLR 1; [2009] HCA 23.

266 *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 55 [111]-[112] per French CJ, 75 [184] per Gummow, Crennan and Bell JJ, 113 [320] per Hayne and Kiefel JJ, 211 [602] per Heydon J.

267 As in *Davis v The Commonwealth* (1988) 166 CLR 79 at 94 per Mason CJ, Deane and Gaudron JJ, 104 per Wilson and Dawson JJ, 110-111 per Brennan J; [1988] HCA 63.

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

> "the Agreement provides for, and its performance involves, the provision of benefits to students (cf s 51(xxiiiA)) … and … the Agreement was entered into with, and provides for assistance to, a trading corporation formed within the limits of the Commonwealth (cf s 51(xx))".

That is, the Commonwealth parties submitted that the disputed payments *could have been* authorised by a valid law made by the Parliament and that, because there could have been a valid law, the Executive had power to make the payments even though there was no legislative authorisation for their making.

177 The broad basis advanced on behalf of the Commonwealth parties was that the Executive's power to spend money lawfully available to it was, in effect, unlimited. It was said that the "capacities" of the Executive to spend money lawfully available to it, or to enter into a contract,

> "do not involve interference with what would otherwise be the legal rights and duties of others. Nor does the Commonwealth, when exercising such a capacity, assert or enjoy any power to displace the ordinary operation of the laws of the State or Territory in which the relevant acts take place." (footnote omitted)

And in amplification of and support for these propositions, the Commonwealth parties further submitted that neither s 51(xxxix) (the incidental power) nor s 96 (the grants power) required some other conclusion.

178 Several important propositions underpinned these submissions. First, as has been noted, they proceeded from the premise that there was no legislative authorisation for the disputed payments or the Darling Heights Funding Agreement. But in supplementary submissions, filed by leave after the close of oral argument, the Commonwealth parties submitted that, if legislative authority to enter the Darling Heights Funding Agreement was required, that authority was provided by s 44 of the *Financial Management and Accountability Act* 1997 (Cth)[269]. And as will later be explained, the premise that there was no

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269 Section 44(1) of the *Financial Management and Accountability Act* 1997 (Cth) now provides:

> "A Chief Executive must manage the affairs of the Agency in a way that promotes proper use of the Commonwealth resources for which the Chief Executive is responsible.
>
> Note: A Chief Executive has the power to enter into contracts, on behalf of the Commonwealth, in relation to the affairs of the Agency. Some Chief Executives have delegated this power under section 53."

(Footnote continues on next page)

legislative authorisation for the disputed payments may require closer examination of the terms of the Appropriation Acts than was given in argument of this matter.

179 The second proposition that underpinned the Commonwealth parties' initial submissions founded on the narrow basis was that the ambit of the Executive's power to spend money that has been the subject of a valid appropriation is fixed by whether the payment *could have been* validly authorised by a law of the Parliament. And at first the focus of the plaintiff and of the interveners fell only upon whether the payments *could have been* authorised by a law of the Parliament, rather than upon whether it was right to say that (assuming a valid appropriation) the Executive can spend in any manner and for *any* purpose that could validly be authorised by legislation, regardless of whether the payment is authorised in that way.

180 The third proposition that underpinned the Commonwealth parties' initial submissions, at least on the broad basis, was that the "capacity" of the Commonwealth Executive is the same as that of a natural person.

181 Each of these three propositions – there was no legislative authority; the executive power to spend extends to any expenditure the Parliament could authorise; and the Executive's capacities are relevantly unbounded – will require consideration of the three fundamental propositions described at the start of these reasons.

How the issues are considered

182 The balance of these reasons will proceed in the following manner. The Commonwealth parties' broad basis submission is examined first. In considering that submission it is convenient to begin by noticing that submissions to the same general effect as the broad basis submission made by the Commonwealth parties in this matter have been made, but not accepted, in those (relatively few) earlier decisions of this Court in which the validity of Commonwealth expenditure has been in issue. Next, the notion of the "capacities" of the Commonwealth, which lay at the heart of the broad basis submission, is considered. Then these reasons will turn to consider the nature and extent of parliamentary control over the expenditure of public moneys. That requires consideration of both the provisions made by the Constitution establishing, and exercises by the Parliament of, parliamentary control over the expenditure of public moneys, and consideration (by reference to the text and structure of the Constitution) of the bounds on the

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When the Darling Heights Funding Agreement was made, the note to s 44(1) had not been inserted. It was added by the *Financial Framework Legislation Amendment Act* 2008 (Cth), Sched 1, item 47.

Commonwealth's executive power to spend. These reasons will thus demonstrate that the Commonwealth parties' broad basis submission should be rejected.

183 The Commonwealth parties' narrow basis submission will then be examined. That entails consideration of the correct approach to examining whether action by the Executive Government is supported by the executive power, of notions of competition with and sufficiency of State legislative and executive power, and ultimately – on the assumption that the approach initially taken by the parties and interveners is correct – of whether the Parliament could have passed a valid law authorising the disputed payments. These reasons will demonstrate that the Parliament could not by law have authorised the disputed payments. Because the Parliament could not by law have authorised the payments, their making was not a valid exercise of the executive power of the Commonwealth. It is, then, not necessary to consider whether (if there had been power to enact such a law) specific legislative authority to make the disputed payments (in addition to the relevant Appropriation Acts) would have been necessary to their being validly made.

184 Finally, attention will be given to Question 2(a), in which the parties asked whether the Darling Heights Funding Agreement was "invalid". As already indicated, the central issue in the case concerned the Commonwealth's power to perform the only obligation it undertook under that agreement – the obligation to make the disputed payments. Because these reasons conclude that the Commonwealth did not have power to make the disputed payments, it follows that the Commonwealth could not validly undertake an obligation to make them. The answer given to Question 2(a) should expressly reflect that absence of power, rather than risk obscuring the point by an answer couched only in terms of "invalidity".

185 It is convenient to deal first with the course of authority in this Court.

Earlier decisions

186 In the relatively few cases where Commonwealth expenditure has been in issue, the Commonwealth has made submissions, along the lines of those advanced in the present case, that its power to expend public moneys, duly appropriated, is unlimited.

187 As early as 1908, the Commonwealth submitted that "the Parliament is invested with the same powers of appropriation for specific purposes as are the State Parliaments in respect of their revenue"[270]. In 1945, the Commonwealth

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270 *The State of New South Wales v The Commonwealth* ("the *Surplus Revenue Case*") (1908) 7 CLR 179 at 185; [1908] HCA 68.

argued[271] that s 81 (read with s 83) of the Constitution is akin to Art I, §8, cl 1 of the United States Constitution, which was said to confer a "power to spend … as wide as the power to tax". The Commonwealth power to tax, and by implication its power to spend, was said[272] to be "perhaps, for all practical purposes unlimited". In 1975, at a time when it was thought that ss 81 and 83 conferred power to spend public moneys, the Commonwealth submitted[273] that "[i]t is for Parliament and not the courts to determine what are purposes of the Commonwealth" (referred to in s 81) and that "[o]nce money has been appropriated by a valid law its devotion to the purpose of the appropriation may be secured *by executive action* or by legislation" (emphasis added). In 1990, the Commonwealth submitted[274] that "*all* that is required [to permit expenditure] is an available appropriation" (emphasis added).

188 This expansive view of the Commonwealth's power to spend has never been accepted by a majority of this Court. Despite the contrary views expressed by some Justices, the Court has recognised that the text and structure of the Constitution require the conclusion that the Commonwealth's power to spend public moneys is not and cannot be unlimited.

189 The source of the Commonwealth's power to spend was a matter of some dispute until the decision in *Pape*. Submissions of the kind described above assumed or asserted, and judgments of some Justices of the Court appeared to proceed on the assumption[275], that s 81, or some combination of ss 81, 83 and 51(xxxix), conferred power on the Commonwealth to expend public moneys.

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271 *Attorney-General (Vict) v The Commonwealth* ("the *Pharmaceutical Benefits Case*") (1945) 71 CLR 237 at 245-246; [1945] HCA 30; see also at 272 per Dixon J ("this case requires us to go no further than to distinguish the carefully chosen words of our Constitution from the very different words of that of the United States").

272 (1945) 71 CLR 237 at 245.

273 *Victoria v The Commonwealth and Hayden* ("the *AAP Case*") (1975) 134 CLR 338 at 342-343; [1975] HCA 52. See also *Pharmaceutical Benefits Case* (1945) 71 CLR 237 at 242-246.

274 *Brown v West* (1990) 169 CLR 195 at 197; [1990] HCA 7.

275 *Pharmaceutical Benefits Case* (1945) 71 CLR 237 at 248, 253-254, 256 per Latham CJ, 265-266 per Starke J, 268-271 per Dixon J (Rich J agreeing at 264), 274-275 per McTiernan J; *AAP Case* (1975) 134 CLR 338 at 354, 361 per Barwick CJ, 394, 396 per Mason J, 412 per Jacobs J, 418-419, 424 per Murphy J; cf at 378-379 per Gibbs J, 385, 387, 390-391 per Stephen J.

(So also in *Combet v The Commonwealth*[276], the Solicitor-General of the Commonwealth stated in argument that Appropriation Acts "merely authorise the drawing of money from the Treasury of the Commonwealth *and its expenditure*" (emphasis added).) In light of the assumption that was made, a limit, perhaps the limit, on the Commonwealth's power to spend was discerned in the words "for the purposes of the Commonwealth" in s 81. Construed in the light of the text and structure of the Constitution – in particular, the enumerated but limited heads of Commonwealth legislative power (especially ss 51, 52 and 122) and the finance provisions (especially ss 87, 94 and 96) – these words were seen as limiting the purposes for which s 81 (with or without ss 83 and 51(xxxix)) authorised appropriations *and expenditure* to be made[277]. But a conclusive statement of that limit proved to be elusive. As Gibbs J said in *Victoria v The Commonwealth and Hayden* ("the *AAP Case*")[278]:

> "This question was fully discussed in the *Pharmaceutical Benefits Case*[279]. There Latham CJ and McTiernan J held that 'the purposes of the Commonwealth' within s 81 are such purposes as the Parliament determines, and that the Courts have no power to declare that an Appropriation Act is invalid on the ground that the appropriation was made for an unauthorized purpose[280]. However, this view, that s 81 does not impose any effective limitation on the purpose for which an appropriation may be made, and that the Parliament may appropriate moneys for any purpose whatever, was not accepted by Rich, Starke, Dixon, and Williams JJ, the other members of the Court. Both Starke J

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276 (2005) 224 CLR 494 at 511; [2005] HCA 61.

277 *Pharmaceutical Benefits Case* (1945) 71 CLR 237 at 266 per Starke J, 269, 271-272 per Dixon J (Rich J agreeing at 264), 281-282 per Williams J; *AAP Case* (1975) 134 CLR 338 at 354-359 per Barwick CJ, 373-374 per Gibbs J, 412-415 per Jacobs J. Mason J, in the *AAP Case* (1975) 134 CLR 338 at 398, relied on considerations of the same kind to limit the *executive* power of the Commonwealth to engage in activities but at 396 appeared to treat s 81 as providing an unbounded power to spend. However, his Honour would have restrained the Commonwealth not only from carrying into effect the Australian Assistance Plan but also from "expending the moneys appropriated for the purpose of carrying the Plan into effect": at 402.

278 (1975) 134 CLR 338 at 371-372.

279 (1945) 71 CLR 237.

280 (1945) 71 CLR 237 at 254-256, 273-274.

> and Williams J were of the opinion that the words referred to the purposes of the Commonwealth as an organized political body[281]. …
>
> Dixon J (with whom Rich J concurred) agreed that if the power of expenditure 'is limited to matters to which the Federal legislative power may be addressed, it necessarily includes whatever is incidental to the existence of the Commonwealth as a state and to the exercise of the functions of a national government'[282]. He said[283] that he did not find it necessary to choose between the view that the power is so limited and the view that the Parliament is authorized to spend money without any limitation of purpose. But it is apparent that he did not favour the latter view".

190 The *AAP Case* itself did not resolve the issue. The joint dissenting reasons in *Pape* explained[284] that decision thus:

> "Because of the way in which opinions were divided in the *AAP Case*, no proposition about the ambit of the Commonwealth's powers as to appropriation and expenditure can be identified as commanding the assent of a majority of the Justices in that case. Two members of the Court, Barwick CJ and Gibbs J, were of opinion that the Commonwealth's power of appropriation was limited to purposes in respect of which the Parliament has legislative power. By contrast, McTiernan, Mason and Murphy JJ were of opinion that the purposes of the Commonwealth are not limited to those purposes for which the Commonwealth has power to make laws and that it is for Parliament to determine what are the purposes of the Commonwealth. Although Jacobs J treated the purposes of the Commonwealth as being limited to purposes identified from within the Constitution, those purposes included, in his Honour's view[285], purposes implied from the existence of 'Australia as a nation externally and internally sovereign' including 'co-ordination of services' to meet the 'various interrelated needs' of a complex society. The seventh member of the Court, Stephen J, held that the plaintiffs, the State of Victoria and the Attorney-General for that State, lacked standing to bring the proceedings."

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281 (1945) 71 CLR 237 at 266, 282.

282 (1945) 71 CLR 237 at 269.

283 (1945) 71 CLR 237 at 269.

284 (2009) 238 CLR 1 at 113 [321].

285 (1975) 134 CLR 338 at 412-413.

What is said in the *AAP Case*, at least what is said by Barwick CJ, McTiernan J, Jacobs J and Murphy J and perhaps by Gibbs J and Mason J, can only be understood once it is recognised that that case was decided on the same assumption: that s 81 (or an Appropriation Act supported by s 81) confers power to spend moneys appropriated.

191 The whole Court decided[286] in *Pape* that the power to spend appropriated moneys must be found either in provisions of the Constitution other than s 81 or s 83, or in statutes made under the Constitution. This conclusion stemmed immediately from the recognition of what the plurality in *Pape* described[287] as "the nature of the process of parliamentary appropriation", "[t]he grant of an appropriation [being] not by its own force the exercise of an executive or legislative power to achieve an objective which requires expenditure"[288].

192 But in *Pape*, as in the decisions that had gone before, this Court recognised that the text and structure of the Constitution impose limits on the Commonwealth's power to spend. These limits reflect federal considerations of the kind expressed by Dixon J in *Melbourne Corporation v The Commonwealth*[289]. They reflect the distribution of powers between the Commonwealth and the States that is effected by the Constitution.

The executive power of the Commonwealth as power to spend

193 It is well settled that the Executive can spend (with an available appropriation) where power to do so is conferred by valid statute[290] or by the Constitution itself[291]. Exercise of a power of that kind can be described as an exercise of the executive power of the Commonwealth. In the former case it falls within "the execution and maintenance … of the laws of the Commonwealth" and in the latter case within "the execution and maintenance of this Constitution",

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286 (2009) 238 CLR 1 at 23 [8(5)], 36 [53], 55-56 [111]-[113] per French CJ, 72-75 [176], [178], [180], [183]-[184] per Gummow, Crennan and Bell JJ, 100-101 [283], 105 [296], 113 [320] per Hayne and Kiefel JJ, 210 [600], 213 [607] per Heydon J.

287 (2009) 238 CLR 1 at 73 [178]; see also at 72-73 [174]-[177].

288 (2009) 238 CLR 1 at 72 [176].

289 (1947) 74 CLR 31; [1947] HCA 26.

290 See, for example, *Pape* (2009) 238 CLR 1 at 55 [111] per French CJ.

291 See, for example, *Pharmaceutical Benefits Case* (1945) 71 CLR 237 at 251 per Latham CJ; *AAP Case* (1975) 134 CLR 338 at 353 per Barwick CJ; *Brown v West* (1990) 169 CLR 195 at 205; Harrison Moore, *The Constitution of the Commonwealth of Australia*, 2nd ed (1910) at 526.

to both of which the executive power of the Commonwealth expressly "extends" by s 61. But in these reasons, reference to "the executive power of the Commonwealth" is to the power conferred by the first limb of s 61 of the Constitution, not to power conferred on the Executive Government by statute or by other provisions of the Constitution[292].

194 It must now be taken as established by the decision in *Pape* that the executive power of the Commonwealth referred to in s 61 of the Constitution confers, in some circumstances, power to expend public moneys. However, acceptance of the majority holding in *Pape* does *not* entail acceptance of the position the Commonwealth has long maintained that, as Deakin put the matter[293]:

> "Executive power exists antecedently to, and independently of, legislation; *and its scope must be at least equal to that of the legislative power – exercised or unexercised*. …
>
> It is impossible to resist the conclusion that the Commonwealth has executive power, independently of Commonwealth legislation, with respect to every matter to which its legislative power extends." (emphasis added)

In particular, acceptance of the majority holding in *Pape* does not entail acceptance of the proposition that, absent some national emergency or crisis, because certain expenditure *could* be authorised by statute, it can be undertaken by the Executive. As the plurality in *Pape* observed, that case could be and was "resolved without going beyond the notions of national emergency and the fiscal means of promptly responding to that situation"[294]. Similarly, French CJ observed that his conclusions left "in place questions about the scope of the executive power which cannot be answered in the compass of a single case"[295]. Whether or not the wider proposition articulated by Deakin and since maintained by the Commonwealth should be accepted, and whether or not such an approach to ascertaining the scope of the executive power is apposite, may be thought to fall for decision – at least on some of the Commonwealth parties' submissions –

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292 See, for example, ss 3, 48, 66, 87.

293 Deakin, "Channel of Communication with Imperial Government: Position of Consuls: Executive Power of Commonwealth", in Brazil and Mitchell (eds), *Opinions of Attorneys-General of the Commonwealth of Australia, Volume 1: 1901-14*, (1981) 129 at 131.

294 (2009) 238 CLR 1 at 91 [241].

295 (2009) 238 CLR 1 at 55 [113].

in this case. These reasons will show, however, that the case should be decided on a narrower footing.

195 It may nonetheless be noted that, in *Brown v West*[296], the Commonwealth argued that the provision of benefits having a pecuniary value could, at least in some circumstances, fall "within the executive power of the Commonwealth" and, as has been mentioned, that "*all* that is required [to permit expenditure] is an available appropriation"[297] (emphasis added). That case suggested, but did not decide, that s 61 confers power on the Executive, in at least some circumstances, to expend public moneys that have been duly appropriated. The Court's statement that certain "money appropriated was not expendable at the Crown's discretion, *as appropriated moneys usually are*"[298] (emphasis added), was not necessary to the decision that, "[w]hatever the scope of the executive power of the Commonwealth might otherwise be, it is susceptible of control by statute"[299] and that the statute considered in that case prevented, in exercise of the executive power, any conferral of benefit beyond that for which the statute provided[300].

196 The decision of a majority of this Court in *Pape* establishes[301] that, in circumstances of national emergency or crisis, the executive power of the Commonwealth supports a determination by the Executive Government that a fiscal stimulus is needed (and that this power, with s 51(xxxix), will support legislation effectuating that payment). This was identified as an example of "activities peculiarly adapted to the government of the country and which otherwise could not be carried on for the public benefit"[302] or measures "peculiarly within the capacity and resources of the Commonwealth Government"[303]. Opinions may differ about whether or not a particular activity meets these descriptions[304], but no party contended that this aspect of the

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296 (1990) 169 CLR 195.

297 (1990) 169 CLR 195 at 197.

298 (1990) 169 CLR 195 at 201 per Mason CJ, Brennan, Deane, Dawson and Toohey JJ.

299 (1990) 169 CLR 195 at 202.

300 (1990) 169 CLR 195 at 205; see also at 211-212.

301 (2009) 238 CLR 1 at 63-64 [133], [136], 83 [213], 89 [232].

302 (2009) 238 CLR 1 at 92 [242].

303 (2009) 238 CLR 1 at 63 [133].

304 cf (2009) 238 CLR 1 at 121-124 [345]-[357], 178-179 [512]-[514], 191 [545].

executive power supported the Commonwealth's payments or activities in issue in this case. Nor, given that Queensland has, itself, carried on a program very similar to that impugned in this litigation, could any party have so contended.

197 Significantly for the present case, all members of the Court in *Pape* held that considerations of text and structure, akin to those alluded to or elucidated in earlier decisions, limit the executive power of the Commonwealth, at least insofar as it enables the Commonwealth to spend public moneys. The plurality observed that the executive power has "at least the limitations discussed in these reasons"[305], including that its content must be ascertained "having regard to the spheres of responsibility vested in [the Commonwealth]"[306] and "the position of the Executive Governments of the States"[307]. French CJ referred[308] with approval to Mason J's statement[309] that: "The scope of the executive power is to be ascertained … from the distribution of the legislative powers effected by the Constitution and the character and status of the Commonwealth as a national government." Similarly, the joint dissenting reasons observed that "structural considerations require the conclusion that the executive power of the Commonwealth in matters of spending is not unbounded"[310], and referred in that regard to "the whole of the constitutional structure" (in particular the existence by s 51(xxxix) of "legislative power with respect to matters incidental to the execution of [the] executive power")[311], the "limited legislative powers" of the Commonwealth[312] and the "supremacy of the Commonwealth's legislative

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305 (2009) 238 CLR 1 at 89 [234]; see also at 87 [228].

306 (2009) 238 CLR 1 at 83 [214].

307 (2009) 238 CLR 1 at 85 [220].

308 (2009) 238 CLR 1 at 63 [132]. His Honour applied this statement at 63 [133].

309 *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd* (1983) 158 CLR 535 at 560; [1983] HCA 29, quoted with approval in *R v Hughes* (2000) 202 CLR 535 at 554-555 [38] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ; [2000] HCA 22.

310 (2009) 238 CLR 1 at 119 [336].

311 (2009) 238 CLR 1 at 119 [337].

312 (2009) 238 CLR 1 at 119 [338].

power"[313]. Heydon J emphasised the "explicit distribution" of powers effected by the Constitution and its importance for the scope of the executive power[314].

198 The position that emerges from *Pape* – that federal considerations limit the scope of the executive power – is supported by and entirely consistent with prior decisions. No less importantly, the textual and structural considerations that have caused this Court not to embrace the repeated submission by the Commonwealth that its power to spend money lawfully available for expenditure is unlimited are equally applicable whether that power to spend is found in s 81 of the Constitution (a view now discarded) or is part of the executive power of the Commonwealth referred to in s 61 of the Constitution, as *Pape* decided.

199 The conclusion that, consistent with earlier decisions, *Pape* holds that federal considerations limit the scope of the executive power is reason enough to reject so much of the submissions of the Commonwealth parties as asserted that "[t]here is no authority restricting the scope of the Commonwealth's power to spend". It is, however, necessary to examine other aspects of the broad basis submission advanced by the Commonwealth parties. It is convenient to deal next with the Commonwealth parties' reliance on the notion of the Executive's "capacities".

The Executive's capacities

200 A deal of attention was given in argument to what "capacities" the Executive Government of the Commonwealth should be found to have. In particular, attention was directed to what capacity the Executive Government had to make the Darling Heights Funding Agreement. Much of the argument in favour of validity proceeded from the premise that the Executive Government has the same capacity to contract and spend money as a natural person has and that the live issue in the case was whether there was some relevant limit (described as a limit on "power" rather than "capacity") to the kinds of contract or kinds of expenditure that could be made.

201 Care must be taken with the use in this context of the word "capacity". As Anson explained[315], the term "[c]apacity of [p]arties" is used in the law of contract to refer to the presence or absence of "some disability for making a valid contract", there being "persons [who] are by law incapable, wholly or in part, of

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313 (2009) 238 CLR 1 at 120 [339].

314 (2009) 238 CLR 1 at 190 [541]; see also at 134 [397].

315 *Principles of the English Law of Contract and of Agency in Its Relation to Contract*, 11th ed (1906) at 121.

binding themselves by a promise, or of enforcing a promise made to them". No issue of capacity of that kind arises here. As a polity, the Commonwealth is not under any disability preventing it from making a contract or a disposition of property. But observing this to be so does not answer the question at issue.

202 The term "capacity" may be used in discussion of the executive power of the Commonwealth in various ways. In his thesis, H V Evatt divided[316] the prerogative powers of the Crown into three categories for analytical purposes. One was described as rights "in the nature of immunities and preferences" of the Crown and included what Evatt termed "permanent and continuous characters and capacities of the Monarch"[317]. The term "capacity" was used in a similar but broader sense in *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority*[318]. There, Brennan CJ[319] and Dawson, Toohey and Gaudron JJ[320] used the term "the capacities of the Crown" to mean "its rights, powers, privileges and immunities".

203 No question arises in this case of the distribution between the Commonwealth and the States of "prerogative" powers or of the ability of State legislative or executive action to affect Commonwealth executive action. Hence reference to the "capacities of the Crown" is unhelpful. But what is at issue in this case is a question of power. And it follows that in this case the word "capacity" is best used in the sense of "power". Its use in any other sense is a distraction. The particular question at issue is: what power was there to make the payments to SUQ? To the extent that the Commonwealth parties' submissions implicitly sought to assert that, because the Commonwealth has some *contractual* and *dispositive* "capacity", it had power to act as it did in this case (by entering into the Funding Agreement and making the payments to SUQ), they should be rejected. Such a submission conflated the question of contractual and dispositive capacity (in the sense of absence of disability) with

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316 *The Royal Prerogative*, (1987) at 29-31.

317 *The Royal Prerogative*, (1987) at 31. These included the entitlement of the Crown to be paid in preference to other creditors, not to be mulct in costs and not to give discovery. It is not necessary to consider whether or to what extent these entitlements survive.

318 (1997) 190 CLR 410; [1997] HCA 36.

319 (1997) 190 CLR 410 at 424.

320 (1997) 190 CLR 410 at 438; see also at 454 per McHugh J ("The executive capacity of the Commonwealth can only mean its legal right or power to do or refrain from doing something").

the question of whether there was power to enter into the contract and to make the payments here at issue.

204 It is not to be assumed, and was not demonstrated, that the Executive Government of the Commonwealth has all of the capacities – in the sense of powers – to contract and spend that a natural person has. There is no basis in law for attributing human attitudes, form, or personality either to the federal polity that was created by the Constitution or, as the Commonwealth parties sought to do, to one branch of the government of that polity – the Executive. The argument asserting that the Executive Government of the Commonwealth should be assumed to have the same capacities to spend and make contracts as a natural person was no more than a particular form of anthropomorphism writ large. It was an argument that sought to endow an artificial legal person with human characteristics. The dangers of doing that are self-evident.

205 Of course, it is important to recognise that s 61 begins by providing that "[t]he executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative". But, as was pointed out in *Sue v Hill*[321], the personification of the Executive as "the Crown" (or, I would add, as "the Queen" or "the Governor-General as the Queen's representative") must not be permitted to disguise the several different senses in which the term "the Crown" is used or to deny that the Executive Government of the Commonwealth is the executive government of an artificial legal entity – a polity.

206 In 1896, Pollock, in the course of discussing the subject of "Persons", wrote[322]: "In political discourse we so constantly personify nations that we almost forget the artificial character of our language: *and yet the unrestrained use of metaphor in politics is quite capable of grave consequences*." (emphasis added) So, too, in talking of the new federal polity established by the Constitution – "one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established" – or of the Executive Government of that polity, the unrestrained use of the metaphor of personification is "quite capable of grave consequences". For as Pollock observed[323], "the State" is "[t]he greatest of artificial persons" and "it depends on the legal institutions and forms of every commonwealth whether and how far the State or its titular head is officially treated as an artificial person".

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321 (1999) 199 CLR 462 at 497-503 [83]-[94]; [1999] HCA 30.

322 Pollock, *A First Book of Jurisprudence for Students of the Common Law*, (1896) at 110.

323 *A First Book of Jurisprudence for Students of the Common Law*, (1896) at 113.

That is, the *extent* to which the Commonwealth may make contracts and dispose of property does not depend on assumptions about its capacities, whether based in analogies or otherwise, but instead must be ascertained by interpreting the Constitution.

207 As a polity, the Commonwealth makes contracts. But contrary to the submissions advanced on behalf of the Commonwealth parties, what has been said in the cases about whether a contract with a government is effective if, when the contract was made, there was no parliamentary appropriation of the money necessary for the government to perform its contracted obligations, does not establish that the capacities of the Commonwealth or of the Executive Government of the Commonwealth should be understood to be the same as those of a natural person. In particular, what was said by Dixon J in *New South Wales v Bardolph*[324] goes no further than to make the point that it is "a function of the Executive, not of Parliament, to make contracts on behalf of the Crown". But as Dixon J also made plain[325]:

> "The Crown's advisers are answerable politically to Parliament for their acts in making contracts. *Parliament is considered to retain the power of enforcing the responsibility of the Administration by means of its control over the expenditure of public moneys.* But the principles of responsible government do not disable the Executive from acting without the prior approval of Parliament, nor from contracting for the expenditure of moneys conditionally upon appropriation by Parliament and doing so before funds to answer the expenditure have actually been made legally available." (emphasis added)

Accordingly, Dixon J concluded[326], "the *prior* provision of funds by Parliament is not a condition preliminary to the obligation of the contract" (emphasis added). Neither in *Bardolph* nor in the earlier decisions in *The Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* ("the *Wooltops Case*")[327] and *Kidman v The Commonwealth*[328] did the Court decide how far the capacity of the Executive to make a contract on behalf of the Commonwealth extends.

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324 (1934) 52 CLR 455 at 509; [1934] HCA 74.

325 (1934) 52 CLR 455 at 509.

326 (1934) 52 CLR 455 at 510.

327 (1922) 31 CLR 421; [1922] HCA 62.

328 (1925) 37 CLR 233; [1925] HCA 55. See also, on application for special leave to appeal to the Privy Council, (1925) 32 ALR 1.

208 In *Bardolph*, Dixon J, with whom Gavan Duffy CJ concurred[329], said[330]: "No statutory power to make a contract in the ordinary course of administering a recognized part of the government of the State [of New South Wales] appears to me to be necessary in order that, if made by the appropriate servant of the Crown, it should become the contract of the Crown, and, subject to the provision of funds to answer it, binding upon the Crown." And the reasons of other members of the Court proceeded[331] from the same starting point to a consideration of whether the contract in issue was, as Rich J put it[332], "incidental to the ordinary and well-recognized functions of Government".

209 Contrary to the submissions of the Commonwealth parties, the Court did not deal only with the question of the authority of the individuals in question to make a contract on behalf of the State. The reasons of the Court in *Bardolph* directed attention not only to the authority of those who had made the contract in issue but also to the *power* (or what the Commonwealth parties in this matter identified as "capacity") to enter into the contract. And for the purposes of that case it was sufficient to decide that the contract was one which was made "in the ordinary course of administering a recognized part of the government of the State"[333] or was "incidental to the ordinary and well-recognized functions of Government"[334]. No broader proposition defining *what kinds* of contract the executive government (of a State) may make, and for what purposes they may be made, emerges from *Bardolph*. It is important to notice, however, that in *Bardolph* it was submitted[335] that "[t]he power of the Executive to enter into a contract is *absolute* so far as it is not fettered by the express statute" (emphasis added). The concern of the Court to locate the making of the contract in issue in *Bardolph* within the ordinary course of the administration of a recognised part of the government points strongly to the conclusions that the proposition advanced in *Bardolph* was not accepted and that the very similar submission made by the Commonwealth parties in this case should not be accepted.

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329 (1934) 52 CLR 455 at 493.

330 (1934) 52 CLR 455 at 508.

331 (1934) 52 CLR 455 at 496 per Rich J, 502-503 per Starke J, 517-518 per McTiernan J.

332 (1934) 52 CLR 455 at 496.

333 (1934) 52 CLR 455 at 508 per Dixon J.

334 (1934) 52 CLR 455 at 496 per Rich J.

335 (1934) 52 CLR 455 at 493.

210 Further, nowhere in the decisions of this Court in the *Wooltops Case* or in *Kidman* was it suggested that the power of the Executive to make a contract on behalf of the Commonwealth, and to discharge the monetary obligations assumed by the Commonwealth under that contract, is unlimited. *Kidman* turned on whether there was statutory authorisation for the contracts and payments in question. The conclusion having been reached[336] that "there was no lack of legislative authority to the Commonwealth to make such contracts, provided the ships were for defence purposes" and that there was "the necessary parliamentary appropriation", no question of executive power to contract or spend arose.

211 In the *Wooltops Case*, the Court was concerned to answer the question whether "it [was] within the legal power of the Commonwealth Executive Government apart from any Act of the Parliament or regulation thereunder to make or ratify" certain agreements[337]. All members of the Court (apart from Powers J, who did not deliver a judgment[338]) held[339] that the Commonwealth's entry into the agreements was beyond power, but the reasons given for this conclusion differed widely and no single view of the ambit of executive power to make agreements commanded the assent of a majority of the Court.

212 As the Commonwealth parties submitted, these cases do suggest that a polity may make at least some contracts without statutory authority. But what is presently important is that these cases, particularly the decisions in *Bardolph* and the *Wooltops Case*, recognise that neither a State's nor the Commonwealth's power to make contracts is unlimited.

213 *Clough v Leahy*[340] is sometimes treated as standing for the proposition advanced by the Commonwealth parties and by the fourth defendant that the Commonwealth has the same power (or "capacity") to contract as a natural person. But it does not support that proposition.

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336 (1925) 37 CLR 233 at 241 per Isaacs J; see also at 239 per Knox CJ, 247-248 per Higgins J, 251 per Rich J. Starke J agreed at 252 that the appeal should be dismissed but gave no reasons.

337 (1922) 31 CLR 421 at 430.

338 (1922) 31 CLR 421 at 461.

339 (1922) 31 CLR 421 at 432 per Knox CJ and Gavan Duffy J, 441-443, 445, 447-448 per Isaacs J, 453-454 per Higgins J, 459-461 per Starke J.

340 (1904) 2 CLR 139; [1904] HCA 38.

214 In *Clough*, Griffith CJ (with whom Barton and O'Connor JJ concurred[341]) was responding to a submission that a commission appointed under letters patent was "'unlawful' and 'illegal'"[342]. Griffith CJ recognised that a State, as a polity, acts through individuals and accepted that an officer of the State executive was not somehow prevented, when "acting for the Crown"[343], from undertaking an action "that every man is free to do"[344], being "any act that does not unlawfully interfere with the liberty or reputation of his neighbour or interfere with the course of justice"[345]. Griffith CJ's statement – that "[t]he liberty of another can only be interfered with according to law, but, subject to that limitation, every person is free to make any inquiry he chooses; and *that which is lawful to an individual can surely not be denied to the Crown*, when the advisers of the Crown think it desirable in the public interest to get information on any topic"[346] (emphasis added) – is no more than the application of the two propositions that have been identified. So much is evident from the reference to "the advisers of the Crown" getting information. It is also evident from his Honour's earlier observation that "[t]he power of inquiry … is a power which *every individual citizen* possesses"[347] (emphasis added), the later observation that "[t]he inquiry simply *amounts to the asking of questions* of persons willing to give information"[348] (emphasis added) and his Honour's later reference to "any *person*, purporting to act under the authority of a Royal Commission … [who] was *acting for* the Crown"[349] (emphasis added). Contrary to the submissions of the Commonwealth parties and the fourth defendant, *Clough* does not stand for a general proposition that a polity, or the Commonwealth in particular, has the same powers or capacities as a natural person.

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341 (1904) 2 CLR 139 at 163.

342 (1904) 2 CLR 139 at 155; see also at 150.

343 (1904) 2 CLR 139 at 161.

344 (1904) 2 CLR 139 at 157.

345 (1904) 2 CLR 139 at 157.

346 (1904) 2 CLR 139 at 157. See also *Lockwood v The Commonwealth* (1954) 90 CLR 177 at 182 per Fullagar J; [1954] HCA 31.

347 (1904) 2 CLR 139 at 156.

348 (1904) 2 CLR 139 at 160.

349 (1904) 2 CLR 139 at 161.

215 Metaphorical comparisons between artificial legal entities and natural persons, though colourful and sometimes provocative of further thought[350], do not provide a sound foundation for legal analysis. An anthropomorphic view of the powers of a corporation incorporated according to statute may now be available but that is only by dint of specific statutory provision giving such a corporation "the legal capacity and powers of an individual both in and outside this jurisdiction"[351]. There is no warrant for adopting such an understanding of the capacities of the Executive Government of the Commonwealth, or the polity more generally, or of the capacity of the Executive in particular, or the polity more generally, to spend money or to make a contract.

216 Not least is that understanding not available in respect of expenditure because an anthropomorphic view of the Executive's (or polity's) capacity to spend assumes that the Executive (or the polity) is spending its "own" money, just as a natural person may do. But that equation of the position of the Executive and a natural person ignores that the money being spent is public money. It thus ignores the carefully crafted checks (worked out in England over so many years and reflected in Australia in the Constitution, especially Ch IV) that effect parliamentary control over the raising and expenditure of public moneys. As will next be demonstrated, parliamentary control over raising and expenditure of public moneys denies the notion that the Consolidated Revenue Fund may be spent as the Executive chooses. And once it is accepted, as it must be, that the Constitution does provide for parliamentary control over the raising and expenditure of public moneys, the anthropomorphic view of the Executive's capacity to spend that lay at the heart of much, if not all, of the argument advanced on behalf of the Commonwealth parties is necessarily falsified.

217 The Commonwealth, as a polity, can make contracts and can outlay public moneys. It is the Executive's function, not the Parliament's, to make contracts and expend public moneys. But neither the Executive nor the polity itself can be assumed to have the *same* powers (or capacities) to contract and spend as a natural person. The question to be answered in this case is whether there was power to make the particular expenditures for which the Darling Heights Funding Agreement provided and to undertake the obligation to make those expenditures.

218 It is necessary to make good the second fundamental proposition identified at the outset of these reasons: that the Constitution provides for parliamentary control over the raising and expenditure of public moneys.

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350 cf *Clough v Leahy* (1904) 2 CLR 139 at 156-157.

351 *Corporations Act* 2001 (Cth), s 124(1).

Parliamentary control

219 It is Pt V of Ch I of the Constitution (particularly ss 53, 54, 55 and 56) and Ch IV (particularly ss 81, 83, 94, 96 and 97) that provide for parliamentary control over the raising and expenditure of public moneys. Section 97 (in Ch IV) with s 51(xxxvi) provides for parliamentary supervision of "the *receipt* of revenue and the *expenditure* of money on account of the Commonwealth" (emphasis added). The prescription of the powers of the Parliament in Pt V of Ch I, when read with the relevant provisions of Ch IV, "reflect[s] the cardinal principle of parliamentary control which underpinned the British financial system at the time of Federation and which had earlier been transported to the Australian colonies"[352]. The parliamentary control for which provision is made is control over both "appropriating revenue or moneys"[353] and "imposing taxation"[354] and supervision of what is actually received and outlaid ("the receipt of revenue and the expenditure of money on account of the Commonwealth"[355]). And it is control that is necessarily asserted through the exercise of the legislative power of the Commonwealth by the Parliament[356], each House of which is "directly chosen by the people"[357].

220 The way in which the raising and expenditure of public moneys is controlled by the Parliament is further regulated by the provisions that govern the relationship between the two Houses of the Parliament in respect of laws or proposed laws appropriating revenue or moneys and laws or proposed laws imposing taxation. In particular, s 53 requires that laws of these kinds "shall not originate in the Senate"; s 54 requires, in the case of a proposed law appropriating revenue or moneys "for the ordinary annual services of the Government", that the proposed law "deal only with such appropriation"; and s 55 requires, in the case of laws imposing taxation, that such laws "deal only with the imposition of taxation"[358]. Section 56 requires that money votes ("[a]

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352 *Pape* (2009) 238 CLR 1 at 105 [294].

353 Sections 53, 54 and 56 all refer to a proposed law or proposed laws "appropriating" or "which appropriates" or "for the appropriation of" revenue or moneys.

354 Sections 53 and 55 deal, respectively, with proposed laws and laws "imposing taxation".

355 s 97.

356 s 1.

357 ss 7 and 24.

358 As to which see *Permanent Trustee Australia Ltd v Commissioner of State Revenue (Vict)* (2004) 220 CLR 388 at 407-420 [38]-[74]; [2004] HCA 53.

vote, resolution, or proposed law for the appropriation of revenue or moneys") "not be passed unless the purpose of the appropriation has in the same session been recommended by message of the Governor-General to the House in which the proposal originated". For present purposes, it is not necessary to examine the detail of these provisions; it is enough to notice that the raising and expenditure of public moneys is subject to parliamentary control.

221 The Parliament's control over the appropriation of public moneys is further governed by the provisions of Ch IV, especially ss 81 and 83. As was said[359] in the joint dissenting reasons in *Pape*:

> "In Britain, '[t]he most ancient, as well as the most valued, prerogative of the House of Commons is the right of supreme control over taxation, *to which the right to control issues is a natural corollary*'[360]. So too, under the Constitution, the power of appropriation given by ss 81 and 83 is a logical consequence of the right of levying supplies." (emphasis added)

But, as was also pointed out[361] in *Pape*, the power of appropriation by the Parliament is a process which *permits* application of the Consolidated Revenue Fund for identified purposes; it does not *require* the application of those funds for those purposes[362].

222 Since Federation, the purposes for which the Consolidated Revenue Fund is appropriated have usually been articulated at a very high level of abstraction. And, as the output accounting practices considered in *Combet*[363] show, there has not been any recent shift to more particular specification of the purposes for which moneys are appropriated. On the contrary, more recent parliamentary practice has been to adopt even more general and abstract descriptions of the purposes for which the Consolidated Revenue Fund is appropriated. As the plurality in *Pape* noted[364], one consequence of the manner of drafting appropriations at a high level of abstraction is that appropriations do not provide

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359 (2009) 238 CLR 1 at 105 [294].

360 Durell, *The Principles and Practice of the System of Control over Parliamentary Grants*, (1917) at 3.

361 (2009) 238 CLR 1 at 105 [296].

362 See also Maitland, *The Constitutional History of England*, (1908) at 445-446.

363 (2005) 224 CLR 494 at 523 [6] per Gleeson CJ, 574-575 [154] per Gummow, Hayne, Callinan and Heydon JJ.

364 (2009) 238 CLR 1 at 78 [197].

any sufficient textual basis for determining the constitutional facts that would be relevant to the validity of any particular expenditure made out of the moneys appropriated. But it also follows from the conclusion that the power to spend lies elsewhere than in ss 81 and 83 that whether any particular expenditure was validly made does not depend upon attempting to give content to the phrase, in s 81, "appropriated for the purposes of the Commonwealth" and then seeking to connect the content given to that phrase with either the (often generally expressed) words of appropriation or some more particular expenditure which is found to be authorised by those words.

223 It is to be observed, however, that since Federation, parliamentary control over expenditure has not stopped at that point in the process of appropriation at which the legislature authorises drawing from the Consolidated Revenue Fund. As Isaacs J observed[365] in the *Wooltops Case*, as well as "power over appropriation", "there arises the necessity for control over the actual expenditure of the sums appropriated". There has always been coupled with the authority to draw from the Consolidated Revenue Fund further legislative provision made in the appropriation legislation, which, if it has not conferred authority to make the relevant expenditures, at least has provided for, and in more recent times in Australia sometimes confined, the application of appropriated sums to expenditures for the designated purposes.

224 In order to demonstrate the generality of that proposition reference should be made first to standing appropriations of the kind considered in *Pape* and then to particular appropriations including those that were made in relation to the payments in issue in this case.

Some examples of the exercise of parliamentary control

225 It will be recalled that the legislation under consideration in *Pape* (the *Tax Bonus for Working Australians Act (No 2)* 2009 (Cth) – "the Tax Bonus Act") obliged[366] the Commissioner of Taxation to make the relevant payments. The Tax Bonus Act contained no express provision appropriating the Consolidated Revenue Fund for the purposes of making the payment but, by giving the general administration of the Act to the Commissioner, the Tax Bonus Act, by a chain of definitions whose detail need not be noticed, engaged the standing appropriation made by s 16(1) of the *Taxation Administration Act* 1953 (Cth). That standing

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365 (1922) 31 CLR 421 at 449.

366 Section 7(1) of the Act provided that if the Commissioner of Taxation was satisfied that a person was entitled to the tax bonus for the 2007-08 income year "the Commissioner must pay the person his or her tax bonus as soon as practicable after becoming so satisfied".

appropriation provided relevantly that, where the Commissioner was required or permitted to pay an amount to a person by or under a provision of an Act of which the Commissioner had the general administration, "the amount is payable out of the Consolidated Revenue Fund, which is appropriated accordingly". Many other examples of similar provisions can be found in the statute book[367]: provisions permitting or requiring payments to persons which are supported by a standing appropriation of the Consolidated Revenue Fund.

226 The first of the Appropriation Acts which provided for the National School Chaplaincy Program ("the Program" or "the NSCP") was the *Appropriation Act (No 3)* 2006-2007 (Cth) ("the 2007 No 3 Act"). The total of the sums dealt with by the 2007 No 3 Act (specified in Sched 1 to that Act) was stated in s 6. The services for which money was appropriated were identified by tables set out in Sched 1, organised by ministerial portfolio and divided between "Departmental Outputs" and "Administered Expenses" – expressions which engaged the defined terms "departmental item"[368] and "administered item"[369]. For departments of State the appropriations were further divided between "outcomes", a term given content by Portfolio Budget Statements and Portfolio Additional Estimates Statements, which s 4(1) of the Act "declared to be relevant documents for the purposes of section 15AB of the *Acts Interpretation Act 1901*".

227 The item in Sched 1 to the 2007 No 3 Act relevant to the NSCP was Outcome 1 for the Department of Education, Science and Training – an outcome described in Sched 1 as "Individuals achieve high quality foundation skills and learning outcomes from schools and other providers". One of the departmental items identified in the relevant Portfolio Additional Estimates Statements was an item of $4.111 million for the NSCP. This was the first appropriation made for the Program. As a departmental appropriation forming part of the total of departmental outputs for Outcome 1 of the Department, the amount appropriated

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367 See, for example, *Audit Act* 1901 (Cth), s 4, *Coronation Celebration Act* 1902 (Cth), s 2, *Loans Securities Act* 1919 (Cth), s 4 and, more recently, *Northern Territory National Emergency Response Act* 2007 (Cth), s 63(2), *Dental Benefits Act* 2008 (Cth), s 65 and *Federal Financial Relations Act* 2009 (Cth), s 22.

368 Defined in s 3 as "the total amount set out in Schedule 1 in relation to an entity under the heading 'Departmental Outputs'". "[E]ntity" was defined in the same section as any of "an Agency … a Commonwealth authority … [or] a Commonwealth company". "Agency" was defined as meaning "an Agency within the meaning of the *Financial Management and Accountability Act 1997*" or this Court.

369 Defined in s 3 as "an amount set out in Schedule 1 opposite an outcome of an entity under the heading 'Administered Expenses'".

for the NSCP was part of the total amount set out in Sched 1 to the 2007 No 3 Act that constituted a "departmental item".

228 Section 7(1) of the 2007 No 3 Act permitted the Finance Minister, for "a departmental item for an entity", to "issue out of the Consolidated Revenue Fund amounts that do not exceed, in total, the amount specified in the item". And s 15 provided that "[t]he Consolidated Revenue Fund is appropriated as necessary for the purposes of this Act".

229 Section 7(2) of the 2007 No 3 Act dealt with "expenditure", a term defined in s 3 as "payments for expenses, acquiring assets, making loans or paying liabilities". Section 7(2) provided that:

> "An amount issued out of the Consolidated Revenue Fund for a departmental item for an entity may only be applied for the departmental expenditure of the entity.
>
> Note: The acquisition of new departmental assets will usually be funded from an other departmental item (in another Appropriation Act)."

Section 8 of the same Act dealt with administered items in terms generally similar to the provisions of s 7. Section 8(2) provided that:

> "An amount issued out of the Consolidated Revenue Fund for an administered item for an outcome of an entity may only be applied for expenditure for the purpose of carrying out activities for the purpose of contributing to achieving that outcome.
>
> Note: The acquisition of new administered assets will usually be funded from an administered assets and liabilities item (in another Appropriation Act)."

Several points may be made about the provisions of ss 7 and 8 of the 2007 No 3 Act.

230 First, in their terms, ss 7 and 8 of the 2007 No 3 Act confined the purposes for which expenditures (that is to say, "payments for expenses, acquiring assets, making loans or paying liabilities"[370]) could be made. In the case of departmental items, amounts issued could be applied *only* "for the departmental expenditure of the entity"; in the case of administered items, the restriction was identified by reference to the applicable outcome of the relevant entity.

231 Second, by confining the purposes for which expenditures could be made, the provisions could also be understood as authorising those expenditures. And

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370 s 3.

in this respect, ss 7 and 8 of the 2007 No 3 Act could be understood as providing to the same effect as earlier forms of Commonwealth Appropriation and Supply Acts[371] (and even the very first Act passed by the Commonwealth Parliament – the *Consolidated Revenue Act* 1901, s 1) when, with some immaterial verbal variations over the years, they provided, in effect, that the Treasurer was "authorized and empowered to issue *and apply* the moneys authorized to be issued and applied" (emphasis added). And both the provisions of ss 7 and 8 of the 2007 No 3 Act and earlier forms of Appropriation and Supply Acts authorising the Treasurer to "apply" the moneys authorised to be issued and applied could well be understood as proceeding from that understanding of ss 81 and 83 of the Constitution which was rejected in *Pape*. But whether that is so need not be examined. It is enough to notice that there were provisions of the 2007 No 3 Act which could be understood as providing authority to make expenditures for the NSCP.

232 Third, while the *Appropriation Act (No 1)* 2007-2008 (Cth) took the same form as the 2007 No 3 Act, later Appropriation Acts which appropriated the Consolidated Revenue Fund for purposes that included the NSCP made provision for application of moneys issued out of the Consolidated Revenue Fund for departmental items and administered items that differed in form from those made by the 2007 No 3 Act. On their face, those later Acts did not confine the purposes for which expenditures could be made in the same way as ss 7 and 8 of the 2007 No 3 Act had.

233 So, for example, the *Appropriation Act (No 1)* 2008-2009 (Cth) provided in ss 7 and 8:

> "**7 Departmental items**
>
> The amount specified in a departmental item for an Agency may be applied for the departmental expenditure of the Agency.
>
> Note: The Finance Minister manages the expenditure of public money through the issue of drawing rights under the *Financial Management and Accountability Act 1997*.
>
> **8 Administered items**
>
> (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 achieving that outcome.

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371 See, for example, *Supply Act (No 1)* 1950-51 (Cth), s 3.

Note: The Finance Minister manages the expenditure of public money through the issue of drawing rights under the *Financial Management and Accountability Act 1997*.

(2) If the Portfolio Budget Statements indicate that activities of a particular kind were intended to be treated as activities in respect of a particular outcome, then expenditure for the purpose of carrying out those activities is taken to be expenditure for the purpose of contributing to achieving the outcome."

It will be observed that neither s 7 nor s 8 of this later Appropriation Act spoke of application *only* for identified expenditures. Nonetheless, these later forms of provision dealing with application of amounts specified in either a departmental item or an administered item were still cast in terms that authorised "expenditure": "payments for expenses, acquiring assets, making loans or paying liabilities". And this legislative conferral of authority for the making of expenditures, like the earlier forms of Appropriation and Supply Acts authorising the Treasurer to issue *and apply* moneys, was consistent with the proposition that it is Parliament, not the Executive, which controls expenditure of public moneys, not just by "power over appropriation"[372] but also by "control over the actual expenditure of the sums appropriated"[373].

Bounds to the power to spend?

234 Does the Executive's power to spend extend to any expenditure that the Parliament could authorise (the narrow basis submission of the Commonwealth parties)? Is it a power that is unbounded (the broad basis submission)? Is neither proposition correct?

235 It is convenient to approach these questions from a proposition about the parliamentary control of expenditure which can be identified as running beneath the submissions made by the Commonwealth parties about what (if any) are the bounds to the Executive's power to spend.

236 The submissions of the Commonwealth parties asserted that parliamentary control over expenditure can cease at the point where the Parliament has identified in an Appropriation Act (with such particularity as the Parliament has chosen) the purposes for which expenditures can be made. How the Executive

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372 *The Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* ("the *Wooltops Case*") (1922) 31 CLR 421 at 449 per Isaacs J.

373 *Wooltops Case* (1922) 31 CLR 421 at 449 per Isaacs J.

uses the moneys thus appropriated was treated as a matter for the Executive unless or until the Parliament has provided otherwise. That is, the Commonwealth parties submitted that how and on what terms money lawfully drawn from the Consolidated Revenue Fund may be applied in making what the relevant Appropriation Acts referred to as "payments for expenses, acquiring assets, making loans or paying liabilities" is to be determined at the discretion of the Executive unless and until the Parliament otherwise provides. Absent legislative provision to the contrary, what expenses may be paid, what assets acquired, what loans made or what liabilities paid would all be for the Executive to decide.

237 The proposition that parliamentary control over expenditure can cease at the point of appropriation of the Consolidated Revenue Fund may or may not appear, on its face, to be large or dubious. For present purposes, however, attention is usefully directed to the qualification to the proposition – unless and until the Parliament otherwise provides – and what legislative power the Parliament could exercise to "otherwise provide" and regulate the expenditures that may be made of money lawfully drawn from the Consolidated Revenue Fund. Unless the qualification is soundly based, and the Parliament *could* otherwise provide, the submission of the Commonwealth parties would entail that appropriation by law is the *only* control the Parliament has over expenditure of at least some public moneys.

238 Plainly the Parliament could otherwise provide in any case in which a law controlling expenditure of money drawn from the Consolidated Revenue Fund would be a law with respect to an enumerated head of legislative power. Observing this to be so echoes the narrow basis submission of the Commonwealth parties about the ambit of the executive power to spend. But what of the case where no head of legislative power, other than the incidental power (s 51(xxxix)), could be engaged? Would s 51(xxxix) be a sufficient basis for the Parliament to control the expenditure of money lawfully drawn from the Consolidated Revenue Fund for purposes and in circumstances which do not engage any other head of legislative power? Would such a law be a law with respect to a matter "incidental to the execution of any power vested by this Constitution … in the Government of the Commonwealth"?

239 The answers to these questions depend upon how the relevant "power vested by this Constitution … in the Government of the Commonwealth" is identified. The broad basis submission of the Commonwealth parties depended upon the relevant executive power being not only sufficiently but *completely* identified as power to spend money lawfully appropriated.

240 In cases of the kind dealt with in *Pape* – where the expenditures in question were directed to meeting a national emergency – and other cases of the kind commonly grouped under the notion of "nationhood", the "power vested by this Constitution … in the Government of the Commonwealth" is not identified

only as a power to spend money; it is a different species of executive power. So, as has been mentioned, the decision in *Pape* depended upon the conclusion that the determination by the Executive of the need for an immediate fiscal stimulus enlivened the power under s 51(xxxix) to enact a law incidental to the execution of a species of executive power identified as the determination of the existence of a national crisis or emergency. But it was not suggested that the payments in issue in this case could be supported on this basis and it is, therefore, not necessary to explore here what content could be given to the notion of a "nationhood" power. Attention must focus upon cases other than those said to engage a "nationhood" power.

241 If the "power vested by this Constitution … in the Government of the Commonwealth" includes a power to spend, as the Executive chooses, any money lawfully appropriated, regardless of the purposes for which or circumstances in which the expenditure is to be applied, several consequences would follow which at least suggest that the proposition is flawed.

242 First, this understanding of the operation of s 51(xxxix) with s 61 in relation to Commonwealth expenditure would work a very great expansion in what hitherto has been understood to be the ambit of Commonwealth legislative power. It must be accepted that the *Engineers' Case*[374] teaches that this is an observation that could conclude debate only if some notion of reserved powers were revived[375]. But it is an observation that suggests the need to pause before concluding that the premise which underpins it is sound.

243 Second, and more tellingly, the understanding of the operation of s 51(xxxix) in relation to Commonwealth expenditure that is under consideration would not only give s 96 of the Constitution a place in the constitutional framework very different from the place it has hitherto been understood to occupy but also render it otiose.

244 Section 96 provides:

> "During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit."

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374 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129; [1920] HCA 54.

375 See, for example, *New South Wales v The Commonwealth* (*Work Choices Case*) (2006) 229 CLR 1 at 119-120 [194]; [2006] HCA 52.

245 In *The State of Victoria v The Commonwealth* ("the *Second Uniform Tax Case*")[376], Dixon CJ said of s 96 that: "It confers a bare power of appropriating money to a purpose and of imposing conditions." On the basis[377] that the scope and purpose of the power given by s 96 is "to be ascertained on the footing that it was not transitional but stood with the permanent provisions of the Constitution", Dixon CJ said[378] that "it is apparent that the power to grant financial assistance to any State upon such terms and conditions as the Parliament thinks fit is susceptible of a very wide construction in which few if any restrictions can be implied".

246 As Dixon CJ recorded[379], "the course of judicial decision" had put out of consideration other, more limited constructions of s 96. In particular, the course of decision precluded adopting "a not improbable supposition that the framers" conceived s 96:

> "as (1) a transitional power, (2) confined to supplementing the resources of the Treasury of a State by particular subventions when some special or particular need or occasion arose, and (3) imposing terms or conditions relevant to the situation which called for special relief of assistance from the Commonwealth"[380].

Dixon CJ continued[381]:

> "In any case it must be borne in mind that the power conferred by s 96 is confined to granting money and moreover to granting money to governments. It is not a power to make laws with respect to a general subject matter, which for reasons such as I gave in *Melbourne Corporation v The Commonwealth*[382], may be taken to fall short of authorising a special attempt to control the exercise of the constitutional powers of the States where there is a connexion with some part of the subject matter of the federal power. The very matter with which the

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376 (1957) 99 CLR 575 at 604; [1957] HCA 54.

377 (1957) 99 CLR 575 at 605.

378 (1957) 99 CLR 575 at 605.

379 (1957) 99 CLR 575 at 609.

380 (1957) 99 CLR 575 at 609.

381 (1957) 99 CLR 575 at 609-610.

382 (1947) 74 CLR 31.

> power conferred by s 96 is concerned relates to State finance. Further there is nothing which would enable the making of a coercive law. By coercive law is meant one that demands obedience. As is illustrated by *Melbourne Corporation v The Commonwealth*[383], the duty may be imposed, not on the State or its servants, but on others and yet its intended operation may interfere unconstitutionally with the governmental functions of the State in such a way as to take the law outside federal power. *But nothing of this sort could be done by a law which in other respects might amount to an exercise of the power conferred by s 96. For the essence of an exercise of that power must be a grant of money or its equivalent and beyond that the legislature can go no further than attaching conditions to the grant.* Once it is certain that a law which is either valid under s 96 or not at all does contain a grant of financial assistance to the States, the further inquiry into its validity could not go beyond the admissibility of the terms and conditions that the law may have sought to impose. The grant of money may supply the inducement to comply with the term or condition. But beyond that no law passed under s 96 can go." (emphasis added)

247 Two points of immediate relevance emerge from this understanding of s 96. First, it is an understanding that is not consistent with reading s 51(xxxix) as supporting any and every law that provides for or otherwise controls the expenditure of money lawfully appropriated from the Consolidated Revenue Fund regardless of the purposes for which or circumstances in which the expenditure is to be made. It is an understanding of s 96 that is not consistent with the view of the intersection between s 51(xxxix) and the executive power to spend which underpinned the submissions of the Commonwealth parties because it would leave s 96 no work to do at all: not even to provide (whether only in the first 10 years of Federation or more permanently) for supplementation of State resources "when some special or particular need or occasion arose". All the work done by s 96 could be done by laws made under s 51(xxxix). Section 96 would be superfluous. Yet as Mason J observed of s 96 in the *AAP Case*[384]:

> "its presence confirms what is otherwise deducible from the Constitution, that is, that the executive power is not unlimited and that there is a very large area of activity which lies outside the executive power of the Commonwealth but which may become the subject of conditions attached to grants under s 96".

And although Mason J made these observations in a context where it was assumed that the power to spend is found in s 81, it is nonetheless apposite to

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383 (1947) 74 CLR 31.

384 (1975) 134 CLR 338 at 398.

recognise that Barwick CJ[385] and Gibbs J[386] in the *AAP Case*, and Starke J[387] in *Attorney-General (Vict) v The Commonwealth* ("the *Pharmaceutical Benefits Case*"), also saw s 96 as limiting the scope of that power.

248 Second, whereas nothing in s 96 would enable the making of a coercive law (one that *demands* obedience), a law made under s 51(xxxix) as incidental to a power to spend money lawfully appropriated could demand obedience from the recipient. The "consensual aspect" of grants to the States under s 96 – the requirement that "the State must accept it with its conditions"[388] – would be obliterated. And because a law made under s 51(xxxix) could demand obedience, the federal considerations mentioned by Dixon CJ in the *Second Uniform Tax Case*, by reference to *Melbourne Corporation v The Commonwealth*, as *not* presented by an exercise of the power conferred by s 96 would arise. That is, if, as the Commonwealth parties' submissions in this case entailed, s 51(xxxix) could be engaged to make a law regulating the application of any money lawfully appropriated, regardless of the purposes for which or circumstances in which it is to be applied, the basic considerations of federal structure which yielded the decision in *Melbourne Corporation* would fall squarely for consideration. And those considerations of federal structure point directly against reading the relevant "power vested by this Constitution … in the Government of the Commonwealth", with which s 51(xxxix) intersects, as sufficiently or completely described as the Executive's power to spend money that has been lawfully appropriated.

249 How is the limit on the Executive's power to spend to be described?

250 Opinion has divided[389] on the importance that should be attached to the surplus revenue provision made by s 94 of the Constitution in deciding the ambit of the Commonwealth's power to spend. As the plurality observed in *Pape*[390]:

> "The governments of the States have the interest given by s 94 of the Constitution in the distribution of all surplus revenue of the

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385 (1975) 134 CLR 338 at 357.

386 (1975) 134 CLR 338 at 374.

387 (1945) 71 CLR 237 at 266.

388 *AAP Case* (1975) 134 CLR 338 at 357.

389 *AAP Case* (1975) 134 CLR 338 at 356-357 per Barwick CJ, 374 per Gibbs J; cf at 393 per Mason J.

390 (2009) 238 CLR 1 at 91 [240].

> Commonwealth, but … the Commonwealth has no obligation to tailor its expenditure to provide a surplus[391]."

For that reason alone it may be that s 94 is of only limited significance in deciding what is the scope of the executive power to spend. But even if s 94 gives no real guidance to how to express the limitation on the power to spend, s 94 does not point away from the conclusion that the power to spend is limited.

251 As has already been emphasised, all decisions of this Court to date have, rightly, acknowledged that some limiting notion additional to the requirement of lawful appropriation must be introduced to the description of the executive power in question. That limiting notion has been seen as required, first and foremost, by the fact that the Constitution divides and distributes powers between the Commonwealth and the States. That is, recognition that the Parliament of the Commonwealth is a Parliament of limited legislative power[392] entails that the Executive's power to spend is limited. An immediate textual foundation for limiting the power to spend has not infrequently been found in s 96. And the conclusion that the Commonwealth's executive power to expend moneys that have been appropriated is not unlimited is strengthened by recognising the intersection between the executive power and s 51(xxxix).

252 The limit on the power to spend must be consistent with the general proposition that it is for the Parliament and not the Executive to control expenditure. And the Parliament can control expenditure only by legislation. Once it is recognised, as it was in *Pape*, that "appropriation made by law"[393] is "not by its own force the exercise of an executive or legislative power to achieve an objective which requires expenditure"[394], it follows that the Parliament's control over expenditure can be exercised by not only the mechanisms of appropriation but also more specific legislation. It follows that the relevant "power vested by this Constitution … in the Government of the Commonwealth" in relation to the spending of money, which is the power with which 51(xxxix) intersects, must be understood as limited by reference to the extent of the legislative power of the Parliament.

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391 *Surplus Revenue Case* (1908) 7 CLR 179.

392 *Pharmaceutical Benefits Case* (1945) 71 CLR 237 at 271 per Dixon J.

393 s 83.

394 (2009) 238 CLR 1 at 72 [176].

253 It follows that the broad basis submission made by the Commonwealth parties – that the Executive's power to spend money lawfully appropriated is unlimited – should be rejected.

The narrow basis submission

254 Is it enough, as the Commonwealth parties submitted, to show that the disputed payments *could have been* authorised by a valid law made by the Parliament?

255 Posing the question in this way reflects what Barwick CJ said[395] in the *AAP Case* (albeit in order to determine whether the Australian Assistance Plan fell within the "purposes of the Commonwealth" as those words are used in s 81):

> "In the long run, whether the attempt is made to refer the appropriation and expenditure to legislative or to executive power, it will be the capacity of the Parliament to make a law to govern the activities for which the money is to be spent, which will determine whether or not the appropriation is valid. With exceptions that are not relevant to this matter and which need not be stated, *the executive may only do that which has been or could be the subject of valid legislation.* Consequently, to describe a Commonwealth purpose as a purpose for or in relation to which the Parliament may make a valid law, is both sufficient and accurate. …
>
> An Act of the Parliament which sought to authorize the carrying out of the Plan, including its financial provisions, *would*, in my opinion, *be* beyond the power of the Parliament." (emphasis added)

256 Approaching the matter in this way may be no more than to ask, as French CJ did in *Pape*[396], whether it can be said that the exercise of the power in question "does not reach beyond the area of responsibilities allocated to the Commonwealth by the Constitution, responsibilities which are ascertainable from the distribution of powers, more particularly the distribution of legislative powers, effected by the Constitution itself and the character and status of the

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395 (1975) 134 CLR 338 at 362-363.

396 (2009) 238 CLR 1 at 63 [132]-[133]. As has been mentioned, his Honour did so by reference to Mason J's later, but substantively identical, statement of principle in *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd* (1983) 158 CLR 535 at 560.

Commonwealth as a national government"[397]. The answer to that question will be assisted, as the plurality in *Pape* suggested[398], by the observation[399] that:

> "the existence of Commonwealth executive power in areas beyond the express grants of legislative power will ordinarily be clearest where Commonwealth executive or legislative action involves no real competition with State executive or legislative competence".

That is, as was said[400] by the plurality in *Pape*:

> "the determination of whether an enterprise or activity lies within the executive power of the Commonwealth:
>
> > '… invites consideration of the sufficiency of the powers of the States to engage effectively in the enterprise or activity in question and of the need for national action (whether unilateral or in co-operation with the States) to secure the contemplated benefit'."

257 In this case, as the plaintiff submitted, these considerations point directly against the Commonwealth's executive power extending to the expenditure (or the making of the agreement) in question. The provision of funding to an organisation to provide chaplains to schools involves direct competition with State executive and legislative action and, as the chaplaincy program run by Queensland demonstrates, the powers of the States are more than adequate to provide chaplains in schools. But while these observations may point towards a finding that Commonwealth power to engage in the activities does not exist, they do not answer the question of whether the Executive's actions were beyond power under the Constitution.

258 Asking "whether the disputed payments could have been authorised by a valid law" proceeds from the premise that the payments were not authorised by legislation and then presents two distinct issues. First, could the disputed payments (and making the Darling Heights Funding Agreement) have been authorised by a valid law? Second, if they could, is the fact that they were not in fact so authorised relevant?

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397 *AAP Case* (1975) 134 CLR 338 at 396 per Mason J.

398 (2009) 238 CLR 1 at 90-91 [239].

399 *Davis v The Commonwealth* (1988) 166 CLR 79 at 93-94 per Mason CJ, Deane and Gaudron JJ.

400 (2009) 238 CLR 1 at 91 [239], quoting *Davis v The Commonwealth* (1988) 166 CLR 79 at 111 per Brennan J.

259 As has already been noted, the premise – that the payments were not authorised by legislation – was assumed by the parties and interveners. No party or intervener examined whether the provision in successive Appropriation Acts which authorised the *application* of moneys appropriated was a relevant statutory authorisation.

260 As previously noted, in submissions made by leave after the close of oral argument, the Commonwealth parties submitted that "if legislative authority to enter into the Darling Heights Funding Agreement was required, that authority was provided by s 44 of the [*Financial Management and Accountability Act*]". Given that, by their defence, the Commonwealth parties admitted that "the NSCP is not authorised by special legislation" and, more importantly, did not assert that "the Commonwealth had and has power to enter into the agreements and make the payments referred to" other than in pursuance of the executive power of the Commonwealth, the submission belatedly made about legislative authority to make the Funding Agreement was probably not open. But whether or not that is so, s 44(1) could not and does not support the making of the Darling Heights Funding Agreement if, as these reasons conclude, there was no power for the Commonwealth to perform the obligations it undertook under that agreement. On no view could it be said that the making of a contract which the Commonwealth not only did not then have, but also could not thereafter have, power to perform promoted "proper use of … Commonwealth resources". Section 44 of the *Financial Management and Accountability Act* did not supply power to make the Darling Heights Funding Agreement. And the Commonwealth parties did not submit that the requirements of s 44(1) – that a Chief Executive "manage the affairs" of an agency "in a way that promotes proper use of the Commonwealth resources for which the Chief Executive is responsible" – supported the making of any of the disputed *payments.*

261 It is therefore appropriate to examine the submissions of the Commonwealth parties – that the disputed payments could have been authorised by a valid law made by the Parliament – without further consideration of the validity of the premise that lies behind the submissions.

262 The submissions directed attention to a hypothesis: that the disputed payments *could have been* authorised by law. Little attention was given in argument to the precise content of the hypothesised law beyond the Commonwealth parties submitting that account need not, indeed should not, be taken of the terms and conditions set out in the particular funding agreement in deciding whether a valid law authorising the payments could have been enacted. But if the test to be applied is whether the Parliament had power to enact a law providing for the disputed payments it is necessary to identify the content of that hypothetical law with precision.

263 In identifying the content of the hypothetical law, there is no warrant for discarding as irrelevant consideration of the terms and conditions which the Commonwealth has chosen to require as the terms and conditions on which the payments will be made available. Discarding reference to those matters could be justified only on the footing that the powers of the Executive to contract are not limited in any relevant way or that the Executive may spend money lawfully available to it in whatever way it sees fit. For the reasons that have been given, neither of those propositions should be accepted and it follows that, in considering whether the Parliament could have made a law providing for the payments in question, account must be taken of the terms and conditions on which the disputed payments were made.

264 Although the focus in this matter necessarily falls upon payments made under the Darling Heights Funding Agreement, it is necessary to recognise and take account of the fact that the disputed payments were made as part of a more general program: the NSCP. The Darling Heights Funding Agreement made repeated reference to the NSCP. What were described as the "National School Chaplaincy Programme Guidelines" ("the Guidelines") formed part of the Funding Agreement, which provided that the Guidelines "must be adhered to by all parties involved in school chaplaincy projects". No less importantly, the Guidelines set out what can properly be seen to be the defining elements of the NSCP.

265 Section 2.1 of the Guidelines described the NSCP as "a calendar year Programme with total funding of up to $30 million available per annum for three years, commencing in the 2007 school year". Section 2.3 dealt with "Funding arrangements". It provided that:

> "When the school principal submits an application, he/she will be asked to nominate the organisation that will enter into a funding agreement to receive funding under the Programme.
>
> Under this Programme, the Australian Government will not make payments to schools without a funding agreement. The following organisations are eligible to enter into a funding agreement under this Programme.
>
> - School Registered Entity:
>
> - A Government School Community Organisation for a government school that has been approved by the Minister to receive funding under the Investing In Our Schools Programme.
>
> - The legal entity for any Independent and Catholic school.
>
> - Supported by state and territory or systemic arrangements:

- State and territory government education authorities which act on behalf of government schools.

- The legal entity for the systems in the non-government sector which support and act on behalf of non-government schools.

- Project sponsor:

  - A project sponsor can be nominated by a school to manage the chaplaincy service on its behalf. For example, the project sponsor could be a chaplaincy service provider already approved by state or territory governments. The Department will enter into a funding agreement with the project sponsor *as long as they are a legal entity, affiliated with or working with a religious institution to provide a school chaplain and deliver chaplaincy services in schools, or a state or territory government approved chaplaincy service*." (emphasis added)

266 The particular arrangements in question in this case fell within the last of the categories identified in the Guidelines. SUQ was a project sponsor nominated by a school to manage the chaplaincy service on its behalf.

267 As has been said, in identifying the relevant hypothetical law, it is important to recognise that the impugned payments were made under the NSCP. The question being considered is whether the executive actions in question (making the Funding Agreement and making payments pursuant to it) could have been authorised by a valid law. The hypothetical law in question must be one which provided for the NSCP generally, not just for the particular payments that lie at the heart of the present litigation. That was the basis on which the Darling Heights Funding Agreement was drawn – that the agreement was made and the payments were to be made under and in accordance with the NSCP and in conformity with the Guidelines. It is the NSCP and the Guidelines that reveal the circumstances in which the impugned payments were made.

268 Contrary to the submission of the Commonwealth parties – that the character of the executive acts in question "flows, relevantly, from the character of the legal persons to whom they relate" – attention cannot be confined to that single circumstance.

269 The hypothetical law to be considered must be one which provides for the payment of money, under a funding agreement that accords with the requirements described in the Guidelines. Would a law of that kind be a valid law of the Parliament?

270 Two heads of legislative power were said to be engaged: that part of s 51(xx) which provides power to make laws with respect to "trading or financial corporations formed within the limits of the Commonwealth", and that part of s 51(xxiiiA) which provides power to make laws with respect to "the provision of … benefits to students".

Corporations power?

271 The payments in issue in this case were made to SUQ as a project sponsor. It was submitted that SUQ was at the relevant times a trading or financial corporation and that it followed that a law regulating the activities of SUQ in its provision of chaplaincy services would be a law with respect to trading or financial corporations. But even if SUQ were a trading or financial corporation (and that is a question which need not be examined), it is necessary to recognise that all that the Guidelines required was that the project sponsor be "a legal entity, affiliated with or working with a religious institution to provide a school chaplain and deliver chaplaincy services in schools". The Guidelines did not require that a project sponsor be a trading or financial corporation. If, as was submitted, SUQ met that description, its being so was wholly irrelevant to the operation and engagement of the Guidelines.

272 The hypothetical law under consideration would not in any way hinge on the constitutional conception of trading or financial corporations. It would not be a law authorising or regulating the capacity of constitutional corporations generally or of a particular corporation to make a contract. Unlike the law considered in *New South Wales v The Commonwealth* (*Work Choices Case*)[401] it would not be a law authorising or regulating the activities, functions, relationships or business of constitutional corporations generally or any particular constitutional corporation; it would not be a law regulating the conduct of those through whom a constitutional corporation acts nor those whose conduct is capable of affecting its activities, functions, relationships or business[402]. The hypothetical law would be no more than a law authorising or requiring the making of a particular kind of contract in which one contracting party could be, but need not be, a constitutional corporation providing services for reward. The hypothetical law would not be a law supported by s 51(xx).

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401 (2006) 229 CLR 1.

402 (2006) 229 CLR 1 at 116 [181]. The hypothetical law would apply indifferently to constitutional corporations and others but would produce no differential effect on such corporations: (2006) 229 CLR 1 at 114 [176], quoting *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 at 337 per Brennan J; [1995] HCA 16.

Provision of benefits to students?

273 The hypothetical law would not be a law with respect to the provision of benefits to students.

274 No party or intervener sought to challenge the conclusions expressed by five members of the Court in *Alexandra Private Geriatric Hospital Pty Ltd v The Commonwealth* ("the *Alexandra Hospital Case*")[403] about the meaning to be given to the words "the provision of … sickness and hospital benefits" in their context in s 51(xxiiiA). And much of the argument in this matter proceeded by seeking to apply what was said in that case to the circumstances of this.

275 In the *Alexandra Hospital Case* three matters were taken as settled in connection with that part of s 51(xxiiiA) which deals with "the provision of … sickness and hospital benefits". First, it was said[404] that it is settled that "the provision" of those benefits was confined to the provision of benefits by the Commonwealth[405]. Second, it was pointed out[406] that the prohibition "but not so as to authorize any form of civil conscription" applies only to the reference to provision of "medical and dental services" but may be relevant to the scope of other elements of the power "at least to the extent that whenever medical or dental services are provided pursuant to a law with respect to the provision of some other benefit, eg, sickness or hospital benefits, 'the law must not authorize any form of civil conscription of such services'[407]".

276 Third, and of most immediate relevance, it was said[408] in the *Alexandra Hospital Case* that "the concept intended by the use in the paragraph of the word 'benefits' is not confined to a grant of money or some other commodity. It may encompass the provision of a service or services." Reference was made by the Court in the *Alexandra Hospital Case*[409] to the discussion by Dixon J in *British*

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403 (1987) 162 CLR 271 at 279-281 per Mason ACJ, Wilson, Brennan, Deane and Dawson JJ; [1987] HCA 6.

404 (1987) 162 CLR 271 at 279.

405 *British Medical Association v The Commonwealth* ("the *BMA Case*") (1949) 79 CLR 201; [1949] HCA 44.

406 (1987) 162 CLR 271 at 279.

407 *BMA Case* (1949) 79 CLR 201 at 287 per Williams J.

408 (1987) 162 CLR 271 at 280.

409 (1987) 162 CLR 271 at 280.

Medical Association v The Commonwealth ("the *BMA Case*")[410] of the meaning to be given in s 51(xxiiiA) to the word "benefit" and whether it would extend to the actual provision of services such as nursing services. The Court concluded[411] in the *Alexandra Hospital Case* that the meaning of the word "benefit" accepted by the majority of the Court in the *BMA Case* was that expressed[412] by McTiernan J:

> "The material aid given pursuant to a scheme to provide for human wants is commonly described by the word 'benefit'. When this word is applied to that subject matter it signifies a pecuniary aid, service, attendance or commodity made available for human beings under legislation designed to promote social welfare or security: the word is also applied to such aids made available through a benefit society to members or their dependants. The word 'benefits' in par (xxiiiA) has a corresponding or similar meaning."

277 That "the word 'benefits' is not confined to a grant of money" and "*may* encompass the provision of a service or services" (emphasis added) may be accepted. But it by no means follows that every provision of a "service" is a "benefit" within the meaning of s 51(xxiiiA). When used in par (xxiiiA), the word "benefits" cannot be read as either "benefits *or* services" *or* "benefits *and* services". The paragraph distinguishes between the two ideas and uses the words differently. The word "services" is used only in the collocation "medical and dental services"; the word "benefits" is used in the collocations "unemployment, pharmaceutical, sickness and hospital benefits" and "benefits to students".

278 As the *Alexandra Hospital Case* illustrates, the concept of "benefit" includes the payment of money for and on behalf of another to obtain the provision to that other of material aid in satisfaction of a human want. In that case, money was paid by the Commonwealth to a nursing home proprietor for services provided to a patient. As the Court pointed out[413], "the intended ultimate beneficiary of any benefit paid [was] the patient in the nursing home to the proprietor of which the payment will ordinarily be made". And as the Court also pointed out[414], the "benefit" could as much be described as money paid for and

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410 (1949) 79 CLR 201 at 260-261.

411 (1987) 162 CLR 271 at 280.

412 (1949) 79 CLR 201 at 279; see also at 246 per Latham CJ, 286-287 per Williams J, 292 per Webb J.

413 (1987) 162 CLR 271 at 280.

414 (1987) 162 CLR 271 at 281.

on behalf of the patient as it could be described as provision of a service to the patient by the nursing home proprietor.

279 But in the present case, unlike the *Alexandra Hospital Case*, the chaplaincy services to be provided by SUQ can be described *only* as the provision of a service to students (and others) attending or associated with the school in question. There is not, in this case, a payment of money by the Commonwealth for or on behalf of any identified or identifiable student for services rendered or to be rendered to that student.

280 Just as "benefits to students" cannot be understood as synonymous with "benefits to or services for students", "benefits to students" does not embrace any and every form of provision of money or services that is of "advantage" to students. If the latter construction of "benefits to students" were adopted, a law that provided for the Commonwealth's payment for provision of a chaplain (whether by paying the wages of the chaplain or by paying an intermediary like SUQ to provide a chaplain at one or more schools) would be a law with respect to the provision of benefits to students. It would provide services to students that they may find helpful. But that construction of "benefits" must be rejected.

281 If "benefits" to students encompasses every form of payment that provides advantage, the power to legislate with respect to the provision of benefits to students is a large power which approaches a general power to make laws with respect to education. It would be a power of a kind radically different from the other elements of legislative power given by s 51(xxiiiA) and a very long way away from the mischief to which s 51(xxiiiA) was directed. The Constitution Alteration (Social Services) Bill, which led to the insertion of s 51(xxiiiA), was introduced[415] following this Court's decision in the *Pharmaceutical Benefits Case*[416] that the *Pharmaceutical Benefits Act* 1944 (Cth) was invalid. It was a constitutional amendment evidently intended to provide federal legislative power with respect to the provision of various forms of social security benefit, including benefits which were then and for some time had been provided by the Commonwealth.

282 When the word "benefits" is twice used in s 51(xxiiiA) the central notion that is being conveyed is a payment to or for an individual for provision of relief against the consequences of identified events or circumstances: sickness, unemployment, hospital treatment, pharmaceutical needs or being a student. To conclude that payments for the provision of chaplaincy services are a form of

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415 See *Wong v The Commonwealth* (2009) 236 CLR 573 at 587-589 [43]-[48], 623-624 [174]-[177]; [2009] HCA 3.

416 (1945) 71 CLR 237.

benefit to students would depend upon treating the central notion of "benefits to students" as no more than a particular instance of a more general concept that encompasses any and every form of payment which may be thought to provide some advantage to a person who is a student.

283 The reference to benefits in s 51(xxiiiA), whether in the collocation "unemployment … benefits", "sickness and hospital benefits" or "benefits to students", is not to be read as encompassing every form of payment that provides some advantage. "Benefits" when used in the collocation "sickness and hospital benefits" does not readily admit of such a broad understanding and there is no warrant for giving the word an altogether different meaning when used in the collocation "benefits to students". Rather, as was accepted in the *BMA Case* (and not challenged in the argument of this case), the notion of benefits is more confined than a generalised reference to provision of advantage. It, like the several notions of maternity *allowances*, widows' *pensions*, child *endowment* and family *allowances*, centres upon the provision of material aid in satisfaction of human wants.

284 The only forms of services mentioned in s 51(xxiiiA) are medical and dental services. But if either of the broad understandings of "benefit" that have been identified – any provision of a service or any provision of an advantage – were to be adopted, the reference in s 51(xxiiiA) to "medical … services" would be superfluous. Every law for the provision by the Commonwealth of medical services would be a law with respect to the provision by the Commonwealth of a form of "sickness and hospital benefits". By contrast, the understanding of "benefit" accepted in the *Alexandra Hospital Case* gives the separate elements of s 51(xxiiiA) independent, rather than entirely overlapping, effect.

285 Adopting and applying the understanding of "benefit" that was accepted in the *Alexandra Hospital Case*, the provision of payment for a chaplain to a school is not the provision of material aid in satisfaction of human wants. It is not a form of "benefits to students". The payments that are made under the NSCP are not made to or for students. They are made to provide a service to which students *may* resort and from which they *may* derive advantage. But they are not "benefits to students". A law providing for the payment to SUQ of moneys on the terms and conditions of the Darling Heights Funding Agreement would not be a law supported by s 51(xxiiiA).

286 The conclusion that the hypothesised law providing for the impugned payments would not be supported by either s 51(xx) or s 51(xxiiiA) entails that the impugned payments were not supported by the executive power of the Commonwealth. It also entails that the Executive had no power to make a contract undertaking to make those payments and that the terms of the Darling Heights Funding Agreement that provided for the making of the payments were unenforceable.

A more fundamental reason?

287 Is there a more fundamental reason for concluding that the making of the impugned payments was not a valid exercise of the executive power of the Commonwealth? Could those payments be made validly only if there was in fact legislation specifically authorising the application of money lawfully appropriated for that purpose? As already noted, the parties and interveners argued the case on the footing that there was no legislation of that kind (thus assuming, without debate, that so much of the Appropriation Acts as provided for the application of moneys appropriated to expenditures did not constitute such a specific authorisation).

288 Sound governmental and administrative practice may well point to the desirability of regulating programs of the kind in issue in this case by legislation. At the least the difficulties that arise from applying tests that require the consideration of a hypothetical as distinct from an actual law made by the Parliament are avoided and the Parliament's control over expenditures is plainly asserted in a manner that is capable of review both within and beyond the Parliament. But to conclude that the Constitution requires that the Executive *never* spend money lawfully available for expenditure without legislative authority to do so is to decide a large and complex issue. It is better that it not be decided until it is necessary to do so. The conclusion that the impugned payments could not have been the subject of a valid law of the Parliament suffices to conclude the issues that have been raised.

The answers to Questions 4(a) and 2(a)

289 The making of the relevant payments by the Commonwealth to SUQ pursuant to the Darling Heights Funding Agreement was not supported by the executive power of the Commonwealth under s 61 of the Constitution. Question 4(a) should be answered accordingly.

290 As foreshadowed earlier in these reasons, the question asked in the Special Case about the validity of the Darling Heights Funding Agreement should be answered in a way that directs attention to the relevant deficiency in power. Because the Commonwealth had no power to make the disputed payments, the Commonwealth could not validly make a contract purporting to oblige the making of those payments. Question 2(a) in the Special Case should be answered: "Save to say that the Commonwealth had no power to make, and thus no power to agree to make, any of the payments for which the Darling Heights Funding Agreement provided, it is inappropriate to answer this question."

291 HEYDON J. I dissent.

The factual background

292 This case concerns a Queensland school. The parties agree that it is called Darling Heights State Primary School ("the School"). The controversy concerns the constitutional validity of the way "chaplaincy services" at the School have been funded.

293 From 1998, various "chaplains" provided "chaplaincy services" at the School for short periods. From April 2006, Mrs Jo-Anne Hawley provided "chaplaincy services" at the School for an equivalent of two school days per week. The duties of the office entailed "pastoral care (including listening to and helping students, parents and staff)", managing or building "peer relationships, child trust and refuge" and giving "support to teachers and others". The appointment of the "chaplains" was made with the permission of the Queensland Department of Education and Training. That Department issued various "policies" stating the requirements that Queensland State schools wishing to provide "chaplaincy services" had to meet. The State of Queensland entered an agreement for the provision of "chaplaincy services" with Scripture Union Queensland, the fourth defendant.

294 In 2007, the School's Principal decided, after consultation with the Parents' and Citizens' Association and others in the School community, that students would be assisted by increasing the number of days that a "chaplain" was in attendance at the School. He made an application on 4 April 2007 for funding under a federal scheme announced in 2006.

295 That scheme is the National School Chaplaincy Program ("the NSCP"). Its application to the School is the subject of this dispute. The defendants contend that its constitutional validity is supported by s 61 of the Constitution, but accept that it is not supported by any other constitutional provision. Pursuant to the NSCP, the first defendant (the Commonwealth) funded "chaplaincy services" for many government and non-government schools. The funds were provided through a series of funding agreements in relation to individual schools. The relevant agreement in this case had two parties. One was the fourth defendant. The other was the first defendant (as represented by the Department of Education, Science and Training, and more recently the Department of Education, Employment and Workplace Relations).

296 The 4 April 2007 application was endorsed by the School's Principal, the President of the School's Parents' and Citizens' Association and the fourth defendant's Regional Manager. The application contained a declaration that there was broad community support for the choice of "chaplain" (Mrs Jo-Anne Hawley) and the proposed "chaplaincy services". There was also a declaration that appropriate steps had been taken to publicise the fact that use of the

"chaplaincy services" was voluntary. The application stated that the fourth defendant endorsed Mrs Jo-Anne Hawley. It also stated that the proposal involved expanding the "chaplaincy services" from two to four school days per week. And the application identified the fourth defendant as the proposed sponsor with whom the first defendant would make the agreement to fund the "chaplaincy services".

297 The application described the expanded "chaplaincy services" for which the NSCP funding was sought thus:

> "1. WORKING WITH STUDENTS (PREP-7): Being able to talk to/counsel students who are experiencing a range of issues that are impacting on them. This may either be referral from Teacher/s or else the child seeking assistance. Also being visible at Break Times so that children may approach and seek help.
>
> 2. READING GROUPS/CLASSROOM ASSISTANCE: Improves knowledge of individual students by observing how they function in the classroom. Invaluable information can be gleaned and observance by students assists the person to build relationships and trust with the students. Children seek the person out as she is seen as a confidante.
>
> 3. GIRLS STUFF AND BOYS STUFF: Working with both genders in the Upper School who are experiencing issues at home, display poor self-esteem/friendship skills or need extra care. The program covers self-esteem, appreciation, positive thinking/talking & responsible behaviour.
>
> 4. BOYS MENTORING PROGRAM: Overseeing the program for boys who need some extra help in dealing with their emotions (anger/anxiety/fear). Boys to be mentored by a positive male role model who can help them learn to handle their emotions/behaviour.
>
> 5. WORKING WITH TEACHERS/STAFF/PARENTS: Ensuring that all stakeholders are able to access the services provided. This involves being available to talk to people about personal issues that may be impacting on them. Having an additional support level available ensures that some minor issues do not become major issues.
>
> The existing/future role is a continuation/refinement of the initial discussions that were conducted when the first Chaplain was appointed. This is an evolving role and the various duties undertaken depend entirely on the make-up of the School Community and the range of issues that are affecting them. We are a very multicultural school and this alone brings another dimension to the range of issues that as a School we have to deal with.

> The role develops as there are concerns that need to be dealt with in an appropriate manner."

298 On or about 7 July 2007, the Department of Education, Science and Training made an offer of funding to the School under the NSCP. On or about 25 July 2007, the School's Principal signed a declaration that the School intended to proceed with the "chaplaincy project". On or about 24 September 2007, the Deputy Principal of the School notified the Department of Education, Science and Training that Ms Christina Putland was to commence as "chaplain" at the School. The notification indicated that she had a Bachelor of Arts (Teaching) degree and formal qualifications in relation to Lifeline telephone counselling. The notification described her as being endorsed by the fourth defendant. The notification did not identify her as being formally ordained or commissioned by a recognised religious institution or endorsed by a religious authority.

299 On 9 November 2007, the first defendant entered into an agreement with the fourth defendant to fund "chaplaincy services" at the School under the NSCP ("the Agreement"). The Agreement was to last three years from the date of its execution. However, the parties later changed the commencement date of the Agreement to 8 October 2007 and extended its term to 31 December 2011. The fourth defendant agreed to provide the "chaplaincy services" described in the School's application. The first defendant agreed to provide funding in three annual instalments of $22,000 upon the rendering of valid tax invoices by the fourth defendant. The parties later amended the Agreement by agreeing that the first defendant should make a fourth payment of $27,063.01.

300 The Agreement included a "Code of Conduct" for "chaplains". "Chaplains" were to sign it before they began delivering any "chaplaincy services" under the Agreement. Breach of the Code of Conduct by a "chaplain" could result in the fourth defendant being obligated to repay all or some of the funding supplied by the first defendant. One of the duties that the Code of Conduct imposed on "chaplains" was to "[r]espect the rights of parents/guardians to ensure the religious and moral education of their children is in line with their own convictions."

301 "Chaplaincy services" funded under the NSCP began at the School. The fourth defendant issued tax invoices to the first defendant in respect of each of the four instalments payable under the Agreement as amended. The first defendant paid the instalments. The fourth and last instalment was paid on 11 October 2010.

302 On 5 October 2009, the plaintiff's three oldest children were enrolled at the School. On 27 January 2010, his youngest child was enrolled.

303 The litigation began on 21 December 2010, after the date of the last payment under the Agreement, but at a time when some of the services for which the fourth defendant had been paid were still to be rendered.

304 The plaintiff sued the Commonwealth of Australia as first defendant. The plaintiff also sued the Minister for School Education, Early Childhood and Youth and the Minister for Finance and Deregulation as the second and third defendants. Below these three defendants will together be called "the Commonwealth". The plaintiff also sued Scripture Union Queensland as fourth defendant.

First preliminary point: the qualifications and work of the "chaplains"

305 One challenge to the Agreement was that the "eligibility criteria" for the office of "chaplain" imposed a religious test contrary to s 116 of the Constitution. Section 116 provides in part: "no religious test shall be required as a qualification for any office or public trust under the Commonwealth." The eligibility criteria appear in cl 1.5 of the 2010 Guidelines for the NSCP. The words complained of are:

> "For the purposes of this Program, a school chaplain is a person who is recognised:
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> - by the local school, its community and the appropriate governing authority as having the skills and experience to deliver school chaplaincy services to the school and its community; and
>
> - through formal ordination, commissioning, recognised qualifications or endorsement by a recognised or accepted religious institution or a state/territory government approved chaplaincy service."

However, the next sentence reads: "In particular circumstances, secular pastoral care workers may be employed under this program." The next paragraph reads in part:

> "School chaplains will deliver services to the school and its community through:
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> - providing general religious and personal advice to those seeking it, comfort and support to students and staff, such as during times of grief;
>
> - supporting students and staff to create an environment of cooperation and respect, promoting an understanding of diversity and the range of religious affiliations and their traditions;

- respecting the range of religious views and cultural traditions in the school and the broader community and also respecting the rights of parents/guardians to ensure the religious and moral education of their children is in line with their own convictions;

- working in a wider spiritual context to support students and staff of all religious affiliations and not seeking to impose any religious beliefs or persuade an individual toward a particular set of religious beliefs".

306 This, read with the statement of the expanded "chaplaincy services" program in the School's application[417], conveys the impression that, at least at this school, neither the NSCP nor the qualification for "chaplains" had much to do with religion in any specific or sectarian sense. The work described could have been done by persons who met a religious test. It could equally have been done by persons who did not.

307 In ordinary speech a "chaplain" is the priest, clergyman or minister of a chapel; or a clergyman who conducts religious services in the private chapel of an institution or household. Those who are "school chaplains" under the NSCP's auspices fall outside these definitions. Their duties in schools are unconnected with any chapel. They conduct no religious services. Perhaps those supporting validity committed an error in calling the NSCP a "chaplaincy program" and speaking of "school chaplains". The language is inaccurate and may have been counterproductive. Some vaguer expression, more pleasing to 21st century ears, like "mentor" or "adviser" or "comforter" or "counsellor" or even "consultant", might have had an emollient effect. The plaintiff must have found the words "chaplain" and "chaplaincy" useful for his contention that the NSCP was void under s 116.

Second preliminary point: the consequence of the plaintiff's arguments

308 Before the NSCP was introduced, the School and the Queensland State Government saw it as beneficial that a "chaplaincy service" be supplied to the School for two days per week. The NSCP enabled the supply of that service to be increased to four days per week. The Queensland State Government supported that change. A federal government of one political colour initiated it before the 2007 election, two other governments of a different political colour continued it until the next election, and a third government of that political colour continued it thereafter. The Queensland State Government did not appear to see the NSCP as impinging on its rights as a State. The NSCP was not controversial as between the major political parties. It was not controversial as between the

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417 See above at [297].

two houses of Parliament. It was voluntary for students and their parents. The introduction of the NSCP at the School was favoured by the School community's key institutions. The plaintiff's submission that the Commonwealth had no power to provide the NSCP funding would invalidate a voluntary program that was seen as advantageous by and had the support of four successive Commonwealth Governments, the Queensland State Government, the School and the School's community. Of course, the results to which the submission leads do not demonstrate that the plaintiff's submission is wrong. But those results do call for the submission to be closely scrutinised.

The structure of the questions

309 Question 1 of the questions stated in the Amended Special Case raises three sub-questions. The first is: does the plaintiff have standing to challenge the drawing of money from the Consolidated Revenue Fund for the purpose of making payments under the Agreement during five financial years: 2007-2008, 2008-2009, 2009-2010, 2010-2011 and 2011-2012[418]? The second sub-question is: does the plaintiff have standing to challenge the making of the four payments by the Commonwealth to the fourth defendant? The third sub-question, which is closely related to the second sub-question, is: does the plaintiff have standing to challenge the validity of the Agreement[419]?

310 Question 3 asks: was the drawing of money from the Consolidated Revenue Fund for the purpose of making payments under the Agreement authorised by the Appropriation Acts for the years 2007-2008, 2008-2009, 2009-2010, 2010-2011 and 2011-2012[420]?

311 Questions 2(a) and 4(a) relate to whether the Commonwealth's acts in making the payments to the fourth defendant under the Agreement were unlawful because they were beyond the executive power of the Commonwealth under s 61 of the Constitution. These questions raise two sub-questions. One is: does the executive power extend to any matter on which the Commonwealth has legislative power, and in particular the powers conferred by s 51(xx) or (xxiiiA) of the Constitution[421]? The second sub-question only arises if the answer to the first sub-question is "Yes". It is: does the Commonwealth have legislative power to enact legislation supporting the Agreement under either of those

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418 See below at [315]-[326].

419 See below at [327]-[331].

420 See below at [332]-[339].

421 See below at [340]-[407].

placita[422]? Below it will be seen that the first sub-question was not expressly identified in the Amended Special Case and emerged only during oral argument.

312 Questions 2(b) and 4(b) relate to whether s 116 of the Constitution prohibits the making of the payments[423].

313 Questions 5 and 6 relate to relief.

314 The questions and sub-questions just described will be answered in the above order, save that it is not necessary to deal with s 51(xx).

Standing to challenge the drawing of money from the Consolidated Revenue Fund

315 The plaintiff has no standing to challenge the drawing of money from the Consolidated Revenue Fund.

316 Where a declaration that executive action is not constitutionally valid is sought, or an injunction against its repetition is sought, it must be demonstrated either that a private right of the plaintiff is interfered with or that the plaintiff has "a special interest in the subject matter of the action"[424]. The Solicitor-General of the Commonwealth did not argue that no litigant could ever have standing to challenge the validity of an appropriation. The Solicitor-General accepted that a person who sought to challenge a payment which had a direct effect on his or her rights[425] would have had standing. But the plaintiff did not claim that his rights were affected. He claimed only that he had "a special interest in the subject matter" – an interest greater than that of the public generally.

317 The plaintiff submitted that his "children attend a school in respect of which funds have been expended by the Commonwealth." He submitted that that expenditure was the subject of his claim to relief. Accordingly, the plaintiff submitted that he did not bring the proceedings as a mere matter of "intellectual or emotional concern."[426] The plaintiff also submitted that he did not bring the

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422 See below at [408]-[441].

423 See below at [442]-[448].

424 *Australian Conservation Foundation Inc v The Commonwealth* (1980) 146 CLR 493 at 527; [1980] HCA 53.

425 Like the plaintiffs in *Brown v West* (1990) 169 CLR 195; [1990] HCA 7 and *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1; [2009] HCA 23.

426 *Australian Conservation Foundation Inc v The Commonwealth* (1980) 146 CLR 493 at 530 per Gibbs J.

proceedings in an attempt to give effect to his beliefs or opinions on a matter "which does not affect him personally except in so far as he holds beliefs or opinions about it."[427]

318 The plaintiff further argued:

> "Given that appropriation is a necessary step in the expenditure of public monies, it is not logically possible to recognise the plaintiff's special interest in the expenditure of such monies on the provision of chaplaincy services at his children's school whilst denying a sufficient interest in the appropriation of those monies from the Consolidated Revenue Fund. The latter interest flows from the former."

319 These arguments must be rejected. It is true that they may establish that the plaintiff may have standing to challenge the *expenditure* of funds. But their flaw is that they do not establish that the plaintiff has standing to challenge the *appropriation* of funds. It does not follow from the fact that the plaintiff may have standing to challenge the expenditure of funds by reason of having a special interest in that expenditure that he also has standing to challenge the appropriation of those funds. The appropriation of money by Parliament through an Appropriation Act authorises the Executive to withdraw money from the Treasury, and restricts its expenditure to the purpose for which it was appropriated, but creates no other rights or duties[428]. The plaintiff has no interest in the appropriation of the money beyond that of any other member of the public[429]. In Mason J's words in the *Australian Assistance Plan* case, "the individual taxpayer has no interest at all in funds standing to the credit of Consolidated Revenue."[430]

320 The plaintiff faces an additional difficulty. His complaint relates to his children's education at the School. They began to attend the School in the financial year 2009-2010. How, then, can the plaintiff have standing in relation to the appropriations for 2007-2008 and 2008-2009? And how can the plaintiff challenge the appropriation for 2009-2010 in relation to the third payment? There is no claim for it to be recovered. The plaintiff endeavoured to surmount

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427 *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27 at 37 per Gibbs CJ; [1981] HCA 50.

428 *Victoria v The Commonwealth and Hayden* (1975) 134 CLR 338 at 386-387 and 392-393; [1975] HCA 52; *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 210-211 [601]-[602].

429 *Anderson v The Commonwealth* (1932) 47 CLR 50 at 51-52; [1932] HCA 2.

430 *Victoria v The Commonwealth and Hayden* (1975) 134 CLR 338 at 402.

this difficulty by submitting that "to the extent that funds expended during financial years prior to the enrolment of any of his children at the School assisted in entrenching a program which now affects his children at that School, … he has a sufficient interest in the legality of that expenditure to constitute his claim in respect of it a justiciable controversy." That argument too must be rejected. The validity of an appropriation is determined by examining the relevant legislation for a particular year, not by examining the validity of expenditures in previous years.

321 The plaintiff also argued:

> "Because the plaintiff's argument concerning appropriations in the years during which his children were enrolled at the School depends upon demonstrating the absence of appropriations in respect of the NSCP in prior years, he has a sufficient interest in those prior purported appropriations to have standing to challenge them."

This was a reference to the plaintiff's contention that there was no valid appropriation in relation to the fourth payment unless there had been valid appropriations for the earlier payments[431]. The argument that there was no valid appropriation in relation to the fourth payment is rejected below for reasons that do not depend on the validity of the earlier payments[432]. Hence the plaintiff's argument for standing in respect of the earlier payments fails.

322 The plaintiff also argued that even if the operation of past Appropriation Acts had been exhausted and all money due had been paid under the Agreement, he had standing because the activities contemplated under the Agreement were "supposed to continue." That argument must fail unless it is shown that those activities, and the past system of funding them, are continuing at the School. This was not shown.

323 The plaintiff advanced another argument:

> "With respect to the declarations sought by the plaintiff in respect of appropriations in financial years prior to the present, it is incorrect to say that these would concern no present or future rights or obligations, notwithstanding the exhausted operation of the relevant Appropriation Acts. This is because:

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431 See below at [334].

432 See below at [332]-[339].

(a) the Executive may, in the absence of an appropriation, contract to expend monies conditional upon there being an appropriation; and so,

(b) if there was never an appropriation in respect of the NSCP, and in particular the … Agreement, then [the fourth defendant] was never entitled to receive payments under that agreement.

Therefore, even while the plaintiff does not seek repayment of the money paid to [the fourth defendant], the declarations sought in respect of previous Appropriation Acts would affect [the fourth defendant's] present title to retain the money it has received under the … Agreement."

There being no claim that the fourth defendant repay the money, a mere declaration affecting its "present title to retain the money it has received" is immaterial and should not be made. Further, it has not retained the money: it has paid it out to others, who are not parties.

324 The plaintiff's final argument on this point was:

"whilst Parliament may, subject to there being a power to spend in respect of the NSCP, make a supplementary appropriation for the NSCP to cure the absence of an appropriation, this does not mean that the relief sought by the plaintiff lacks utility: placing the matter before Parliament for its specific consideration is precisely what ss 53, 54, 56, 81 and 83 of the *Constitution* require."

For reasons given below, there is no "absence of an appropriation"[433]. There is no need for the government to return to Parliament in search of a supplementary appropriation. Hence the purported basis for the argument does not exist.

325 Question 1(b) in the Amended Special Case should be answered "No".

326 The Solicitor-General of the Commonwealth advanced a submission going beyond the terms of the questions in the Amended Special Case. He submitted that even though the States would have had standing to commence the proceedings, the plaintiff's lack of standing could not be cured by the intervention of the States. He submitted that when the proceedings began there was no "matter" in relation to the validity of the appropriations because the plaintiff lacked standing. He submitted that the States could not intervene under s 78A of the *Judiciary Act* 1903 (Cth) unless there was a pre-existing "matter". And he submitted that their purported intervention did not create a matter or expand a

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433 See below at [336]-[338].

matter. The Court did not have the benefit of contrary argument from any party or intervener. Subject to that, the submission appears to be sound.

Standing to challenge the Commonwealth's payments to the fourth defendant, and to challenge the Agreement

327 Because of the times when his children began attending the School, the plaintiff has no standing to challenge expenditures in 2007-2008 and 2008-2009[434]. Except for arguments that relate to the 2010-2011 payment of $27,063.01, the plaintiff's arguments about expenditures already made under the Agreement are immaterial. The arrangements under which the 2007-2008, 2008-2009 and 2009-2010 payments were made "are no longer in operation and were not in operation when these proceedings were commenced."[435] That is, at the time when the proceedings started, the conduct of which the plaintiff complains in relation to those payments had already been carried out. Declarations that that conduct was unlawful should not be granted because of their inutility and futility: they "can produce no foreseeable consequences for the parties."[436] However, the receipt of the $27,063.01 payment by the fourth defendant obliged it to carry out the NSCP under the Agreement until 31 December 2011, a period during which the plaintiff's children were at the School.

328 At the time when the proceedings began, the plaintiff and his children had not participated, and they were not obliged to participate, in the NSCP. The NSCP did not affect the plaintiff's freedom of action or that of his children. The plaintiff did not contend that he wished to be a counsellor or mentor to children at the School and that his wish was frustrated because the Agreement imposed a religious test for that office contrary to s 116 of the Constitution. There is thus much to be said for the view that when the proceedings began the plaintiff was seeking no more than "the satisfaction of righting a wrong, upholding a principle or winning a contest"[437].

329 However, Mrs Jo-Anne Hawley, who was the "chaplain" named in the 4 April 2007 application for funding, did participate in conventional teaching

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434 See above at [320]-[321].

435 *Gardner v Dairy Industry Authority of New South Wales* (1977) 52 ALJR 180 at 188 per Aickin J; 18 ALR 55 at 71.

436 *Gardner v Dairy Industry Authority of New South Wales* (1977) 52 ALJR 180 at 189 per Aickin J; 18 ALR 55 at 71. See also *Church of Scientology v Woodward* (1982) 154 CLR 25 at 62; [1982] HCA 78.

437 *Australian Conservation Foundation Inc v The Commonwealth* (1980) 146 CLR 493 at 530 per Gibbs J.

activities. She was said to work "on the Personal Development Programs for both males & females in the Senior School, … in varying capacities in the Options in Yrs 4/5, [and in] the Reading Programme in Yrs 2/3 and in varying capacities in the Prep/1 area." Although Mrs Hawley left the School before the plaintiff's children arrived, it may be inferred that her successor's role was similar. It was also contemplated that in future the "chaplain" would be involved in reading groups and classroom assistance. The plaintiff submitted:

> "The Court may infer from this material that [Mrs] Hawley – and her replacement, Ms Putland – did not merely provide services additional to those provided in the classroom by teachers, in circumstances where the plaintiff's children were free to avoid any contact or dealings with her. Rather, she was involved in aspects of the life of the School that extended far beyond the forms of individually directed pastoral care that one might ordinarily associate with the title 'chaplain'. Indeed, she was a presence in the classroom.
>
> Accordingly, if it is [said] that the plaintiff lacks the requisite standing to seek relief on the basis that there was a *de facto* wall separating him and his children from the activities of first [Mrs] Hawley and then Ms Putland, this proceeds upon an incorrect factual premise."

The plaintiff made no concession as to the position if there had been a de facto wall.

330 The submission of counsel for the plaintiff suggests that the plaintiff does, and did when he instituted the proceedings, feel very troubled by the "activities" of Ms Putland. "Special interests" are not limited to material interests. They can include points of conscience. Therefore at the time the proceedings began the plaintiff had a special interest in having a judicial determination of the validity of the payment made on 11 October 2010. The services for which it was paid were still being performed and to be performed, and the payment was returnable to the Commonwealth in the event of breach by the fourth defendant. The Solicitor-General of the Commonwealth was therefore correct to concede that the plaintiff has a special interest in having a judicial determination of the validity of the Agreement. No payment has been made since 11 October 2010, and hence there is no special interest in relation to 2011-2012. The lapse of time since the proceedings began might affect the form of relief to be granted to the plaintiff, but not his standing.

331 Question 1(a) and (c)(iv) should be answered "Yes". The consequence is that the plaintiff has standing to raise his ss 61 and 116 points.

Was the drawing of the money used to make the fourth payment authorised by the *Appropriation Act (No 1)* 2010-2011 (Cth)?

332 Although this question does not arise, in deference to the very lengthy arguments advanced by the plaintiff it will be dealt with.

333 Above it was concluded that the plaintiff did not have standing to challenge the appropriation of the money supplied. If, contrary to that conclusion, he did, the standing can have been no wider than his standing to challenge the 11 October 2010 payment itself.

334 On the plaintiff's view of the interconnectedness of appropriation issues and expenditure issues, the statute relevant to the 11 October 2010 payment is the *Appropriation Act (No 1)* 2010-2011 (Cth) ("the No 1 Act"). It is entitled: "An Act to appropriate money out of the Consolidated Revenue Fund for the ordinary annual services of the Government, and for related purposes". The plaintiff submitted that the NSCP was outside the concept of "ordinary annual services of the Government" as understood between the houses of Parliament. The plaintiff submitted that "unless it provides otherwise in clear language, an [A]ct to appropriate moneys for the ordinary annual services of the Government should not be construed as authorising spending on policies not previously authorised by special legislation and for which no appropriations have been made in the past."

335 The Commonwealth denied that there was an understanding between the houses of Parliament of the kind the plaintiff relied on. It also submitted that by the time of the No 1 Act, the NSCP was not a new policy, and that appropriations had been made for it in the past. It is not necessary to deal with these two arguments of the Commonwealth. It is sufficient to uphold its primary argument – that on the clear construction of the No 1 Act there was an appropriation.

336 The No 1 Act expressly authorised the drawing of money from the Consolidated Revenue Fund for the purpose of expenditure under the NSCP. It is not necessary to resort to the meaning of "ordinary annual services of the Government" as used in the long title to construe the Act. The meaning of the Act is so clear that it is incapable of being altered by the long title.

337 Section 17 of the No 1 Act provided:

> "The Consolidated Revenue Fund is appropriated as necessary for the purposes of this Act, including the operation of this Act as affected by the *Financial Management and Accountability Act 1997*."

The "purposes of this Act" were stated in s 8, which provided:

> "(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 achieving that outcome.
>
> …
>
> (2) If the Portfolio Statements indicate that activities of a particular kind were intended to be treated as activities in respect of a particular outcome, then expenditure for the purpose of carrying out those activities is taken to be expenditure for the purpose of contributing to achieving the outcome."

"Administered item" is defined in s 3: "an amount set out in Schedule 1 opposite an outcome for an Agency under the heading 'Administered'." The relevant "outcome for an Agency" appears in Sched 1, in relation to the Agency known as "Department of Education, Employment and Workplace Relations". It 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". Under the heading "Administered" there appears opposite Outcome 2 the figure of $456,982,000.

338 Section 3 defines "Portfolio Statements" as "the Portfolio Budget Statements". Section 3 in turn defines "Portfolio Budget Statements" as meaning: "the Portfolio Budget Statements that were tabled in the Senate or the House of Representatives in relation to the Bill for this Act." In the part of the Portfolio Budget Statements so tabled that deals with the Department of Education, Employment and Workplace Relations, "Outcome 2" is described as it appears in Sched 1 to the Act. Under the heading "Schools Support" appear the following words:

> "National School Chaplaincy Program – is 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."

That is an activity in respect of a particular outcome within the meaning of s 8(2). Expenditure for the purpose of carrying out that activity is therefore taken to be expenditure for the purpose of contributing to achieving Outcome 2. Accordingly, s 8(1) authorised the necessary expenditure.

339 If question 3(d) arose, the answer would be "Yes". The balance of question 3 does not arise.

Executive power of the Commonwealth under s 61

340 Section 61 of the Constitution provides:

> "The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth."

There were several controversies in these proceedings about the meaning of s 61, but the central one is as follows. In the end the defendants submitted that the executive power of the Commonwealth included a power to do what the Commonwealth legislature could authorise the Executive to do by enacting legislation, whether or not the Commonwealth legislature had actually enacted the legislation. The plaintiff, and some interveners, on the other hand, contended that the executive power was narrower. The defendants submitted that many modern authorities supported their submission. The plaintiff submitted that older authorities did not. The stand of the defendants is correct.

341 Paragraph 2(a)(i) of the plaintiff's written submissions assumed that the executive power of the Commonwealth included a power to enter contracts without statutory authority as long as the Commonwealth had legislative power to give it statutory authority. The plaintiff's proposition was not a slip. It was repeated later in his written submissions. It was repeated again in his Outline of Oral Submissions. The written submissions of all other parties and interveners accepted its correctness. Indeed, Queensland specifically submitted that "[n]o party disputes" this. Queensland also went so far as to submit that the assumed proposition was "the orthodox test of the scope of executive power."

342 In its written outline of oral argument, the Commonwealth was thus correct to describe the assumed proposition as a "common assumption" – correct at least at the time when that document was composed before the second day of oral argument commenced. There are exceptions to the assumed proposition as the plaintiff stated it, some widening it and some narrowing it. They will be referred to below[438]. The assumed proposition, as qualified by the exceptions, will be called "the Common Assumption".

343 The extent to which the Common Assumption was actually common began to break down when Western Australia began its oral address. It withdrew the relevant part of its written submissions. Victoria and Queensland followed suit. In due course, the plaintiff and most government interveners withdrew their assertion of the Common Assumption and lined up against the defendants. This

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438 See below at [397]-[402].

great *renversement des alliances* created a new and unexpected hurdle for the defendants. So the Court was as on a darkling plain, swept with confused alarms of struggle and flight, where ignorant armies clash by night – although the parties were more surprised than ignorant.

344 The five parties and the seven interveners were represented by exceptionally capable and experienced constitutional lawyers. Those lawyers included seven Solicitors-General and a retired Federal Court judge. Their solemn adherence to the Common Assumption, during the calm and leisured composition of their written submissions, is a significant phenomenon. If Hugh Cairns and Roundell Palmer, arguing opposite sides of a case, agreed on a principle of equity, that was some indication that that principle was sound. Of course, an agreement between parties or interveners on the law does not bind the courts[439]. Adherence to the Common Assumption does not demonstrate or constitute the law. It is not decisive. But it is material. Why did this large group of expert constitutional lawyers initially adhere to the Common Assumption? Because they thought it to be correct. And it was correct.

345 It is now necessary to examine, in roughly chronological order, first the legal materials supporting the Common Assumption and then the opinions of modern writers supporting it.

346 *Convention Debates.* According to *Cole v Whitfield*, reference to the history of constitutional provisions[440]:

> "may be made, not for the purpose of substituting for the meaning of the words used the scope and effect – if such could be established – which the founding fathers subjectively intended the [provision] to have, but for the purpose of identifying the contemporary meaning of language used, the subject to which that language was directed and the nature and objectives of the movement towards federation from which the compact of the Constitution finally emerged."

347 On 6 April 1891 the Constitutional Convention considered an early version of s 61. It was contained in Ch II cl 8 of the then draft:

> "The executive power and authority of the commonwealth shall extend to *all matters with respect to which the legislative powers of the parliament may be exercised*, excepting only matters, being within the legislative

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439 *Pantorno v The Queen* (1989) 166 CLR 466 at 473; [1989] HCA 18.

440 (1988) 165 CLR 360 at 385 per Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ; [1988] HCA 18.

> powers of a state, with respect to which the parliament of that state for the time-being exercises such powers." (emphasis added)

Sir Samuel Griffith then said:

> "This afternoon I have had circulated an amendment which I propose to make in this clause. It does not alter its intention, though it certainly makes it shorter. As the clause stands, it contains a negative limitation upon the powers of the executive; but the amendment will give a positive statement as to what they are to be. I move:
>
> > That in line 2 all the words after the words 'extend to' be omitted with a view to the insertion in lieu thereof of the words 'the execution of the provisions of this constitution, and the laws of the commonwealth.'
>
> That amendment covers all that is meant by the clause, and is quite free from ambiguity."[441]

The amendment was agreed to, and the clause, as amended, was agreed to. This incident was referred to in *Pape v Federal Commissioner of Taxation*[442]. Those passages constitute evidence that the "contemporary meaning" of the words "execution … of the laws of the Commonwealth" used in s 61 included all matters on which Commonwealth legislative power might be exercised, even though it had not been exercised, subject to the stated exception.

348 *Opinions of the framers after 1900.* The principles stated in *Cole v Whitfield*[443] apply also to the language of lawyers at a time roughly contemporary with federation[444].

349 In 1901, Alfred Deakin, the Attorney-General, stated in an opinion for the Prime Minister[445]:

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441 *Official Report of the National Australasian Convention Debates*, (Sydney), 6 April 1891 at 777-778.

442 (2009) 238 CLR 1 at 56-57 [115]-[117] per French CJ.

443 See above at [346].

444 *XYZ v The Commonwealth* (2006) 227 CLR 532 at 583-591 [153]-[173]; [2006] HCA 25.

445 "Position of Commonwealth and States in Relation to Treaties: Source and Extent of Commonwealth Executive Power and External Affairs Power: Nature of Adherence to Treaties: Channel of Communication Between States and Empire or

(Footnote continues on next page)

> "The executive power of the Commonwealth unlike the legislative is derived directly and independently from its fountain head – the Crown. It may be contended that it has a higher and larger scope than that of the States (see sections 61 and 64) but it is not necessary to discuss such a claim here. Its powers are at least coextensive with its legislative charter."

350 In 1902, Deakin said in what is known as his *Vondel* opinion[446]:

> "Had it been intended to limit the scope of the executive power to matters on which the Commonwealth Parliament had legislated, nothing would have been easier than to say so."

This sentence was quoted with approval in *Pape v Federal Commissioner of Taxation*[447]. Then Deakin stated[448]:

> "The framers of that clause evidently contemplated the existence of a wide sphere of Commonwealth executive power, which it would be dangerous, if not impossible, to define, flowing naturally and directly from the nature of the Federal Government itself, and from the powers, exercisable at will, with which the Federal Parliament was to be entrusted."

That sentence, too, was approvingly quoted in *Pape v Federal Commissioner of Taxation*[449].

Foreign Powers", in Brazil and Mitchell (eds), *Opinions of Attorneys-General of the Commonwealth of Australia, Volume 1: 1901-14*, (1981) 2 at 3.

446 "Channel of Communication with Imperial Government: Position of Consuls: Executive Power of Commonwealth", in Brazil and Mitchell (eds), *Opinions of Attorneys-General of the Commonwealth of Australia, Volume 1: 1901-14*, (1981) 129 at 130.

447 (2009) 238 CLR 1 at 59 [124] per French CJ.

448 "Channel of Communication with Imperial Government: Position of Consuls: Executive Power of Commonwealth", in Brazil and Mitchell (eds), *Opinions of Attorneys-General of the Commonwealth of Australia, Volume 1: 1901-14*, (1981) 129 at 130.

449 (2009) 238 CLR 1 at 59 [124] per French CJ.

351 A little later Deakin said: "section 61 points also to executive powers which belong to prerogative", and continued[450]:

> "Shorn of prerogative powers, the Commonwealth Executive would be a mere appendage to the Parliament – a board of subordinate officers exercising such powers as might be conferred upon it, but without independent authority of any kind. Such a conception of the executive is wholly at variance, not only with every principle of English constitutional law, but with the clear and unmistakable provisions of the Constitution. Responsible government, though far more clearly established there than in any of the State Constitutions, would then be much more restricted in authority, character, and domain than it is in the States under their less explicit charters. 'The King's Ministers of State for the Commonwealth' – so described for the first time in a great constitutional document – would, individually and collectively, be less His Majesty's Ministers than are the members of the State Executives; the vast fund of powers held by the Crown in trust for the people would disappear; and the Commonwealth, instead of inheriting the fullest development of constitutional rights and privileges, would find its new political organisation had dwindled from a national to a municipal body, for making and executing continental by-laws."

That suggests an amplitude in the powers conferred by s 61. How ample?

352 Deakin answered that question thus[451]:

> "It is impossible to resist the conclusion that the Commonwealth has executive power, independently of Commonwealth legislation, *with respect to every matter to which its legislative power extends*. It is not contended that the Commonwealth Government has power to administer State Acts which remain in force relating to matters within the concurrent

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450 "Channel of Communication with Imperial Government: Position of Consuls: Executive Power of Commonwealth", in Brazil and Mitchell (eds), *Opinions of Attorneys-General of the Commonwealth of Australia, Volume 1: 1901-14*, (1981) 129 at 131. Deakin had stated similar ideas during the Convention Debates: *Official Report of the National Australasian Convention Debates*, (Sydney), 6 April 1891 at 769-773.

451 "Channel of Communication with Imperial Government: Position of Consuls: Executive Power of Commonwealth", in Brazil and Mitchell (eds), *Opinions of Attorneys-General of the Commonwealth of Australia, Volume 1: 1901-14*, (1981) 129 at 131-132. The last sentence is an exaggeration: see below at [393], [395], [399] and [406].

> power of the State Parliaments; nor that there are no executive acts requiring prior authority. What is clear is that *in all matters within the scope of the legislative power* of the Commonwealth, its executive possesses all the powers of the Crown properly exercisable within the Commonwealth. Although instances may be found in which there are, for the present, what may be treated as concurrent executive powers in the Commonwealth and the States, these are exceptions mainly of a temporary character. As a general rule, wherever the executive power of the Commonwealth extends, that of the States is correspondingly reduced." (emphasis added)

Deakin then referred to Sir Samuel Griffith's 1891 amendment discussed above[452]. He proceeded[453]:

> "The original clause, therefore, extended the executive power of the Commonwealth *to all matters within the legislative power of the Parliament*, with a negative limitation applying to the execution of State laws on matters within the concurrent power of the States. The form was altered, to avoid even a negative limitation, but the intention remained the same." (emphasis added)

In *Pape v Federal Commissioner of Taxation* this passage was quoted with approval. It was said that[454]:

> "Deakin did not intend to convey that the executive power was exhaustively defined by reference to the heads of Commonwealth legislative power." (footnote omitted)

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452 See above at [397].

453 "Channel of Communication with Imperial Government: Position of Consuls: Executive Power of Commonwealth", in Brazil and Mitchell (eds), *Opinions of Attorneys-General of the Commonwealth of Australia, Volume 1: 1901-14*, (1981) 129 at 132.

454 (2009) 238 CLR 1 at 57 [118] per French CJ.

353 In 1907, Littleton Groom, the Attorney-General, said[455]:

> "it must be taken to be settled law that the executive power of the Commonwealth is *coextensive with the whole range of its legislative powers, whether those powers are exercised or unexercised*: and further, that there is vested in the Governor-General under section 61 of the Constitution the whole undefined mass of executive powers which are necessarily implied in the creation of a new political entity, sovereign within its own sphere. These general propositions are of course subject to the limitation that where the matter is one which is governed by a State law which has not been displaced by a law of the Commonwealth, the State executive power under the State law still remains." (emphasis added)

354 As was recorded in *Pape v Federal Commissioner of Taxation*[456], in 1903 and twice in 1912 other framers of the Constitution – H B Higgins, Sir John Forrest and Sir John Quick – stated in the House of Representatives that the Executive's power to spend was limited to the heads of legislative power[457].

355 *Dr H V Evatt's view.* Prerogative powers are a species of executive power. In *The Royal Prerogative*, completed in 1924 but not published until 1987, Dr H V Evatt gave consideration to what criterion should be applied to "the question of the division of Prerogative power between … Commonwealth and [the States]."[458] He cited the opinion of Lord Buckmaster LC, Viscount Haldane, Lord Parker of Waddington and Lord Sumner in the Privy Council for the proposition that "the British North America Act has made a distribution between the Dominion and the provinces which extends not only to legislative but to

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455 "Executive Power of Commonwealth – Whether Coextensive with Legislative Power: When is State Executive Power Displaced: Whether Commonwealth has Power by Executive Act to Permit Landing of Foreign Troops or Crews", in Brazil and Mitchell (eds), *Opinions of Attorneys-General of the Commonwealth of Australia, Volume 1: 1901-14*, (1981) 358 at 360.

456 (2009) 238 CLR 1 at 108 [306].

457 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 9 July 1903 at 1997-1998 (H B Higgins); Australia, House of Representatives, *Parliamentary Debates* (Hansard), 25 September 1912 at 3422-3424 (Sir John Forrest); Australia, House of Representatives, *Parliamentary Debates* (Hansard), 1 October 1912 at 3639 (Sir John Quick).

458 (1987) at 203-204.

executive authority."[459] They said that in general "the distribution under the new grant of executive authority in substance follows the distribution under the new grant of legislative powers."[460] Dr Evatt also cited Canadian legal writing approving those views[461]. Dr Evatt considered that they were "supported by the fact that in modern times at any rate all executive power is in a sense referable to some head of legislative power." He quoted Harrison Moore: "The executive power is … closely allied to the legislative … [W]e are not encouraged to believe that the executive can make good an independent sphere of its own, free from legislative interference and control."[462] Dr Evatt also referred to the statement of Knox CJ, Isaacs, Rich and Starke JJ that executive power is "necessarily correlative to legislative power"[463].

356 *High Court authority before 1974.* The relevant authorities contain many statements supporting the Common Assumption. All of them are in some sense dicta, as are competing statements or assumptions, and some were uttered at a time when it was thought that ss 81 and 83 of the Constitution created a power to approve expenditure.

357 In 1935, in *Attorney-General (Vict) v The Commonwealth*[464] Starke J said in a judgment which was dissenting, but not on this point:

> "It may well be that the executive power 'is co-extensive with the responsibility and power of the Commonwealth' and not limited 'to matters connected with departments actually transferred or matters upon which the Commonwealth has power to make laws and has made laws'."[465]

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459 *Bonanza Creek Gold Mining Co Ltd v The King* [1916] 1 AC 566 at 579. See also *Attorney-General for Canada v Attorney-General of the Province of Ontario* (1894) 5 Cart 517 at 543 and *Her Majesty in right of the Province of Alberta v Canadian Transport Commission* [1978] 1 SCR 61 at 71.

460 [1916] 1 AC 566 at 580.

461 *The Royal Prerogative*, (1987) at 204-205.

462 *The Constitution of the Commonwealth of Australia*, 2nd ed (1910) at 98.

463 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 148; [1920] HCA 54.

464 (1935) 52 CLR 533 at 567; [1935] HCA 31.

465 There is a reference, preceded by "cf", to Berriedale Keith, *Responsible Government in the Dominions*, (1912), vol II at 809. The correct page reference is

(Footnote continues on next page)

358 In 1940, Evatt J said that in determining which aspects of the royal prerogative were exercisable by the Governor-General and which were exercisable by the Governors of the States, "the division of subject matters suggested by secs 51 and 52 of our Constitution affords a guide"[466]. He did not suggest that exercises of the royal prerogative needed statutory backing, only the capacity to legislate.

359 *Barton v The Commonwealth.* In 1974, in *Barton v The Commonwealth*, Mason J said[467]:

> "[Section 61] enables the Crown to undertake all executive action which is appropriate to the position of the Commonwealth under the Constitution and to the spheres of responsibility vested in it by the Constitution."

That was later quoted with approval in *Davis v The Commonwealth*[468]. It was also quoted with approval in *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority*[469]. And it was also referred to[470] and quoted[471] with approval in *Pape v Federal Commissioner of Taxation.*

360 *The Australian Assistance Plan case.* In 1975, this Court decided the *Australian Assistance Plan* case. Barwick CJ said[472]:

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800. The words are in fact those of a quotation, of which the author appears to approve, of part of a despatch from the Secretary of State for the Colonies, Joseph Chamberlain, in relation to the question of the channels through which the Imperial Government and the Commonwealth Government should communicate.

466 *Federal Commissioner of Taxation v Official Liquidator of E O Farley Ltd* (1940) 63 CLR 278 at 321; [1940] HCA 13.

467 (1974) 131 CLR 477 at 498; [1974] HCA 20. As Winterton noted ("The Relationship between Commonwealth Legislative and Executive Power", (2004) 25 *Adelaide Law Review* 21 at 33 n 87), the last sentence is "essentially quote[d]" in *Re Ditfort; Ex parte Deputy Commissioner of Taxation* (1988) 19 FCR 347 at 369.

468 (1988) 166 CLR 79 at 93 per Mason CJ, Deane and Gaudron JJ; [1988] HCA 63.

469 (1997) 190 CLR 410 at 455 per McHugh J and 464 per Gummow J; [1997] HCA 36.

470 (2009) 238 CLR 1 at 83 [214] per Gummow, Crennan and Bell JJ.

471 (2009) 238 CLR 1 at 116 [328] per Hayne and Kiefel JJ.

472 *Victoria v The Commonwealth and Hayden* (1975) 134 CLR 338 at 362.

> "In the long run, whether the attempt is made to refer the appropriation and expenditure to legislative or to executive power, it will be the capacity of the Parliament to make a law to govern the activities for which the money is to be spent, which will determine whether or not the appropriation is valid. With exceptions that are not relevant to this matter and which need not be stated, the executive may only do that which has been or could be the subject of valid legislation."

361 Gibbs J said[473], after quoting s 61 of the Constitution:

> "the Executive cannot act in respect of a matter which falls entirely outside the legislative competence of the Commonwealth. … We are in no way concerned in the present case to consider the scope of the prerogative or the circumstances in which the Executive may act without statutory sanction. Once it is concluded that the Plan is one in respect of which legislation could not validly be passed, it follows that public moneys of the Commonwealth may not lawfully be expended for the purposes of the Plan."

362 Mason J said of s 61[474]:

> "Although the ambit of the [executive] power is not otherwise defined by Ch II it is evident that in scope it is not unlimited and that its content does not reach beyond the area of responsibilities allocated to the Commonwealth by the Constitution, responsibilities which are ascertainable from the distribution of powers, more particularly the distribution of legislative powers, effected by the Constitution itself and the character and status of the Commonwealth as a national government. The provisions of s 61 taken in conjunction with the federal character of the Constitution and the distribution of powers between the Commonwealth and the States make any other conclusion unacceptable."

That passage was summarised with approval in *Davis v The Commonwealth*[475] and it was quoted and summarised with approval in *Pape v Federal Commissioner of Taxation*[476].

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473 (1975) 134 CLR 338 at 379.

474 (1975) 134 CLR 338 at 396-397.

475 (1988) 166 CLR 79 at 93 per Mason CJ, Deane and Gaudron JJ.

476 (2009) 238 CLR 1 at 114 [323].

363 The references to "allocated" and "distribution" are plainly references to ss 51 and 52 of the Constitution. The reference to the States is a reference to the limits on legislative power and therefore State power. Mason J then dealt with certain executive powers which it was appropriate for a national government to have. His Honour went on[477]:

> "However, the executive power to engage in activities appropriate to a national government, arising as it does from an implication drawn from the Constitution and having no counterpart, apart from the incidental power, in the expressed heads of legislative power, is limited in scope. It would be inconsistent with the broad division of responsibilities between the Commonwealth and the States achieved by the distribution of legislative powers to concede to this aspect of the executive power a wide operation effecting a radical transformation in what has hitherto been thought to be the Commonwealth's area of responsibility under the Constitution, thereby enabling the Commonwealth to carry out within Australia programmes standing outside the acknowledged heads of legislative power merely because these programmes can be conveniently formulated and administered by the national government."

Gibbs CJ said in *The Commonwealth v Tasmania*[478]: "I completely agree with that statement."

364 In the *Australian Assistance Plan* case Jacobs J said[479]:

> "When moneys are voted to the Queen by Parliament for the purposes declared by the Parliament, it falls within the prerogative to determine whether or not those moneys will be expended for that purpose and how, within the expression of the purpose to which the moneys have been appropriated, the expenditure will be made. Legislation is only needed when Parliament chooses to replace or affect the prerogative powers by legislation which either extends or limits or simply reproduces in the form of executive or other authority the powers previously comprehended within the prerogative. The exercise of the prerogative of expending moneys voted by Parliament does not depend on the existence of legislation on the subject by the Australian Parliament other than the appropriation itself. This exercise of the prerogative is in no different case from other exercises of the prerogative which fall within the powers of the

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477 (1975) 134 CLR 338 at 398.

478 (1983) 158 CLR 1 at 109; [1983] HCA 21. It was also approved in *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 181 [519].

479 (1975) 134 CLR 338 at 404-405.

> Executive Government of the Commonwealth under s 61 of the Constitution. If legislation were a prerequisite it would follow that the Queen would never be able to exercise the prerogative through the Governor-General acting on the advice of the Executive Council; she would always exercise executive power by authority of the Parliament. This cannot be suggested. It would, if correct, result in an inability of Australia to declare war, make treaties, appoint officers of State and members of the public service of the Commonwealth and do all the multitude of things which still fall within the prerogative, unless there was a general or special sanction of an Act of Parliament."

Then he said of the prerogative[480]: "Primarily its exercise is limited to those areas which are expressly made the subject matters of Commonwealth legislative power." That means that while the executive power of the Commonwealth does not generally extend beyond the limits of its legislative power, the executive power does extend up to those limits. Jacobs J then indicated respects in which the executive power of the Commonwealth extends beyond those limits which are immaterial for present purposes. Finally, his Honour said[481]:

> "although the Parliament may legislate in respect of any subject matter which is within the prerogative so far as it is exercisable through the Governor-General on the advice of the Executive Council, it does not follow that legislation is necessary before a prerogative power is exercised."

365 What do the opinions of these four Justices in the *Australian Assistance Plan* case say?

366 The scope of executive power was something which it was necessary for only Mason and Jacobs JJ to examine. That is because only those two Justices decided that the appropriation of funds for the Australian Assistance Plan was valid (Barwick CJ and Gibbs J did not) but that the appropriation statute provided insufficient authority for the expenditure of the funds. Hence what Barwick CJ and Gibbs J said about s 61 was not necessary for their conclusions. And Barwick CJ and Gibbs and Mason JJ were in dissent from the result of the case as a whole. But what all four Justices said has been treated as important. The issue to which the passages quoted from those four judgments go is the principle controlling the relationship between the executive power conferred by s 61 and the legislative powers conferred by ss 51-52 and s 122. Putting aside the matter of exceptions, to which Barwick CJ referred, and which will be discussed

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480 (1975) 134 CLR 338 at 405.

481 (1975) 134 CLR 338 at 406.

below[482], there was agreement that the power of the Executive to act extended to fields in which the Commonwealth had the power to legislate. The controversy was whether the power of the Executive to act extended further. Barwick CJ and Gibbs J denied that it extended further. Mason J thought that s 61 extended a little further in relation to "activities appropriate to a national government", but denied that s 61 could support the Australian Assistance Plan. Jacobs J, who considered that s 61 could support the Plan, thought that s 61 extended to "all matters which are the concern of Australia as a nation"[483].

367 Subject to the content of the exceptions to which Barwick CJ referred, his Honour did not say "the executive cannot go beyond the boundary marked by the legislature's capacity to legislate, and may indeed have lesser powers." Rather his Honour was saying: "the executive can go right up to the boundary marked by the legislature's capacity to legislate."

368 In relation to what Gibbs J said[484], the Solicitor-General of the State of Queensland put the following submission:

> "[I]t would be to commit the fallacy of the undistributed middle to say that if something falls within the legislative competence of the Commonwealth, therefore, by reliance upon that dictum, it falls within the executive power. His Honour did not consider that."

The submission assumes that to adopt Gibbs J's statement was to reason syllogistically. That is not so. It is true that Gibbs J said: "We are in no way concerned in the present case to consider … the circumstances in which the Executive may act without statutory sanction."[485] But he was not there denying the Common Assumption. One aspect of the Common Assumption is that it deals with what has been called the "breadth" of the executive power – with how the limits of the executive power fit in with federal considerations[486]. Another aspect of the Common Assumption is that it deals with the "depth" of executive power, which raises questions about when the Executive can, and when it cannot, act without legislative authority. In the sentence just quoted Gibbs J was pointing out that the case did not concern the "depth" of executive power. Questions about the depth of executive power may well require different answers

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482 See below at [397]-[402].

483 (1975) 134 CLR 338 at 406.

484 (1975) 134 CLR 338 at 379, quoted above at [361].

485 (1975) 134 CLR 338 at 379.

486 See below at [385] and [405].

in the circumstances of the *Australian Assistance Plan* case (which concerned the payment of money to newly created Regional Councils in order to allow them to engage in social planning) from those which arise in relation to entering contracts. But read in context, which context concerned the breadth of executive power, his Honour was proceeding on the basis that there was not much point in marking the line beyond which the Executive could not go unless the line also marked the edge of the area in which it had power to act. Gibbs J did not say that executive incapacity to act existed even within the area his Honour demarcated. In context, Gibbs J's statement that the s 61 grant of executive power is limited in the manner indicated implies that within that limit executive power exists. The same is true of what Barwick CJ, Mason and Jacobs JJ each said.

369 Thus although Mason J, for example, spoke in the first passage quoted[487] of executive power not reaching "beyond" a certain area, he did not suggest that there were islands of non-power within that area.

370 *High Court authority after 1975.* In 1977 Aickin J said in *Ansett Transport Industries (Operations) Pty Ltd v The Commonwealth*[488]:

> "It is plain that even without statutory authority the Commonwealth in the exercise of its executive power may enter into binding contracts affecting its future action."

Barwick CJ added[489]:

> "[I]t is significant in this case that the Agreements have been authorized by the Parliament. There is no question, in my opinion, that the Parliament had constitutional authority to authorize their making. We are not considering an agreement resting merely on the authority of the executive, though I agree with my brother Aickin in thinking that, even if we were, there is no ground for thinking that the Agreements or any of them were beyond the competence of the executive."

Aickin J's statement was quoted with approval by Gibbs CJ in *A v Hayden*[490].

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487 (1975) 134 CLR 338 at 396-397, quoted above at [362].

488 (1977) 139 CLR 54 at 113; [1977] HCA 71.

489 (1977) 139 CLR 54 at 61.

490 (1984) 156 CLR 532 at 543; [1984] HCA 67.

371 In 1983, in *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd*, Mason J stated that the[491]:

> "executive power of the Commonwealth is not … limited to heads of power which correspond with enumerated heads of Commonwealth legislative power … The scope of the executive power is to be ascertained, as I indicated in the *AAP Case*[492], from the distribution of the legislative powers effected by the Constitution and the character and status of the Commonwealth as a national government. Of necessity the scope of the power is appropriate to that of a central executive government in a federation in which there is a distribution of legislative powers between the Parliaments of the constituent elements in the federation."

All but the first sentence of this passage was quoted with approval in *R v Hughes*[493] and again in *Pape v Federal Commissioner of Taxation*[494].

372 In 1988, in *Davis v The Commonwealth*, Brennan J, after quoting parts of what Barwick CJ, Gibbs and Jacobs JJ said in the *Australian Assistance Plan* case, said[495]: "There is no reason to restrict the executive power of the Commonwealth to matters within the heads of legislative power." That implies at least that the executive power of the Commonwealth does extend to matters within the heads of legislative power.

373 In 2002, in *Western Australia v Ward*, Callinan J cited Barwick CJ, Gibbs and Mason JJ in the *Australian Assistance Plan* case for his Honour's conclusion that[496]: "The scope of the Commonwealth's executive power is generally coterminous with the scope of its legislative powers." (footnote omitted)

374 The idea that the executive power of the Commonwealth does not generally extend beyond its legislative power was considered by Gibbs and Mason JJ in the *Australian Assistance Plan* case[497] to find support in *The*

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491 (1983) 158 CLR 535 at 560; [1983] HCA 29.

492 (1975) 134 CLR 338 at 396-397.

493 (2000) 202 CLR 535 at 554-555 [38] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ; [2000] HCA 22.

494 (2009) 238 CLR 1 at 63 [132] per French CJ.

495 (1988) 166 CLR 79 at 110.

496 (2002) 213 CLR 1 at 391 [962]; [2002] HCA 28.

497 (1975) 134 CLR 338 at 379 and 396-397.

Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd ("the *Wool Tops* case")[498] and *The Commonwealth v Australian Commonwealth Shipping Board*[499]. Zines has also expressed this view[500]. These are, however, difficult authorities. The difficulty both of the authorities and of the problem under discussion is revealed by the fact that those opposing the Common Assumption relied on the former[501].

375 *Non-High Court authority.* Applications of the Common Assumption include cases upholding the validity of a contract made by the Commonwealth to refund to prospective overseas students the fees they had paid for the provision of educational services which they had been unable to receive because of visa problems, in return for an assignment of the students' rights in respect of those fees[502].

376 *The opinions of writers.* The Common Assumption, and in particular what was said in support of it in the *Australian Assistance Plan* case, has received significant support from writers. This has been true from the time that the case was decided until the present day.

377 In 1977, Crommelin and Evans said of the passages quoted above[503]:

> "Considerable support was voiced for the proposition that the limits placed on executive power coincide with those applicable to Commonwealth legislative power."

Later they said that the relevant four Justices "indicated that as a matter of principle the limits upon legislative and executive powers of [the] Commonwealth would in general coincide."[504]

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498 (1922) 31 CLR 421 at 432; [1922] HCA 62. See also at 441, 443 and 451 (requiring a statutory sanction beyond an Appropriation Act).

499 (1926) 39 CLR 1 at 10; [1926] HCA 39.

500 *The High Court and the Constitution*, 5th ed (2008) at 346-347.

501 See below at [387]-[388].

502 *The Commonwealth v Ling* (1993) 44 FCR 397 at 430; appeal dismissed *Ling v The Commonwealth* (1994) 51 FCR 88.

503 "Explorations and Adventures with Commonwealth Powers", in Evans (ed), *Labor and the Constitution 1972-1975*, (1977) 24 at 43.

504 "Explorations and Adventures with Commonwealth Powers", in Evans (ed), *Labor and the Constitution 1972-1975*, (1977) 24 at 57.

378 In 1979, Lane said[505]:

> "If we rely on the very creation and existence of a Government of the Commonwealth as a source of federal executive power, then the limits will be found in the kind of polity in which this Government was created and exists – a federal polity. The Commonwealth may declaim that it is a national government. That may well be. But it is a national government in a federal polity.
>
> *In this context the limits of the federal executive power are two: limits reflecting the federal division of legislative power and limits of a national government (as opposed to a local, that is, State government).*
>
> *The real difficulty will lie in applying the criterion 'an executive power peculiar to the status of a national government'*." (emphasis in original)

Lane then quoted parts of the first passage from Mason J's judgment quoted above[506]. Lane then said[507]:

> "When measuring the extent of the federal executive power in the light of the Commonwealth catalogue of powers we may not have great difficulty. When measuring the extent of the federal executive power in the light of the status of a national government we will falter."

Lane was thus suggesting that federal executive power existed up to the limit of legislative power, but not necessarily beyond, or far beyond it. Lane was not a writer who applauded judicially recognised expansions in the central power of the Australian Commonwealth, whether it be legislative power or executive power. Nor did he permit expansions of which he disapproved to pass without comment. Thus he said, after noting the opinions of Mason and Jacobs JJ and their differing outcomes for the Australian Assistance Plan[508]:

> "The criterion, status-of-a-national-government, may be common to both Justices, but its application differs. Our current centripetal High

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505 *The Australian Federal System*, 2nd ed (1979) at 430.

506 See above at [362].

507 *The Australian Federal System*, 2nd ed (1979) at 430.

508 *The Australian Federal System*, 2nd ed (1979) at 431.

> Court, I suspect, would be as generous in its application as Jacobs [J]." (footnote omitted)

He was not using the word "centripetal" in a laudatory way. Yet there is not in Lane any suggestion that the *Australian Assistance Plan* case was only marking a boundary beyond which the legislative power could not extend. He did not read the case as leaving open any significant areas within that boundary where executive power did not apply. When he spoke of "measuring the extent of the federal executive power in the light of the catalogue of [legislative] powers", he was not implying that there were significant unstated restrictions within the area so demarcated.

379 Winterton, writing in 1983, said: "the contours of executive power generally follow those of legislative power."[509] Winterton referred to earlier "uncertainties" on the subject. As examples of the uncertainties he gave J G Latham KC's argument in *Attorney-General (Vict) v The Commonwealth*[510] and D M Dawson QC's argument in the *Australian Assistance Plan* case[511]. Winterton said, however, that: "[w]hatever uncertainties there may have been in the past regarding the breadth of the executive power of the Commonwealth, they have been dispelled by the clear statements of four members of the High Court in the *AAP* case."[512]

380 In 1987, Rose stated that the power under s 61 to enter contracts "is nowadays properly regarded as extending to any contracts that *could be* authorised under a Commonwealth Act (whether or not there is such an Act)" (emphasis in original)[513].

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509 *Parliament, the Executive and the Governor-General: A Constitutional Analysis*, (1983) at 30, approved in *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 181 [520]. See also at 47.

510 (1935) 52 CLR 533 at 552 ("The definition of the powers of the Commonwealth Parliament does not limit the executive powers of the Commonwealth at all").

511 (1975) 134 CLR 338 at 341: that s 61 "does not confer executive power beyond the execution of laws made by the Parliament."

512 *Parliament, the Executive and the Governor-General: A Constitutional Analysis*, (1983) at 30 (footnote omitted).

513 Rose, "The Government and Contract", in Finn (ed), *Essays on Contract*, (1987) 233 at 246.

381 In 1992, 1997 and 2008, Zines asserted, in the 3rd, 4th and 5th editions of *The High Court and the Constitution*, in reliance on the *Australian Assistance Plan* case[514]:

> "It is clear that the scope of Commonwealth responsibilities which limit the executive power of the Commonwealth is to be judged primarily from the express powers granted to the Commonwealth Parliament."

In 1987, Zines also said[515]:

> "Generally speaking the criterion adopted by the High Court in respect of the executive power of the Commonwealth is, as Evatt suggests, whether the subject comes within Commonwealth legislative power."

And Zines said that this had been accepted by a majority of the judges in the *Australian Assistance Plan* case.

382 In 1999, 2004 and 2009, Seddon said, in the 2nd, 3rd and 4th editions of *Government Contracts: Federal, State and Local*[516]:

> "The … generally accepted … view … is that the Commonwealth's executive power is limited by reference to specific subject-matter found in the Constitution and it can only make contracts that relate to, or are a necessary part of, the subject-matter of its legislative powers." (footnote omitted)

383 In a paper written in collaboration with Winterton published in 2009, Gerangelos spoke of the executive power of the Commonwealth thus[517]: "The

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514 *The High Court and the Constitution*, 3rd ed (1992) at 218, 4th ed (1997) at 255 and 5th ed (2008) at 347. In the 1st ed (1981) at 206 and the 2nd ed (1987) at 227, the passage read: "The prevailing view … is that any executive action that can be taken by the Commonwealth without legislative authorisation is confined to matters in respect of which Parliament can make laws."

515 "Commentary", in Evatt, *The Royal Prerogative*, (1987) at C12.

516 *Government Contracts: Federal, State and Local*, 2nd ed (1999) at 50 [2.11], 3rd ed (2004) at 58 [2.11] and 4th ed (2009) at 68 [2.11], and in each citing the relevant passages in the judgments of Barwick CJ, Gibbs and Mason JJ in the *Australian Assistance Plan* case.

517 "Parliament, the Executive, the Governor-General and the Republic: The George Winterton Thesis", in Lee and Gerangelos (eds), *Constitutional Advancement in a Frozen Continent: Essays in Honour of George Winterton*, (2009) 189 at 192.

Commonwealth's constitutional sphere of activity has been interpreted as essentially coincident with its legislative powers." He gave a footnote reference to the key passages in the *Australian Assistance Plan* case quoted above. Gerangelos then set out some criticisms which Winterton made of Mason J's extension of executive powers beyond that limit to include those derived from the "character and status of the Commonwealth as a national government". But he set out no criticism of the proposition that executive power existed up to that limit. And Gerangelos described "the view that s 61 extended to all subjects falling within the Commonwealth's legislative power" as based on "long established authority"[518]. In this he was following the view of Winterton[519].

384 In 2010, Twomey stated, citing inter alia the reasons of Barwick CJ, Gibbs and Mason JJ in the *Australian Assistance Plan* case[520], that it "has generally been accepted that executive power follows legislative power."[521] She also said[522]:

> "it is necessarily an interference with the constitutional distribution of powers to confer on the Commonwealth additional executive powers (and incidental legislative powers) which do not fall within the categories of powers distributed to the Commonwealth by the *Constitution*. It is an even greater interference where those executive powers and associated incidental legislative powers fall within an area of state legislative and executive jurisdiction." (footnote omitted)

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518 "Parliament, the Executive, the Governor-General and the Republic: The George Winterton Thesis", in Lee and Gerangelos (eds), *Constitutional Advancement in a Frozen Continent: Essays in Honour of George Winterton*, (2009) 189 at 195 (footnote omitted).

519 "The Relationship between Commonwealth Legislative and Executive Power", (2004) 25 *Adelaide Law Review* 21 at 31.

520 (1975) 134 CLR 338 at 362, 379 and 396-397.

521 "Pushing the Boundaries of Executive Power – *Pape*, The Prerogative and Nationhood Powers", (2010) 34 *Melbourne University Law Review* 313 at 321.

522 "Pushing the Boundaries of Executive Power – *Pape*, The Prerogative and Nationhood Powers", (2010) 34 *Melbourne University Law Review* 313 at 329.

385 The most recent writer is Gerangelos[523], who said of the passage from Mason J's reasons for judgment in the *Australian Assistance Plan* case quoted above[524]:

> "He … held that the subject matters in relation to which the Commonwealth could take [executive] action were coincident with its *legislative* powers, express or implied." (footnote omitted; emphasis in original)

Gerangelos also supported the Common Assumption in the following passage, which relies on the parts of the *Australian Assistance Plan* case quoted above[525]:

> "Winterton conceived his neat distinction between the 'breadth' and 'depth' elements of Commonwealth executive power in the maintenance limb; 'breadth' referring to the subject matters in relation to which the Commonwealth executive could operate, 'depth' referring to the precise actions which may be taken in relation to those subject matters. Breadth is defined by reference to the *legislative* powers of the Commonwealth and is essentially coincident with them:[526] 'the distribution of legislative powers effected by the Constitution itself and the character and status of the Commonwealth as a national government.'[527]" (emphasis in original)

386 *What is the alternative to the Common Assumption?* After the *renversement des alliances*, the plaintiff and some interveners contended that the authorities did not say that the executive power of the Commonwealth, vis-à-vis

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523 "The Executive Power of the Commonwealth of Australia: s 61 of the Commonwealth Constitution, 'Nationhood' and the Future of the Prerogative", to be published in the forthcoming issue of the *Oxford University Commonwealth Law Journal*.

524 See above at [362].

525 "The Executive Power of the Commonwealth of Australia: s 61 of the Commonwealth Constitution, 'Nationhood' and the Future of the Prerogative", to be published in the forthcoming issue of the *Oxford University Commonwealth Law Journal*. The "breadth"/"depth" distinction which Winterton drew, though it may not exhaust the possibilities which s 61 offers for analysis, is not only neat but illuminating.

526 *Victoria v The Commonwealth and Hayden* (1975) 134 CLR 338 at 362 per Barwick CJ, 379 per Gibbs J, 396-397 per Mason J and 405-406 per Jacobs J.

527 *Victoria v The Commonwealth and Hayden* (1975) 134 CLR 338 at 396 per Mason J.

the States, enabled the Commonwealth, in the performance of a contract, to spend money properly appropriated up to the limits of its legislative power, whether or not the expenditure is authorised by statute. They contended rather that Commonwealth executive power was subject to some further limitation. But they never identified clearly what that limitation was and what its source was. The Commonwealth Solicitor-General complained about this in oral argument more than once. The complaint was not addressed in later oral argument, nor in the written submissions filed after the close of oral argument. Of course, the complaint could easily be met by those who departed from the Common Assumption by submitting that the executive power of the Commonwealth does not extend beyond the powers that specific constitutional provisions and Commonwealth statutes give it. That rule would not sit comfortably with the fact that for the first six months of the Commonwealth's existence, the framers tolerated a state of affairs in which Parliament enacted no legislation and the first Commonwealth public servant, R R Garran, exercised a great deal of executive power[528]. But it would be a clear rule. It would satisfy all the demands for representative and responsible government and respect for the Senate made by those opposing the Common Assumption[529]. That, however, was not the submission they made. The closest that those opposing the Common Assumption came to meeting the complaint was the Solicitor-General of the State of Queensland's submission that the executive power of the Commonwealth extends, and extends only, to "all of those things [which] arise implicitly from the creation of the nation by the Act that gave effect to the Commonwealth, and the establishment of the Executive by the terms of the Constitution itself. … [O]ne then looks to the terms of a Commonwealth statute expressly or implicitly, or the terms of the Constitution expressly or implicitly." Heavy work is done in this submission by the thrice invoked adverb "implicitly". What does the submission mean?

387 *The submissions attacking the Common Assumption: authority.* Those who resiled from the Common Assumption pointed to what was said to be authority contradicting it, and to its supposed difficulties.

388 The Solicitor-General of the State of Queensland relied on dicta by Isaacs J[530], Higgins J[531] and Starke J[532] in the *Wool Tops* case. Whether those

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528 The first Commonwealth statute received royal assent on 25 June 1901.

529 See below at [394]-[396].

530 (1922) 31 CLR 421 at 445-451.

531 (1922) 31 CLR 421 at 455.

532 (1922) 31 CLR 421 at 460-461.

dicta support the Queensland position is obscure. If they do, they are inconsistent with many later statements. The result of that case can be explained thus. It concerned four agreements made by the Commonwealth. Their validity was impugned on the basis that they were made without power. The first three agreements were treated as amounting to taxation, which required legislative authority[533]. The fourth agreement was vitiated by what was then, but is no longer seen to be, a requirement that executive expenditure depends on a prior rather than a subsequent appropriation[534].

389 The dicta of Isaacs and Rich JJ in *The Commonwealth v Colonial Ammunition Co Ltd*[535] were also relied on. Queensland submitted that their Honours were discussing the exercise of executive power without statutory authorisation. Those dicta are better understood on the basis that their Honours were discussing the grant to the Executive by legislation of power which depended on a condition – an Order in Council – which was not satisfied.

390 Queensland relied on dicta in *Kidman v The Commonwealth*[536]. However, though these dicta appear to assume the need for statutory authority to validate executive action, it is not clear that the question was to the forefront of their Honours' minds.

391 Finally, Queensland referred to passages in *New South Wales v Bardolph*[537]. That case did not concern the executive power of *the Commonwealth* (as distinct from *a State*). In any event, it does not support the conclusion that Queensland said followed from it, namely that for the Executive "to do an act which involves the expenditure of money it must point to a Commonwealth law or a provision of the Constitution or something which inheres in itself, as the Executive, which would permit it to do so."

392 *Submissions attacking the Common Assumption: principle.* The Solicitor-General of the State of Tasmania submitted that Commonwealth executive power should be limited to the execution and maintenance of laws actually enacted by the Commonwealth Parliament, because otherwise there would be a potential for the concurrent but inconsistent exercise of Commonwealth and State executive power with respect to the same matter. Queensland adopted a similar approach.

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533 (1922) 31 CLR 421 at 433-434, 443-445 and 460-461.

534 (1922) 31 CLR 421 at 434 and 445-451.

535 (1924) 34 CLR 198 at 220; [1924] HCA 5.

536 (1925) 37 CLR 233 at 240-241 and 251; [1925] HCA 55.

537 (1934) 52 CLR 455 at 496 and 507-509; [1934] HCA 74.

Underlying that submission was the fact that while some Commonwealth legislative powers are exhaustive (for example, ss 52, 122, 51(vi)[538], and, at least in narrower applications, s 51(xxix)[539]) many are concurrent. While s 109 of the Constitution resolves inconsistency between Commonwealth and State legislation, there is no provision resolving inconsistency between Commonwealth and State executive conduct. The more actions that the Commonwealth Executive may permissibly take without support in legislation, the greater the scope for collisions between Commonwealth and State executive power[540].

393 The chance of conflicts between Commonwealth and State executive power is reduced by the energy with which the Commonwealth has exercised its legislative powers to the exclusion of State laws. Any inconsistency between exercises of State executive power and Commonwealth executive power can be terminated by the Commonwealth enacting legislation which regulates or abolishes State executive power. That is so whether the source of the State executive power is non-statutory (in the prerogative or elsewhere) or in legislation. In the former case the Commonwealth legislation will prevail over

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538 The defence power is not expressed to be exhaustive, but several other provisions in the Constitution indicate that it is. Section 114 prevents a State without the consent of the Commonwealth Parliament from raising or maintaining any naval or military force. Section 52(ii) makes exclusive to the Commonwealth the power of legislation with respect to "matters relating to any department of the public service the control of which is by this Constitution transferred to the Executive Government of the Commonwealth". Section 69 provides for the transfer to the Commonwealth of departments of "naval and military defence". Section 119 imposes a duty on the Commonwealth to "protect every State against invasion". The executive power in relation to defence is also extensive, because of s 70. See *Joseph v Colonial Treasurer (NSW)* (1918) 25 CLR 32 at 46-47; [1918] HCA 30.

539 The external affairs power is not expressed to be exclusive, but, as Barwick CJ said in *New South Wales v The Commonwealth* (1975) 135 CLR 337 at 373; [1975] HCA 58:

> "Whilst the power with respect to external affairs is not expressed to be a power exclusively vested in the Commonwealth, it must necessarily of its nature be so as to international relations and affairs. Only the Commonwealth has international status. The colonies never were and the States are not international persons."

540 See *Cadia Holdings Pty Ltd v New South Wales* (2010) 242 CLR 195 at 210 [31]; [2010] HCA 27.

non-statutory law; in the latter it will prevail by virtue of s 109 of the Constitution[541].

394 The Solicitor-General of the State of Tasmania also submitted that if Commonwealth executive power extended beyond powers granted by statute, it would operate unsatisfactorily in two respects. First, it would operate free of legislative control. Secondly, it would operate in an area of immunity from statutory judicial review. The answer to the first point is that the use of executive power can be controlled by the legislature enacting legislation. What is more, use by the Executive of its powers in a fashion displeasing to the legislature is likely to lead to the House of Representatives losing confidence in the Executive and to an inability on the part of the Executive to procure the passage of future Appropriation Bills. The answer to the second point is that quite apart from the *Administrative Decisions (Judicial Review) Act* 1977 (Cth), which depends on conduct "under an enactment", common law principles of judicial review can be invoked in this Court under s 75(iii) or (v) of the Constitution and s 30(a) of the *Judiciary Act* 1903 (Cth) and in the Federal Court of Australia under s 39B(1) and (1A)(a) and (b) of that Act.

395 In various respects critics of the Common Assumption contended that it ignored federal considerations. Federal considerations have certainly been seen as relevant to the extent of the executive power. Different Justices grappled with the impact of federal considerations in different ways in *Pape v Federal Commissioner of Taxation*, to go no further back. But the vice of Commonwealth executive power is reduced when the executive power relied on is marked by the limits of the Common Assumption. For the Common Assumption takes federal considerations into account in holding that Commonwealth executive power follows the contours of Commonwealth legislative power. Commonwealth legislative power, coupled with s 109, gives the Commonwealth a preferred position over the States in certain respects. But otherwise State executive power is not fettered by Commonwealth executive power.

396 Critics of the Common Assumption appealed to federal considerations by submitting that on the Common Assumption the Executive could bypass the Senate, damage representative and responsible government, and upset the correct balance between the House of Representatives and the Senate. They submitted that if all the Commonwealth Executive needed to act was an Appropriation Act and an unexercised capacity on the part of the legislature to legislate, the Senate's role in government would diminish. That is because Commonwealth legislation, other than appropriation and taxation legislation, requires Senate assent, can be

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541 Winterton, *Parliament, the Executive and the Governor-General: A Constitutional Analysis*, (1983) at 47.

initiated in the Senate and can be amended in the Senate, whereas appropriation and taxation Bills, though they need Senate assent, cannot originate or be amended in the Senate. Bills of that kind can only be returned to the House of Representatives with a request for amendment (s 53 of the Constitution). They submitted that if the Common Assumption were correct, the Executive would be able to avoid legislative scrutiny, and in particular the risk of amendments by the Senate to draft legislation. Those arguments may be answered thus. In practice, and by right, the Senate takes a very active role in controlling and monitoring executive expenditure. It is true that the description given to money appropriated in Appropriation Acts and their accompanying documents is often very brief and general. But Senators are able to seek information and criticise proposals to expend money. Senators can do this through the Senate Estimates Committee, through correspondence with responsible Ministers, through debate on Appropriation Bills, and through the questioning of Ministers who are Senators, or their representatives, in the Senate. Nothing in the Constitution prevents the Senate from returning Bills to which s 53 relates which it dislikes to the House of Representatives for amendment, and, in the last resort, from rejecting them. The Senate is not in the same position as some almost impotent post-Asquithean House of Lords. It cannot be said that the effect of the Common Assumption is to remove the Senate (or the House of Representatives) from the process of sanctioning executive expenditure. And nothing in the Constitution prevents the Senate initiating legislation to control the use by the Executive of its power to spend what has been appropriated. Finally, the Senate, like the House of Representatives, is a platform from which critics of how the executive power has been wielded can build up that corrosive dissatisfaction which eventually leads to a change of government after an election.

397 *Exceptions narrowing the extent of executive power as formulated in the Common Assumption.* Barwick CJ in the *Australian Assistance Plan* case referred to the existence of exceptions to the generality of the Common Assumption. Within the area marked out by Commonwealth legislative power there certainly are exceptions to it. In part that is because the Common Assumption rests on an implication. No implication of power can be made which is inconsistent with an express power.

398 Hence one exception to the generality of the principle that executive power follows the contours of legislative power is s 51(ii) – the taxation power. The Executive cannot raise taxes, because, even apart from the pressures of English constitutional history against that possibility[542], there are express powers in, for example, ss 53, 54, 55 and 56 dealing with the raising of taxes.

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542 See *The Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 460.

399 Another exception was conceded by the Solicitor-General of the Commonwealth. He conceded that so far as the executive power of the Commonwealth extends to prerogative powers to affect rights or liabilities, an unexercised Commonwealth power to legislate does not permit the Executive to alter rights and liabilities arising under State law. In the absence of statutory authority the Commonwealth Executive has no power to dispense with the operation of any law. It has no power to alter the content of State law. It has no power to relieve others from their obligation to comply with it[543]. Thus the Commonwealth Executive (like the judiciary) has no power to create offences[544]. As Harrison Moore said: "[T]he executive has no inherent legislative power."[545] The Commonwealth cannot by executive action seize the property of another (including a State): legislation conforming to s 51(xxxi) of the Constitution is necessary[546]. This concession by the Solicitor-General of the Commonwealth fitted in with a reciprocal concession by counsel for the plaintiff: that there is an executive power to contract without statutory authorisation when there is no abrogation of any other person's rights, so that there is no need for legislation to change the common law. A contract to pay money implements or uses the common law; it does not abrogate anyone's rights. Legislation is only required for conduct which affects the rights of others against their will. The Solicitor-General of the Commonwealth's concession harks back to an early draft of s 61 discussed above[547]. It provided in effect that Commonwealth executive power based on an unexercised legislative power did not extend to areas in which State legislative power has been exercised. It will be recollected that Sir Samuel Griffith stated that an amendment bringing that draft close to the ultimate form that s 61 took did not alter that meaning.

400 A third exception to the Common Assumption is that the executive power to spend money must not operate so as to curtail the capacity of the States to function as governments[548].

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543 *A v Hayden* (1984) 156 CLR 532 at 580-581; *Vasiljkovic v The Commonwealth* (2006) 227 CLR 614 at 634-635 [49]-[50]; [2006] HCA 40.

544 *Davis v The Commonwealth* (1988) 166 CLR 79 at 112. There may well be other powers in s 51 only exercisable by the legislature and not the Executive.

545 *The Constitution of the Commonwealth of Australia*, 2nd ed (1910) at 98.

546 *Federal Commissioner of Taxation v Official Liquidator of E O Farley Ltd* (1940) 63 CLR 278 at 322.

547 See above at [347].

548 The Solicitor-General of the Commonwealth referred to *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 85 [220] and *Clarke v Federal*

(Footnote continues on next page)

401 It is not necessary to consider what further qualifications to the Common Assumption there may be. None was identified as fatal to the defendants in this case.

402 *Exceptions broadening the extent of executive power as formulated in the Common Assumption.* There are, on the authorities, exceptional cases in which the executive power of the Commonwealth goes beyond the line marked by unexercised legislative power. One illustration is *Davis v The Commonwealth*[549]. Other illustrations are found in the two approaches taken by different Justices supporting the majority orders in *Pape v Federal Commissioner of Taxation*[550]. However, these exceptions, despite the fourth defendant's submissions to the contrary, are irrelevant to the issues in the present case.

403 *Conclusion on the authorities.* In view of the state of authority, particularly as analysed in constitutional scholarship, the Common Assumption should be treated as the law.

404 *Principle.* Is the Common Assumption in truth so wrong as a matter of principle as distinct from authority that the authorities supporting it should be overruled? This case is not an appropriate one in which that question should be answered. All parties and interveners initially adhered to the Common Assumption. Its sudden abandonment by the plaintiff and most government interveners during oral argument meant that the submissions attacking and defending the Common Assumption were deployed only at a very late stage of the fray. Inevitably, they betrayed signs of disorganisation. It is true that the plaintiff, South Australia, Tasmania and the Commonwealth were given leave to file additional written submissions after the oral argument closed. But this gave the Commonwealth only the period between when oral argument ended on 11 August 2011, and when the additional submissions were filed on 1 September 2011, to consider the point. On 7 August 2011, urgent and important litigation affecting the Commonwealth had commenced. Interlocutory hearings took place. After 11 August 2011, written argument was filed and preparation for oral argument took place. Oral argument was then heard on 22 and 23 August 2011. That litigation was decided on 31 August 2011. This must have depleted the relevant resources of Commonwealth energy and distracted those who were to

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Commissioner of Taxation (2009) 240 CLR 272 at 306 [64] and 307 [66]; [2009] HCA 33.

549 (1988) 166 CLR 79.

550 (2009) 238 CLR 1 at 63 [133] per French CJ and 91-92 [242] per Gummow, Crennan and Bell JJ.

tap them[551]. It is important that points of fundamental significance such as the one that this case belatedly raised be pondered by counsel for years – as they often are when appeals come to this Court – or at least for months – as is usual when matters in the original jurisdiction are brought to the Full Court. Above all, they need to be considered calmly. Radical changes in the construction of the Constitution should not be made without better assistance than the unpredicted conspiracy of circumstances permitted counsel to provide in this case.

405 Two facts illustrate these problems. The first is that the argument was framed on the basis of the Common Assumption until it ceased to be common. The second is that most of the argument thereafter was devoted to the question of whether it was sound. In consequence attention was concentrated on what Winterton called the "breadth" element in s 61, and distracted from the "depth" element[552]. No attention was given to the "depth" element before the *renversement des alliances*, and very little after it. In *Pape v Federal Commissioner of Taxation*[553], French CJ said that the powers which the Executive has under s 61 include statutory powers, "prerogative" powers and the "capacities"[554] which may be possessed by persons other than the Executive. A capacity to contract is a prime example of a capacity which both the Executive and persons other than the Executive possess. In the same case, Gummow, Crennan and Bell JJ said[555]:

> "The conduct of the executive branch of government includes, but involves much more than, enjoyment of the benefit of those preferences, immunities and exceptions which are denied to the citizen and are commonly identified with 'the prerogative'."

In the same case, Gummow J asked in argument[556]:

> "Why should not the newly created polity the Commonwealth of Australia have received all the executive capacities of the United Kingdom

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551 *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144; [2011] HCA 32.

552 See above at [385].

553 (2009) 238 CLR 1 at 60 [126].

554 *Davis v The Commonwealth* (1988) 166 CLR 79 at 108 per Brennan J.

555 (2009) 238 CLR 1 at 83 [214].

556 (2009) 238 CLR 1 at 18.

> executive save in so far as it is necessary to give effect to the interests of the States under federal considerations?"

One limitation which a person responding to that question would have to consider is the "breadth" element of s 61, which goes to the federal division of powers. For reasons given below[557], the Commonwealth had legislative power under s 51(xxiiiA) to enact legislation giving effect to the NSCP: hence the "breadth" element is satisfied. Gummow J's question also calls attention to the "depth" element. That element concentrates on whether the executive action in question cannot be taken without prior legislative authority.

406 The question in the present case then becomes: Why can the Executive not pay money to the fourth defendant to carry out the NSCP pursuant to contract? If the NSCP involved the creation of rights and obligations which collided with pre-existing rights and obligations or with State or federal laws, no doubt statute would be necessary. If the conflicting law was a federal enactment, a federal enactment repealing it would be necessary. If the conflicting legal provision was a State enactment, a federal enactment would also be necessary. There would be, ex hypothesi, federal legislative power to support that enactment (since the "breadth" aspect was satisfied), and it would prevail over the State enactment by reason of s 109 of the Constitution. If the conflicting legal provision was a rule of the common law, a federal enactment would be necessary, and there would be legislative power to enact it. But the NSCP does not create rights and obligations which conflict with pre-existing rights and obligations or with State or federal laws. Hence no statute is necessary on that account. Those alleging invalidity did not demonstrate that at Federation the United Kingdom Executive could not enter a contract to further a purpose in relation to which funds had been appropriated. The lack of full argument about the "depth" element in this case is a further illustration of how the circumstances of this case do not make it one in which it is appropriate to narrow the executive power of the Commonwealth to an extent sufficient to find for the plaintiff.

407 *Immaterial points.* In the circumstances it is not necessary to deal with arguments advanced by the defendants that the power conferred by s 61 was greater in various respects than that contemplated by the Common Assumption. Nor is it necessary to deal with a submission by the Commonwealth that s 44 of the *Financial Management and Accountability Act* 1997 (Cth) gave statutory authority to enter the Agreement. It would probably be wrong to do so, since the submission was raised only in the written submissions filed after the close of oral argument, and is outside the pleadings.

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557 See below at [408]-[441].

The Commonwealth's legislative power under s 51(xxiiiA)

408 Section 51(xxiiiA) of the Constitution provides that the Parliament has power to make laws for the peace, order and good government of the Commonwealth with respect to:

> "the provision of maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services (but not so as to authorize any form of civil conscription), benefits to students and family allowances".

409 The plaintiff submitted that s 51(xxiiiA) did not grant legislative power to arrange for funding through the Agreement. The plaintiff accepted that "benefits to students" could fall within s 51(xxiiiA) even though the Commonwealth did not directly provide them. But the plaintiff submitted that the provision of benefits under s 51(xxiiiA):

> "must involve the Commonwealth, or an entity established by it, and under its control:
>
> (a) making money payments to students;
>
> (b) supplying goods or services to students, where this may be subcontracted to a private entity, provided that the obligation to provide the goods or services to the students entitled to them remains with the Commonwealth or the Commonwealth entity; or
>
> (c) paying, either in whole or in part, for the supply of goods or services to students, for which those students would otherwise be obliged to pay."

Under the NSCP the students received no money, the Commonwealth did not itself provide services, and students were not relieved of any liability they owed to the "chaplaincy services" provider – they owed it no liability. The plaintiff accepted that the stipulated methods of providing benefits to students under s 51(xxiiiA) may not be exhaustive. But he submitted that it was not enough to provide merely a beneficial program in which students may involve themselves. The "difficulty" of "rendering justiciable a decision whether a certain course of study [or] training is a benefit to students or not" was said to justify this limitation.

410 The plaintiff supported this submission with references to United Kingdom legislation. The *National Insurance Act* 1911 (UK) employed the term "benefits" to refer to both payments and medical services, so long as the obligation to provide the services was upon the Insurance Commissioners charged with their administration, not upon the practitioners engaged to provide them. The *National Insurance Act* 1946 (UK) drew a distinction between

"benefits", which referred to money payments to individuals, and the making of a funding contribution to the provision of health services. The plaintiff did not subject these references to close analysis and they do not appear to be decisive.

411 The plaintiff also supported this submission with references to the Second Reading Speech of the Attorney-General and Minister for External Affairs (Dr Evatt) on the Constitution Alteration (Social Services) Bill 1946, which led to the insertion of s 51(xxiiiA) into the Constitution. Dr Evatt said[558]:

> "The object of this bill is to alter the Constitution so that *this Parliament can continue to provide directly* for promoting social security in Australia. This is in no sense a party measure. Ever since federation, it has been assumed by successive governments and parliaments that the National Parliament could spend for any all-Australian purpose the money that it raises. In 1944, I warned the House and the country that, under the Constitution as it stands, the legal foundations for even the most urgent modern social service legislation were doubtful and insecure. The High Court's decision last year in the pharmaceutical benefits case has shown that these doubts were only too well founded. … [T]he framers of the Constitution recognized that such a matter could be dealt with more satisfactorily on an Australia-wide basis than by piecemeal and varied action on the part of separate States. This is just as true of other social services, such as, for example, child endowment, widows' pensions or medical benefits, which we realise to-day must be provided." (emphasis added)

After referring to s 51(xiv) and (xxii) of the Constitution, Dr Evatt added: "[a]ny other social service payments *made by the Commonwealth* must, therefore, rest on some other foundation" (emphasis added).

412 The plaintiff relied on the parts of those two passages to which emphasis has been added. The plaintiff also relied on the following words in the "Yes" case on the referendum on the proposed s 51(xxiiiA)[559]:

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558 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 27 March 1946 at 646-647. The "pharmaceutical benefits case" to which Dr Evatt referred was *Attorney-General (Vict) v The Commonwealth* (1945) 71 CLR 237; [1945] HCA 30.

559 Commonwealth Electoral Office, *Referendums to be taken on the Proposed Laws: Constitution Alteration (Social Services) 1946, Constitution Alteration (Organized Marketing of Primary Products) 1946, Constitution Alteration (Industrial Employment) 1946: The Case For and Against*, (1946) at 5.

> "You probably know that the Commonwealth is already providing most of [the services described in s 51(xxiiiA)]. It provides **maternity allowances, widows' pensions, child endowment, unemployment, sickness and hospital benefits, and benefits to students**. But because of a legal decision last year, the Constitution now needs altering to **make sure that this can continue**." (emphasis in original)

413 The plaintiff submitted that, in the light of these materials, the word "benefits" was understood in the context of the Constitution Alteration (Social Services) Bill to denote:

> "(a) benefits of the same character as the benefits then conferred under Commonwealth legislation; and
>
> (b) something other than the mere provision of funding which could have occurred by way of grants pursuant to s 96 of the *Constitution*."

414 In the same vein, Western Australia submitted that the services which the Commonwealth was already providing to which Dr Evatt and the "Yes" case referred were benefits in the form of financial assistance. To the plaintiff's references, it added the following. One was the National Security (Universities Commission) Regulations 1943 (Cth). They provided for the payment of tuition and other non-voluntary University fees and for the payment of allowances. They did so under the heading "Financial Assistance to Students". Western Australia also referred to the *Education Act* 1945 (Cth). That Act established a Universities Commission. Section 14 of the Act gave it functions which included:

> "(*a*) to arrange, as prescribed, for the training in Universities or similar institutions, for the purpose of facilitating their re-establishment of persons who are discharged members of the Forces within the meaning of the *Re-Establishment and Employment Act* 1945;
>
> (*b*) in prescribed cases or classes of cases, to assist other persons to obtain training in Universities or similar institutions;
>
> (*c*) to provide, as prescribed, financial assistance to students at Universities and approved institutions".

Finally, Western Australia referred to the Universities Commission (Financial Assistance) Regulations 1946 (Cth), which, like the 1943 Regulations, made provision for the payment of tuition and other non-voluntary fees to students and for the payment of an allowance. And Western Australia submitted that nothing in these extrinsic materials suggested that s 51(xxiiiA) was to authorise Commonwealth laws regulating the operations of schools.

415 However, when read as a whole, Dr Evatt's speech is not concerned with distinguishing between direct payments by the Commonwealth and other payments. Dr Evatt's concern was the opposite – to ensure that the Constitution gave a wide support for Commonwealth legislation in relation to social services payments, whether direct or indirect.

416 Similarly, the "Yes" case did not distinguish between the power to provide social services directly and the power to provide them indirectly, and seek to procure power only to do the former.

417 The argument of the plaintiff and Western Australia is undercut by one of Western Australia's examples. Section 14(a) and (b) of the *Education Act* conferred on the Universities Commission the function of arranging for discharged members of the armed forces to be trained and of assisting others to obtain training. Those functions were not limited to making direct payments to the identified persons to obtain training. They were not limited to services that the Commonwealth provided. And they were not limited to relieving students of any liabilities they owed to the service providers.

418 Paragraphs (a) and (b) of s 14 of the *Education Act* also falsify the following submission of the plaintiff:

> "the benefits conferred by Commonwealth legislation at the time of the 1946 referendum involved the Commonwealth, or an entity established by it, either:
>
> (i) providing financial assistance directly to the intended ultimate recipient of the benefits; or
>
> (ii) substituting itself for each such intended recipient as the party obliged, either in whole or in part, for paying the cost of certain services provided to that recipient."

Section 14 is significant, because Dr Evatt referred to it in his Second Reading Speech. He said that opinions of senior counsel as to the validity of some Commonwealth legislation after the *Pharmaceutical Benefits* case had been obtained[560]. One provision with which the opinions dealt was s 14. Whilst Sir Robert Garran KC thought that it was probably valid, Mr Maughan KC, Mr Barwick KC and Mr Ham KC thought pars (b) and (c) of s 14 were invalid, and Dr Coppel KC thought them valid in limited respects only. The significant point is, however, that Dr Evatt asserted that the proposed s 51(xxiiiA) would be limited, "in the main, to benefits of a type provided for by legislation already on

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560 *Attorney-General (Vict) v The Commonwealth* (1945) 71 CLR 237.

the statute-book."[561] In other words, Dr Evatt thought that the benefits that s 14(b) and (c) conferred would be supported by s 51(xxiiiA). Section 14(b) was concerned with assistance not limited to financial assistance. As the Solicitor-General of the Commonwealth correctly submitted in this case: "the notion that what was intended was limited to money payments is falsified by consideration of one of the very provisions that was identified as in need of shoring up."

419 The Solicitor-General's submission is supported by another statute in the group of Commonwealth Acts on which the various senior counsel advised – the *National Fitness Act* 1941 (Cth). Three of them thought it to be of no or doubtful validity. Sections 3 and 5 of that Act were concerned with the promotion of "national fitness" and "physical education in schools, universities and other institutions". And the Solicitor-General's submission also finds support in another statute in that group – the *Re-establishment and Employment Act* 1945 (Cth). Section 57(1) gave power to a Minister to provide or arrange for the provision of facilities to disabled persons to make them fit for training or employment. Section 57(2) provided that "facilities" included training, exercise, occupational and other therapy, and other facilities under medical supervision and under circumstances likely to restore the persons concerned to physical and mental fitness. And s 48 empowered the Commonwealth Employment Service to provide various non-monetary services and facilities.

420 In any event, there is no indication in Dr Evatt's speech that the social welfare measures in place just before 1946 exhausted the contemporary meaning of the words used in s 51(xxiiiA)[562].

421 The authorities on s 51(xxiiiA) point against the narrow construction that the plaintiff and Western Australia propounded.

422 *British Medical Association v The Commonwealth*[563] concerned indirect payments only. It is true that the legislation created a system of Commonwealth funding for the provision of medicines and appliances to patients by chemists. But the legislation was not struck down on that ground. It was struck down on the ground that other aspects of the scheme constituted civil conscription. The case does not reveal that s 51(xxiiiA) is limited to direct provision by the Commonwealth only. Webb J said that s 51(xxiiiA) "does not empower the Commonwealth Parliament to do more than legislate for the provision by the

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561 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 27 March 1946 at 648.

562 See *Cole v Whitfield* (1988) 165 CLR 360 at 385, quoted above at [346].

563 (1949) 79 CLR 201; [1949] HCA 44.

Commonwealth itself of the allowances, pensions, endowment, benefits and services to which it refers"[564]. But his Honour was not asserting any distinction between direct provision by the Commonwealth and indirect provision by the Commonwealth.

423 In *Alexandra Private Geriatric Hospital Pty Ltd v The Commonwealth*, which concerned legislation providing a benefit to be paid to the proprietor of an approved nursing home, Mason ACJ, Wilson, Brennan, Deane and Dawson JJ stated two approaches to identifying a "benefit" for s 51(xxiiiA) purposes[565]:

> "On one approach, the benefit can be identified as the money paid to the proprietor of the nursing home. On another approach, the benefit can be identified as the accommodation, sustenance and care to the extent that it is provided by the proprietor to the patient as the quid pro quo for the money payment made by the Commonwealth. Ultimately, it matters not which of these alternative identifications of the 'benefit' is preferred because no distinction relevant to the characterization of the overall legislative scheme can be drawn between them. If the scheme is capable of being supported as a law with respect to the provision of a money payment by the Commonwealth to the proprietor of a nursing home in consideration of nursing care provided to a patient it likewise will be capable of being supported as a law with respect to the provision of nursing care for that patient. In the former case, it will be seen as the means chosen by the Parliament of controlling the application and ensuring the effectiveness of the benefits paid; in the latter case, the scheme will be seen as the means adopted to provide those benefits."

Their Honours concluded that legislation controlling the fees charged by nursing homes receiving benefits had a significant connection with s 51(xxiiiA).

424 The plaintiff submitted that the scheme under consideration in *British Medical Association v The Commonwealth* was one 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. In relation to *Alexandra Private Geriatric Hospital Pty Ltd v The Commonwealth* the plaintiff submitted that the Commonwealth subsidy for nursing home care conferred a direct benefit on the recipient of the care, namely, a partial discharge of the payment obligation he or she owed to the proprietor of the relevant nursing home. The plaintiff submitted that the Court

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564 (1949) 79 CLR 201 at 292.

565 (1987) 162 CLR 271 at 281; [1987] HCA 6.

did no more than recognise that the Commonwealth could provide nursing care under legislation supported by s 51(xxiiiA) in one of two ways – by providing the relevant services itself or by relieving the recipients of those services of part or all of their obligation to pay for them. In either case, that recipient would be receiving a benefit directly from the Commonwealth.

425 The plaintiff submitted that neither *British Medical Association v The Commonwealth* nor *Alexandra Private Geriatric Hospital Pty Ltd v The Commonwealth* was authority for the proposition that the mere provision of funding by the Commonwealth, falling short of an assumption by the Commonwealth of at least part of a payment obligation that the recipient of the benefit would otherwise have owed, was "provision" within s 51(xxiiiA). It is true that this proposition was not part of the ratio decidendi of either case. But the dicta are wide enough to support it. Those cases do not support the plaintiff's submission that payment by the Commonwealth to a third party falls within s 51(xxiiiA) only if that payment relieved the person benefited from an obligation to reimburse the third party. There is, as South Australia submitted, broad similarity between those two cases and the present in that in each case the Commonwealth supplies funding for the provision of a benefit by another organisation.

426 Both the travaux préparatoires to s 51(xxiiiA) and the authorities suggest that the expression "benefits to students" is not limited to payments of money to students any more than "hospital benefits" are limited to payments of money to patients, rather than to the hospitals which care for them. The expression "benefits to students" can extend to the funding of services that persons other than the Commonwealth provide. It is not limited to the supply of goods or services for which students would otherwise be obligated to pay. There are other matters that support that conclusion.

427 One is the following precept[566]:

> "The simplest approach … to the problem is simply to read the paragraph and to apply it without making implications or imposing limitations which are not found in the express words. We must remember that it is part of the Constitution and go back to the general counsel to remember that it is a constitution we are construing and it should be construed with all the generality which the words used admit."

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566 *R v Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways Pty Ltd* (1964) 113 CLR 207 at 225 per Dixon CJ, Kitto, Taylor, Menzies, Windeyer and Owen JJ; [1964] HCA 15.

That is a proper approach, subject to any contrary indication in the context or in the rest of the Constitution[567]. To treat the absence of express Commonwealth legislative power over education as a reason for limiting the meaning of s 51(xxiiiA) would be to defy that principle.

428 Another matter which supports the conclusion concerns the contrasts within s 51(xxiiiA). Some integers of it relate to benefits in the form of monetary payments, for example allowances and pensions. Others relate to benefits which are not necessarily monetary from the standpoint of the persons benefited, though they cost money to provide – sickness and hospital benefits, and benefits to students. As Dixon J said in *British Medical Association v The Commonwealth*[568]:

> "The general sense of the word 'benefit' covers anything tending to the profit advantage gain or good of a man and is very indefinite. But it is used in a rather more specialized application in reference to what are now called social services; it is used as a word covering provisions made to meet needs arising from special conditions with a recognized incidence in communities or from particular situations or pursuits such as that of a student, whether the provision takes the form of money payments or the supply of things or services."

In the same case Latham CJ, McTiernan, Williams and Webb JJ made similar statements[569]. And in *Alexandra Private Geriatric Hospital Pty Ltd v The Commonwealth*[570], Mason ACJ, Wilson, Brennan, Deane and Dawson JJ referred approvingly to Dixon J's observations in *British Medical Association v The Commonwealth*.

429 Hence s 51(xxiiiA) confers power to enact legislation permitting the Commonwealth to provide non-monetary benefits to students by financing others to provide those benefits. They need not be benefits for which the students would otherwise be obligated to pay.

430 Against that background, it is necessary to turn to four arguments that Victoria in particular advanced.

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567 *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 138-143 [404]-[419].

568 (1949) 79 CLR 201 at 260.

569 (1949) 79 CLR 201 at 230, 279-280, 286-287 and 292 respectively.

570 (1987) 162 CLR 271 at 280.

431 Victoria's first submission was that "benefits to students" did not include "services provided to students". Victoria pointed out that the word "services" is used in s 51(xxiiiA) in the expression "medical and dental services" only. Hence it submitted that the other integers of s 51(xxiiiA) only extended to benefits in the nature of financial assistance and conceivably assistance in the nature of goods but no further. Victoria also pointed out that the words "(but not so as to authorize any form of civil conscription)" qualify "medical and dental services" only[571]. Victoria submitted that if "benefits" extended to "services", an anomaly would arise: civil conscription in areas other than medical and dental services would not be expressly prohibited. Victoria also submitted that "sickness and hospital benefits" was a wider expression than "benefits to students".

432 This argument is inconsistent with Dixon J's view in *British Medical Association v The Commonwealth*. His Honour made it plain that the term "benefits" encompassed the supply of "services"[572]. Other members of the Court concurred with his opinion[573]. Mason ACJ, Wilson, Brennan, Deane and Dawson JJ approved it in *Alexandra Private Geriatric Hospital Pty Ltd v The Commonwealth*[574]. Victoria's argument in relation to civil conscription sheds little light on the construction of the word "benefits". The civil conscription exception was introduced not by the Government, but by the Leader of the Opposition, in order to address a concern about the nationalisation of medicine[575]. And there is no reason to treat the word "benefits" in the expression "benefits to students" as being narrower than the word "benefits" as used in the expression "sickness and hospital benefits". Section 51(xxiiiA) contains 11 grants of legislative power. One grant of power in s 51 does not, in the absence of express words of limitation, narrow the scope of any other by a process of implication.

433 Victoria's second submission, in which the plaintiff joined, was that "benefits to students" did not mean anything tending to benefit students. If it did, the Court would be required to decide matters insusceptible of proof. It would be required to assess the merits of particular proposals. The submission was that "benefits to students" could only refer to material, tangible things.

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571 *British Medical Association v The Commonwealth* (1949) 79 CLR 201 at 254, 261, 281-282 and 286-287.

572 (1949) 79 CLR 201 at 260, quoted above at [428].

573 See above at [428].

574 (1987) 162 CLR 271 at 280.

575 See *Wong v The Commonwealth* (2009) 236 CLR 573 at 588-591 [48]-[50]; [2009] HCA 3.

434 Victoria relied on *Gilmour v Coats*[576]. This was misplaced. No analogy can usefully be drawn between issues of public benefit in the law of charity as applied to intercessory prayers by nuns in closed orders, and counselling for various problems encountered at school. Victoria also relied on McTiernan J's account of the word "benefit" in *British Medical Association v The Commonwealth*[577], approved by Mason ACJ, Wilson, Brennan, Deane and Dawson JJ in *Alexandra Private Geriatric Hospital Pty Ltd v The Commonwealth*[578]. McTiernan J said:

> "The material aid given pursuant to a scheme to provide for human wants is commonly described by the word 'benefit'. When this word is applied to that subject matter it signifies a pecuniary aid, service, attendance or commodity made available for human beings under legislation designed to promote social welfare or security: the word is also applied to such aids made available through a benefit society to members or their dependants. The word 'benefits' in par (xxiiiA) has a corresponding or similar meaning."

Contrary to Victoria's submission, however, McTiernan J did not limit benefits to "material" or "tangible" things. He spoke of "material aid", but he included within "material aid" a "service" to "promote social welfare". Those are wide expressions. Further, in speaking of legislation "designed to promote social welfare", McTiernan J was referring to legislation identifying a process working out an organised method of responding to a perceived need. The "care" provided in nursing homes to which Mason ACJ, Wilson, Brennan, Deane and Dawson JJ referred in *Alexandra Private Geriatric Hospital Pty Ltd v The Commonwealth*[579] has intangible aspects too – the need for comfort and security for one – but their Honours assumed that it was a "benefit".

435 Victoria said that no measurable "benefit" existed in this case. However, the Agreement does render to students a comprehensible benefit because it provides funding to meet needs that experienced school authorities have identified. The operation of the NSCP contemplates decisions about what a particular school thinks it needs, decisions about how those needs could be met by "chaplaincy services", decisions about how the efficacy of "chaplaincy services" in meeting those needs could be monitored and evaluated as time goes

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576 [1949] AC 426 at 446 and 451-453.

577 (1949) 79 CLR 201 at 279.

578 (1987) 162 CLR 271 at 280.

579 (1987) 162 CLR 271 at 281, quoted above at [423].

on, and decisions taken in consequence of that monitoring and evaluation. Those decisions are made by staff who may reasonably be expected to have the capacity to form appropriate judgments about student wellbeing.

436 Finally, in assessing the validity of legislation enacted in reliance on s 51(xxiiiA), Latham CJ expressed the view that it is appropriate for the Court to give substantial weight to a legislative judgment that the opinion of an expert about the existence of a benefit was sound[580]. In that case the opinion was that of a doctor about the drugs and medicines which could be beneficial to a patient. So here, while the legislature cannot delegate its statutes into validity, if legislation had been enacted to underpin the Agreement, the legislature's judgment that the opinion of the School authorities that certain structures and conduct were beneficial to the students was a sound opinion would be something to which weight would have been given.

437 Victoria's third submission, in which the plaintiff and Western Australia joined, was that even if what students received under the Agreement were "benefits", they were not "benefits to students" because they did not benefit students as students. The submission referred to the words Dixon J used in his Honour's description of "benefit" set out above: "provisions made to meet needs arising from … [the] pursuits … of a student"[581]. The submission was:

> "While material assistance – such as the provision of books, computers and other educational equipment – may readily be seen as meeting a need arising from the pursuits of a school student, the fostering of general 'spiritual wellbeing' is not. There is no sufficient relationship between the chaplaincy services to be provided under the Agreement, and the particular needs of a *student*. For example, the services are not confined to services needed as a result of being a student (such as addressing bullying), but extend to any chaplaincy services that members of a school community, including staff and students, might require. In the case of students, this extends to services that may be required irrespective of the fact of being a student or not; the services would extend to counselling in respect of matters not arising at all from the pursuits of a student (for example, following the death of a family member)." (footnote omitted; emphasis in original)

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580 *British Medical Association v The Commonwealth* (1949) 79 CLR 201 at 233.

581 *British Medical Association v The Commonwealth* (1949) 79 CLR 201 at 260, quoted above at [428].

And Western Australia submitted that while all the other benefits in s 51(xxiiiA) were defined by reference to the character of the authorised expenditure, "benefits to students" are defined by reference to the character of the recipient.

438 To be a school student involves encountering numerous vicissitudes. Some may be closely connected with studies – worry about success or failure, overwork, a feeling of incomprehension, discontent with teachers. Some may be more connected with the fact of being a young person – horseplay which leads to victimisation, victimisation which leads to bullying, the cruelty of little clans to the outsider, bereavement, hostility between parents, divorce, a lack of personal confidence, the problems of life in a multicultural area. The latter group of vicissitudes may be rendered more acute by the school environment. That a scheme might be devised to benefit persons generally by preventing or ameliorating those woes does not prevent a scheme being devised to benefit school students by preventing or ameliorating those woes. Dixon J did not speak of benefits specifically relating to the "pursuits" of children, but of "needs arising from … particular … pursuits". The vicissitudes in question create "needs arising from special conditions with a recognized incidence in [school] communities". Those vicissitudes also create "needs arising from … particular … pursuits such as that of a student". They often flow from stress referable to the pursuit of studying, the vulnerability of those who study by reason of age, and the risks to which other students expose them. Factors which are closely connected to studying in a narrow sense are almost impossible to separate from factors which affect young people who are students. Since education is compulsory between specific ages, the category "young people within those ages" and the category "students within those ages" are substantially similar, leaving aside those who cannot and those who will not attend school. Victoria's submission would mean that s 51(xxiiiA) would not support legislation authorising the provision of benefits in the form of payments of money to alleviate financial need. Poverty is a characteristic that students (and widows and the unemployed) share with other members of the public.

439 Victoria's fourth submission, in which Western Australia joined, was that the benefits conferred under the Agreement were not benefits "to students", but to the broader school community. Victoria drew attention to various references in the Agreement and the documents it incorporates to School staff, the wider School community, and the community of which the School is part. However, when those documents are read as a whole, it is clear that the NSCP's central object as implemented at the School through the Agreement is providing benefits to students; the provision of benefits to others is incidental to that object. It is, after all, the students, not the wider School community and the community of which the School is part, who spend most of their time at the School and to whom the services of the "chaplains" are most readily available. As for the staff, they are the servants of the students. It may be a secondary function of the "chaplains" to provide benefits to the wider communities and the staff. But the primary function of the "chaplains" is to provide benefits to students. And there

is a close connection between the wellbeing of parents, teachers and the wider School community on the one hand and the wellbeing of students on the other. The function of advancing the wellbeing of parents, teachers and the wider communities is ancillary to the NSCP's primary function of benefiting students. The proposition that the NSCP assisted schools and school communities does not deny the proposition that it benefited students, because schools and communities which have been assisted are likely to benefit students.

440 The final submission about s 51(xxiiiA) to consider was advanced by the plaintiff. He submitted that for a measure to fall within the description "benefits to students" it was necessary to demonstrate a benefit to a particular student. This submission has three flaws. First, the argument is inconsistent with Dixon J's analysis of "benefit" in *British Medical Association v The Commonwealth*[582]. Secondly, even if it is correct, it would be possible, if the enterprise were thought useful, to identify particular students at the School whom the Agreement benefited. Thirdly, it narrows s 51(xxiiiA) unduly. The arrangements at the School could result in a benefit to any student depending on that student's particular circumstances from time to time.

441 For the above reasons s 51(xxiiiA) would support legislation authorising the provision of "chaplaincy services" by the fourth defendant using money provided by the Commonwealth.

Section 116

442 The plaintiff advanced two submissions concerning s 116 of the Constitution, which relevantly provides: "no religious test shall be required as a qualification for any office … under the Commonwealth." First, the plaintiff submitted that NSCP "chaplains" hold an "office … under the Commonwealth" within the meaning of s 116. The plaintiff submitted that the more closely "chaplains" complied with Commonwealth requirements as to their qualifications, activities and obligations, the more they acted for the Commonwealth and under its supervision. Secondly, the plaintiff submitted that the eligibility criteria in the Agreement imposed a religious test as a qualification for the offices of the "chaplains". In relation to his second submission, the plaintiff accepted that "this is not a scheme which proclaims its uniquely Christian character" and that it was "a scheme which forbids proselytising". But he argued that it was "to provide for spiritual guidance, and by persons who are likely to be clerics."

443 In relation to the first submission, the plaintiff drew attention to the differences between s 44(iv) of the Constitution, s 75(v) of the Constitution and

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582 (1949) 79 CLR 201 at 260, see above at [428].

s 116. Section 44(iv) refers to an "office of profit under the Crown", and means a permanent officer of the executive government[583]. The plaintiff submitted that the omission of the words "of profit" from s 116 suggests that it contemplates something less than a relationship of employment. The plaintiff also pointed to the fact that s 75(v) refers to "officer of the Commonwealth" while s 116 refers to an "office … under the Commonwealth". The plaintiff submitted that "of" indicates a person engaged or appointed by the Commonwealth, while "under" indicates the exercise of Commonwealth supervision or control over the office holder. The plaintiff submitted that if his proposed construction of s 116 were not adopted, the Commonwealth could evade s 116 by engaging subcontractors to perform its activities and stipulating that those subcontractors employ only adherents to a particular religious faith. The plaintiff contended that the Commonwealth exercised supervision or control over the "chaplains". That is because if the Code of Conduct were breached, the Commonwealth could cause the "chaplain" in breach to cease providing "chaplaincy services". And it is because the Commonwealth had the right to conduct monitoring activities.

444 The plaintiff's construction of s 116 must be rejected. The absence of the words "of profit" from s 116 indicates only that s 116 is wider than s 44(iv). Section 116 applies to offices which are not "of profit" as well as those which are. An "office" is a position under constituted authority to which duties are attached[584]. That suggests that an "officer" is a person who holds an office which is in direct relationship with the Commonwealth and to which qualifications may attach before particular appointments can be made or continued. The word "under" in s 116 has no significance. It does not suggest the wider meaning which the plaintiff advocated. It simply repeats the relevant part of Art VI of the United States Constitution: "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."

445 The Commonwealth has no legal relationship with the "chaplains". It cannot appoint, select, approve or dismiss them. It cannot direct them. The services they provide in a particular school are determined by those who run that school. The provision of those services is overseen by school principals.

446 In the result, the plaintiff's construction of s 116 is an unattractive one. Under that construction, whenever the Commonwealth enters a contract under which services are to be provided by a party with whom it is to have no legal relationship, under which particular standards are stipulated, and under which reporting obligations are created to ensure compliance with those standards, that party would hold an office under the Commonwealth. This would radically

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583 *Sykes v Cleary* (1992) 176 CLR 77 at 96; [1992] HCA 60.

584 *R v Boston* (1923) 33 CLR 386 at 402; [1923] HCA 59.

expand s 75(v). The effect would be greatly to widen opportunities to commence litigation within the original jurisdiction of this Court, without the possibility of statutory restriction of them. Section 75(v) is a very beneficial provision, but not as beneficial as that.

447 This is not the occasion on which to attempt an exhaustive definition of "office … under the Commonwealth". It is sufficient to say that whatever its outer limits, the "chaplains" are beyond them.

448 It is therefore not necessary to deal with the plaintiff's other, somewhat controversial, submission, that the eligibility criteria impose a religious test.

Relief

449 The questions in the Amended Special Case should be answered thus:

1(a): Yes.

1(b): No.

1(c)(i): No.

1(c)(ii): No.

1(c)(iii): No.

1(c)(iv): Yes.

1(c)(v): No.

2(a): No.

2(b): No.

3: This question does not arise.

4(a): No.

4(b): No.

5: This question does not arise.

6: The plaintiff.

450 CRENNAN J. The plaintiff is the father of four children currently enrolled at the Darling Heights State Primary School in Queensland ("the School"). This action, within the Court's original jurisdiction, was referred by a single Justice to the Full Court as a special case under r 27.08 of the High Court Rules 2004. The plaintiff challenged the validity of an agreement dated 9 November 2007 ("the Funding Agreement") between the Commonwealth (the first defendant) and Scripture Union Queensland ("SUQ") (the fourth defendant) for the provision of funding for chaplaincy services to the School under a Commonwealth initiative entitled the National School Chaplaincy Program ("the NSCP").

451 There is no special statute under any specific head of Commonwealth legislative power in the Constitution authorising the institution of the NSCP and spending on its activities. Nor is there any utilisation of s 96, which permits grants of financial assistance to the States on such terms and conditions as the Commonwealth Parliament thinks fit. In those circumstances, the present litigation concerns the scope of the Commonwealth's executive power under the Constitution, specifically s 61, to enter into and pay moneys under the Funding Agreement.

The questions

452 The special case stated four main questions for this Court's consideration. The first question is whether the plaintiff has standing to challenge the validity of the Funding Agreement, the Commonwealth's drawing of moneys from the Consolidated Revenue Fund, or the making of payments under the Funding Agreement.

453 The second and principal question is whether the Funding Agreement is invalid because it is beyond the executive power of the Commonwealth under s 61 of the Constitution (construed either alone or in conjunction with s 51(xxiiiA) or s 51(xx)) or prohibited by s 116 of the Constitution.

454 The third question is whether the drawing of moneys from the Consolidated Revenue Fund for the purpose of making payments under the Funding Agreement is authorised by relevant Commonwealth appropriation legislation. A sub-issue related to this question is whether the payments made to SUQ under the Funding Agreement were for an activity within "the ordinary annual services of the Government" pursuant to ss 53 and 54 of the Constitution.

455 The fourth question is whether the making of payments by the Commonwealth to SUQ under the Funding Agreement is constitutionally invalid on either of the bases described above. The fifth question concerns relief and the sixth question relates to costs.

456 All States intervened, and the Court received submissions from the Churches' Commission on Education Incorporated as amicus curiae.

457 In the reasons which follow it is concluded that the executive power of the Commonwealth in s 61 of the Constitution does not authorise the expenditure of funds appropriated in the manner described below on the activities of the NSCP. It is further concluded that s 116 of the Constitution does not operate to invalidate the NSCP. The conclusions reached in these reasons do not involve any assessment of the merits or wisdom of the NSCP. In accordance with these conclusions, I agree with the answers to the questions proposed in the reasons of Gummow and Bell JJ.

The NSCP

458 The Prime Minister announced the NSCP as a new initiative of the Australian Government on 29 October 2006. Under the NSCP the Australian Government would commit up to $30 million each year for three years to provide chaplaincy services in Australian schools. The funding per school under the program was to be capped at $20,000 per year. In 2007, total funding for the program was increased to $165 million over three years. In 2009, the Prime Minister announced an extension of the NSCP until December 2011, guaranteeing "a total additional investment of $42 million over the 2010 and 2011 school years."

459 Because the NSCP was not initiated under a special statute of the Commonwealth Parliament, it is necessary to consider constituent documents prepared by the Commonwealth Executive in order to understand the nature and purposes of the NSCP.

The Guidelines

460 The NSCP is administered by the Department of Education, Employment and Workplace Relations ("DEEWR")[585] in accordance with guidelines which were initially issued in December 2006 ("the 2006 Guidelines") and subsequently replaced by updated versions issued on 19 January 2007 ("the 2007 Updated Guidelines"), 1 July 2008 ("the 2008 Updated Guidelines") and 16 February 2010 ("the 2010 Updated Guidelines"). The 2006 Guidelines and the 2007, 2008 and 2010 Updated Guidelines each state that the NSCP is a voluntary program which supports schools and their communities that wish to establish school chaplaincy services or to enhance existing chaplaincy services.

461 To receive funding under the NSCP, schools and their communities must "engage a school chaplain and demonstrate how the services provided by the school chaplain achieve the outcomes required by the [NSCP]." The 2008 and

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585 Formerly the Department of Education, Science and Training ("DEST").

2010 Updated Guidelines provide that these services may alternatively be provided by a "secular Pastoral Care Worker".

462 A "school chaplain" is defined in the various guidelines as:

"a person who is recognised:

- by the local school, its community and the appropriate governing authority as having the skills and experience to deliver school chaplaincy services to the school and its community; and

- through formal ordination, commissioning, recognised qualifications or endorsement by a recognised or accepted religious institution or a state/territory government approved chaplaincy service."

463 In the 2008 and 2010 Updated Guidelines, a "secular Pastoral Care Worker" is defined in the same way as a school chaplain, with the exception that the second criterion quoted above is omitted and the words "pastoral care services" are substituted for the words "school chaplaincy services" in the first criterion.

464 The 2006 Guidelines and the 2007, 2008 and 2010 Updated Guidelines describe the tasks which school chaplains may perform in their respective schools and communities in delivering services under the NSCP. These tasks can include:

> "assisting school counsellors and staff in the delivery of student welfare services; supporting students to explore their spirituality; providing guidance about spiritual, values and ethical matters; and facilitating access to the helping agencies in the community, both religious-based and secular."

465 School chaplains must abide by the NSCP Code of Conduct ("the Code of Conduct") in the course of providing services under the program.

466 To receive funding under the NSCP, a school must nominate an organisation which will enter into a funding agreement with the Commonwealth. Eligible organisations include certain legal entities nominated as "project sponsors" by schools to manage the chaplaincy services on their behalf.

467 The funding for a school is then covered by a separate funding agreement. Schools may use these funds only "for expenditure that directly relates to the provision of chaplaincy services."

468 Funding is "provided on an annual basis subject to the provision of appropriate project performance reporting", and "[f]ailure to comply with reporting processes outlined in the funding agreement will be considered a breach of the funding agreement".

The Funding Agreement

469 On or about 4 April 2007, the School applied for funding under the NSCP to expand an existing chaplaincy program regulated under procedural policies made by the Queensland Parliament. The existing program had commenced at the School after consultation with staff, students and parents in 1998, and was, at the time of the application to the NSCP, a program which supported the provision of chaplaincy services at the School for an equivalent of two school days per week. In its application, the School identified SUQ as the project sponsor with which the Commonwealth would enter into a funding agreement. DEST made an offer of funding to the School under the NSCP on or about 7 July 2007, and on or about 25 July 2007 the School's Principal signed a declaration that the School intended to proceed with the NSCP-funded chaplaincy project. Ultimately, this had the effect that the School's chaplaincy services were enlarged to three school days per week, two of those three days being funded by the Commonwealth Government.

470 On 9 November 2007, DEST (on behalf of the Commonwealth) entered into the Funding Agreement with SUQ for the provision of funding under the NSCP. The term of the Funding Agreement was three years from the date of its execution. By written variations made on or about 12 October 2008 and 13 May 2010, the parties altered the commencement date of the Funding Agreement to 8 October 2007 and extended its term to 31 December 2011. Under the Funding Agreement, SUQ agreed, among other things, to provide the chaplaincy services described in the School's NSCP application, and the Commonwealth agreed to provide funding in accordance with the project payment schedule. The funding to be provided under the original term of the Funding Agreement was $66,000 inclusive of GST in three equal instalments upon the rendering of valid tax invoices by SUQ. Pursuant to the contractual variation made on or about 13 May 2010, the parties agreed for the Commonwealth to make a fourth payment of $27,063.01 inclusive of GST, bringing the total NSCP funding in respect of the School to $93,063.01.

471 NSCP-funded chaplaincy services commenced at the School on 8 October 2007 and continued at the date of the hearing. Each chaplain provided to the School by SUQ in accordance with the Funding Agreement signed a document in substantially the same form as the Code of Conduct, and delivered the chaplaincy services described in the School's NSCP application. SUQ issued tax invoices to the Commonwealth in respect of each instalment payable under the Funding Agreement as varied, and the Commonwealth duly paid the respective

instalments to SUQ on or about 14 November 2007, 15 December 2008, 2 December 2009 and 11 October 2010.

Appropriations in respect of the NSCP

472 Whilst practice in the Commonwealth Parliament in relation to appropriations has varied over time, the contemporary practice is to enact appropriation statutes falling into one of two categories. An Act in the first category is described in its long title as legislation appropriating money "for the ordinary annual services of the Government, and for related purposes", and is given an odd number (for example, "Appropriation Act (No 1)"). An Act in the second category is described as legislation appropriating money "for certain expenditure, and for related purposes", and is given an even number (for example, "Appropriation Act (No 2)"). This practice originated in an arrangement between the Houses of Parliament in May 1965, which has become known as the "Compact of 1965", and which is described more fully in *Combet v The Commonwealth*[586]. There it was further said[587]:

> "[T]he Senate resolved, on 17 February 1977, to reaffirm that appropriations for (among other things) 'new policies not previously authorised by special legislation' were not appropriations for the ordinary annual services of the Government[588]."

473 The reason for the practice lies in ss 53 and 54 of the Constitution. Section 53 provides, among other things, that proposed laws "appropriating revenue or moneys, or imposing taxation" are not to originate in the Senate and may not be amended by the Senate. Section 54 provides that a proposed law which "appropriates … moneys for the ordinary annual services of the Government" must deal only with such appropriation. It should also be noted that s 56 requires that a proposed appropriation Bill must not be passed unless "the purpose of the appropriation has in the same session been recommended by message of the Governor-General to the House in which the proposal originated."

474 It is recognised by the parties that there is no even-numbered appropriation Act making specific appropriation for the expenditure of moneys out of the Consolidated Revenue Fund for the purposes of the NSCP. Rather, funds directed towards the NSCP appear always to have been appropriated from

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586 (2005) 224 CLR 494 at 573-574 [150]-[151] per Gummow, Hayne, Callinan and Heydon JJ; [2005] HCA 61.

587 (2005) 224 CLR 494 at 574 [151] per Gummow, Hayne, Callinan and Heydon JJ.

588 Australia, Senate, *Journals of the Senate*, 1976-1977, No 82, 17 February 1977 at 572.

the Consolidated Revenue Fund "for the ordinary annual services of the Government" pursuant to odd-numbered appropriation Acts commencing with the *Appropriation Act (No 3)* 2006-2007 (Cth).

Standing of the plaintiff

475 I agree with the reasons of Gummow and Bell JJ in respect of the issue of standing.

Section 116 of the Constitution

476 The plaintiff's contention that the NSCP contravened s 116 of the Constitution by imposing a religious test as a qualification for office under the Commonwealth must be rejected for the reasons given by Gummow and Bell JJ.

Section 61 of the Constitution

477 The parties' submissions were refined over the course of oral argument to define more precisely the issues and areas of dispute between the plaintiff and the Commonwealth defendants and SUQ.

478 It was accepted that s 81 of the Constitution, which provides for the establishment of the Consolidated Revenue Fund[589], and s 83, which provides for appropriation by Parliament[590], are not capable of conferring a "substantive spending power"[591].

479 The plaintiff also accepted that success on his constitutional challenge to the entry into and payment of moneys under the Funding Agreement would render it unnecessary for the Court to deal with all of his arguments concerning the appropriations.

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589 Section 81: "All revenues or moneys raised or received by the Executive Government of the Commonwealth shall form one Consolidated Revenue Fund, to be appropriated for the purposes of the Commonwealth in the manner and subject to the charges and liabilities imposed by this Constitution."

590 Section 83: "No money shall be drawn from the Treasury of the Commonwealth except under appropriation made by law."

591 *ICM Agriculture Pty Ltd v The Commonwealth* (2009) 240 CLR 140 at 169 [41]; [2009] HCA 51, referring to *Pape v Federal Commissioner of Taxation* ("*Pape*") (2009) 238 CLR 1; [2009] HCA 23.

480 Reduced to essentials, the question asked in this litigation is whether the Commonwealth Executive had the power to enter into and pay moneys under the Funding Agreement in the absence of special legislation under any of the heads of legislative power in s 51, those nominated being s 51(xxiiiA) and s 51(xx), or legislation in respect of matters incidental to the execution of the NSCP under s 51(xxxix). The main question for determination is whether s 61 of the Constitution supported the Executive contracting and spending in respect of the NSCP in the absence of legislative support other than the relevant appropriation Acts.

481 The "executive power" of the Commonwealth as described in s 61 "extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth."

482 A number of propositions drawn from the course of authority in respect of the scope of Commonwealth executive power were not in contest and formed the backdrop to submissions.

483 First, it was accepted that, despite the establishment of some limits, s 61 is not amenable to exhaustive definition in any single case[592].

484 Secondly, while a typical source of executive power is a special statute (of which there were none here), it was accepted that there are circumstances in which executive power can be exercised lawfully without statutory authority. Such circumstances include the exercise of prerogative powers accorded to the Crown at common law (now reposed in the Commonwealth Executive alone[593]), such as the power to enter a treaty or wage war. These are not relevant here. They also include the powers which derive from the capacities of the Commonwealth as a juristic person, such as the capacities to enter a contract and to spend money when exercised in the ordinary course of administering a recognised part of the Commonwealth government[594].

485 Thirdly, it was recognised that s 61 is the source of the Commonwealth Executive's capacity "to engage in enterprises and activities peculiarly adapted to

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592 *Pape* (2009) 238 CLR 1 at 55 [113] per French CJ, 87 [227], 89 [234] per Gummow, Crennan and Bell JJ. See also *Davis v The Commonwealth* ("*Davis*") (1988) 166 CLR 79 at 92 per Mason CJ, Deane and Gaudron JJ, 107 per Brennan J; [1988] HCA 63.

593 *Barton v The Commonwealth* (1974) 131 CLR 477 at 498 per Mason J; [1974] HCA 20.

594 *New South Wales v Bardolph* ("*Bardolph*") (1934) 52 CLR 455; [1934] HCA 74.

the government of a nation … which cannot otherwise be carried on for the benefit of the nation"[595], although it may not necessarily so act in aid of *any* subject which the Executive regards as being of national concern and interest[596].

Submissions

486 In the light of those established propositions, the plaintiff first contended that the entry into and payment of moneys under the Funding Agreement was not authorised as an enterprise or activity "peculiarly adapted to the government of a nation … which cannot otherwise be carried on for the benefit of the nation"[597] – a recognised example of which is a need to deal with a national emergency[598], reflecting the Commonwealth's "inherent right of self-protection"[599].

487 Secondly, the plaintiff contended that the Commonwealth Executive's entry into and making of payments under the Funding Agreement could not be described as spending on "the ordinary annual services of the Government" and therefore could not be treated as authorised under that rubric. For the purposes of this argument, the plaintiff drew a distinction between, on the one hand, the Commonwealth Executive's power to enter into and make payments under contracts for "the ordinary annual services of the Government" and, on the other, entering contracts and spending as a means of carrying out or implementing a new policy. The NSCP, as at its instigation, was said to fall into the latter category. Although the plaintiff did not challenge the validity of the initial appropriation, the plaintiff contended that the NSCP at that point should have been subject to greater scrutiny by Parliament by reason of Parliament's control of expenditure. This led to the next contention that, generally, in the absence of a situation calling for the exercise of prerogative power, or a national

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595 *Victoria v The Commonwealth and Hayden* ("the *AAP Case*") (1975) 134 CLR 338 at 397 per Mason J; [1975] HCA 52. See also *Davis* (1988) 166 CLR 79 at 111 per Brennan J and *Pape* (2009) 238 CLR 1 at 87 [228] per Gummow, Crennan and Bell JJ.

596 *Pape* (2009) 238 CLR 1 at 87-88 [228] per Gummow, Crennan and Bell JJ.

597 *AAP Case* (1975) 134 CLR 338 at 397 per Mason J. See also *Davis* (1988) 166 CLR 79 at 111 per Brennan J.

598 As, for example, in *Pape* (2009) 238 CLR 1.

599 *R v Kidman* (1915) 20 CLR 425 at 440 per Isaacs J; [1915] HCA 58. See *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 259 per Fullagar J; [1951] HCA 5. See also *Burns v Ransley* (1949) 79 CLR 101 at 109-110 per Latham CJ, 116 per Dixon J; [1949] HCA 45; *R v Sharkey* (1949) 79 CLR 121 at 148-149 per Dixon J; [1949] HCA 46.

emergency[600], or the need for some unique national enterprise[601], spending associated with a new policy requires express authorisation by Parliament beyond an appropriation – both because of the principles of responsible government and the separation of powers. It was posited that, if spending on a new policy is represented as spending on "the ordinary annual services of the Government", the Executive would not be accountable to Parliament in respect of that policy, as required by the principles of responsible government, because the Senate would effectively be bypassed by reason of ss 53 and 54 of the Constitution. The thrust of these submissions was that spending on the activities of the NSCP amounted to the Executive governing without parliamentary authorisation, or authorisation otherwise sourced in the Constitution.

488 The Commonwealth defendants' primary contention was that the Commonwealth Executive's power to spend is sourced in the Commonwealth's legal capacity as a juristic person to spend moneys lawfully appropriated to be spent, and to enter into contracts ("the wider submission"). In *Davis*, preferring Blackstone[602] to Dicey[603], Brennan J distinguished between the Crown's unique governmental prerogative rights and powers once enjoyed by "the King ... alone" and the Crown's ordinary rights and powers in its private capacity, described by his Honour as "mere capacities", which were no different from the capacities of

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600 As in *Pape* (2009) 238 CLR 1.

601 As in *Davis* (1988) 166 CLR 79.

602 Blackstone, *Commentaries on the Laws of England*, (1765), bk 1, c 7 at 232:

> "[I]t can only be applied to those rights and capacities which the king enjoys alone, in contradistinction to others, and not to those which he enjoys in common with any of his subjects: for if once any one prerogative of the crown could be held in common with the subject, it would cease to be prerogative any longer."

In *Federal Commissioner of Taxation v Official Liquidator of E O Farley Ltd* (1940) 63 CLR 278 at 320-321, Evatt J described those rights and powers as the "royal prerogatives" or "executive prerogatives"; [1940] HCA 13.

603 Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed (1959) at 424-425 described the prerogative powers accorded to the Crown broadly:

> "The prerogative appears to be both historically and as a matter of actual fact nothing else than the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown. … Every act which the executive government can lawfully do without the authority of the Act of Parliament is done in virtue of this prerogative."

ordinary persons to enter into contracts or to spend money[604]. This restrained approach to the prerogative is consistent with Australia's legal independence from Britain, the constraints of federalism and the paramountcy[605] of the Commonwealth Parliament, and respect under our democratic system of government for the common law rights of individuals.

489 It was submitted by the Commonwealth defendants that, whilst these capacities were the same as the capacities of a natural person, they were sourced in the character and status of the Commonwealth as a polity, which rendered constitutional spending by the Commonwealth Executive for any purpose, including purposes beyond the specific heads of legislative power in s 51. Central to this argument was the proposition that the Commonwealth could no more be constrained than a non-governmental juristic person could be if an exercise of its capacities did not unlawfully intrude on the rights of others. The exercise by the Commonwealth of its capacities to contract and to spend was said to be limited only by the need for an appropriation and any constraints arising out of the law, the principles of responsible government and the federalist distribution of executive power between the Commonwealth and the States.

490 As to the plaintiff's reliance on the principles of responsible government and the detail of the initial appropriation, it was contended that, whilst there is general parliamentary adherence to the broad concept that a new policy is not to be included in odd-numbered appropriation legislation, "a new activity within an existing outcome is not a new policy and can be included in Acts No 1 and 3 for the ordinary annual services of government." That submission was explained by reference to a DEEWR Budget Statement tabled in the Senate and the House of Representatives relevant to the period 2010-2011 in which the relevant outcome set out was "Improved learning and literacy, numeracy and educational attainment for school students, through funding for quality teaching and learning environments, workplace learning and career advice." The NSCP was listed as an "administered item" in respect of that outcome.

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604 (1988) 166 CLR 79 at 107-109. See *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25 at 63-64 per Stephen J, 155 per Brennan J; [1982] HCA 31. See also *Joseph v Colonial Treasurer (NSW)* (1918) 25 CLR 32 at 48 per Isaacs, Powers and Rich JJ; [1918] HCA 30. See further Evatt, *The Royal Prerogative*, (1987) at 12-13 and Goldsworthy, *The Sovereignty of Parliament: History and Philosophy*, (1999) at 81-82.

605 *Ex parte McLean* (1930) 43 CLR 472 at 485 per Dixon J; [1930] HCA 12. See also *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2011) 85 ALJR 945 at 952 [36]; 280 ALR 206 at 214; [2011] HCA 33.

491 Alternatively, in reliance on the *AAP Case*[606], the Commonwealth defendants contended that the NSCP and the entry into and payment of moneys under the Funding Agreement *could* have been authorised by Parliament as the subject-matter of a grant of statutory authority under ss 51, 52 and 122 of the Constitution – which, it was said, constituted sufficient authorisation of those actions ("the narrower submission").

492 In a further alternative, the Commonwealth defendants argued that spending under the Funding Agreement was authorised by s 44 of the *Financial Management and Accountability Act* 1997 (Cth).

493 By reference to *Bardolph*[607], the plaintiff accepted that the Commonwealth Executive does not need statutory authority to enter into contracts and to spend money when the contracts concern "the ordinary annual services of the Government". An aspect of the dispute was therefore whether the Funding Agreement was such a contract and, if it were not, whether spending pursuant to it required statutory authority, there being no special statute and no reliance on s 96.

494 SUQ essentially supported the submissions of the Commonwealth defendants. In particular, it contended that Commonwealth executive power extended to functions, capacities and discretions appropriate to be undertaken on behalf of a national government as a polity where such activities were not subject to any lawful or constitutional limitations; it was contended by SUQ that the NSCP funding met this description.

495 The Commonwealth defendants' wider submission, based on the common law freedom to contract enjoyed by the Commonwealth, must be assessed in the light of: the text and structure of the Constitution as it bears on the Executive's powers to protect or benefit the body politic or nation of Australia; the distribution of executive powers between the Commonwealth and the States as polities[608]; financial relations between the Commonwealth and States; and relations between the Commonwealth Parliament and the Commonwealth Executive affecting spending, which include the Executive's obligations of accountability to Parliament.

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606 (1975) 134 CLR 338.

607 (1934) 52 CLR 455.

608 *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31 at 82-83 per Dixon J; [1947] HCA 26.

496 In the reasons which follow, each of these matters will be considered. Together, they establish the equipoise between executive power under s 61 and the powers of Parliament, which equipoise determines the boundaries of s 61. The reasons will then deal with the Commonwealth defendants' first alternative, the narrower submission, before finally addressing the further alternative submission in relation to s 44 of the *Financial Management and Accountability Act* 1997 (Cth).

The nation – the distribution of powers – section 96

497 The Queensland Government has regulated chaplaincy services in the State of Queensland since 1998, and it initiated chaplaincy/pastoral care funding arrangements in July 2007. The initial (and subsequent) guidelines extracted above contemplated that the NSCP could operate to enhance "existing chaplaincy services", which (as explained earlier) is what occurred under the Funding Agreement.

498 From that viewpoint alone, the present facts are readily distinguishable from those in *Davis*, which concerned the scope of s 61 in relation to executive acts the object of which was the commemoration of the Bicentenary throughout Australia. The facts here do not lend themselves to any characterisation of the NSCP as an enterprise or activity "peculiarly adapted to the government of a nation … which cannot otherwise be carried on for the benefit of the nation."[609]

499 The facts here are also readily distinguishable from *Pape*. There, an exercise of executive power was upheld in the circumstances that the agreed statement of facts referred to a global financial crisis giving rise to a national emergency[610] most easily dealt with by the Commonwealth Executive (and not those of the States), and legislation incidental to the execution of power under s 61 had been passed.

500 It was acknowledged in the joint majority judgment in *Pape* that, even where an exercise of executive power is authorised by reference to the understanding that s 61 gives the Commonwealth government the power to

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609 *AAP Case* (1975) 134 CLR 338 at 397 per Mason J. See also *Davis* (1988) 166 CLR 79 at 111 per Brennan J and *Pape* (2009) 238 CLR 1 at 87 [228] per Gummow, Crennan and Bell JJ.

610 *Pape* (2009) 238 CLR 1 at 88-89 [229]-[231].

protect the body politic or nation of Australia (as was found in that case[611]), it still remains necessary to consider the scope of the power vis-à-vis the States[612]:

> "it is only by some constraint having its source in the position of the Executive Governments of the States that the government of the Commonwealth is denied the power, after appropriation by the Parliament, of expenditure of moneys raised by taxation imposed by the Parliament."

501 Chapter IV of the Constitution includes provisions governing the financial relations between the Commonwealth and the States. Relevantly, s 96 allows the Commonwealth Parliament to make grants to the States on such terms and conditions as it thinks fit. It was noted by Barwick CJ in the *AAP Case* that s 96 has allowed the Commonwealth to intrude in point of policy into areas outside the Commonwealth's legislative competence, although s 96 grants which are subject to conditions wear a consensual aspect[613]. His Honour went on to observe that, leaving s 96 apart, the Commonwealth cannot, by executive act, intrude into an area of responsibility left by the Constitution to the States[614]. In a similar vein, Mason J stated that the presence of s 96 in the Constitution confirms that Commonwealth executive power is not unlimited and "there is a very large area of activity which lies outside the executive power of the Commonwealth but which may become the subject of conditions attached to grants under s 96."[615]

502 The Commonwealth makes grants of financial assistance to States under the *Schools Assistance Act* 2008 (Cth)[616]. The financial assistance is then distributed to schools, the governing authorities of which have entered into funding agreements with the Commonwealth for defraying "recurrent expenditures". Financial assistance which may be paid to a State under the *Schools Assistance Act* 2008 (Cth) is not limited to recurrent expenditure[617], but

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611 *Pape* (2009) 238 CLR 1 at 83 [215] per Gummow, Crennan and Bell JJ.

612 *Pape* (2009) 238 CLR 1 at 85 [220] per Gummow, Crennan and Bell JJ.

613 (1975) 134 CLR 338 at 357.

614 (1975) 134 CLR 338 at 357-358.

615 (1975) 134 CLR 338 at 398.

616 And the earlier *Schools Assistance (Learning Together – Achievement Through Choice and Opportunity) Act* 2004 (Cth).

617 See s 3(2)(a) and Pt 4.

also includes capital expenditure[618] and targeted expenditure[619]. Targeted expenditure is available, among other things, for "Literacy, numeracy and special learning needs"[620]. The similarity between "targeted expenditure" and the "outcome" relevant to the NSCP which is extracted above is obvious.

503 There was nothing in the facts here amounting to a circumstance in which the nation needed protection, or invoking Commonwealth executive powers otherwise peculiarly referable to the government of Australia as a nation, such that the Commonwealth Executive was, for this or any other identifiable reason, the arm of government exclusively, best, or uniquely authorised to act in respect of the NSCP. There was nothing to explain or justify the absence of special legislation or any involvement by Parliament, beyond the appropriation Acts, or the bypassing of s 96.

504 Further, contrary to the submissions of SUQ, the fact that an initiative, enterprise or activity can be "conveniently formulated and administered by the national government"[621], or that it ostensibly does not interfere with State powers, is not sufficient to render it one of "truly national endeavour"[622] or "pre-eminently the business and the concern of the Commonwealth as the national government"[623].

505 In the *Tasmanian Dam Case*, Deane J said[624]:

> "Even in fields which are under active State legislative and executive control, Commonwealth legislative or executive action may involve no competition with State authority".

506 His Honour was there referring to executive and legislative power shared between the Commonwealth and the States rather than setting out a sufficient condition for characterising an initiative as a national endeavour, enterprise or

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618 See s 3(2)(b) and Pt 5.

619 See s 3(2)(c) and Pt 6.

620 See Pt 6, Div 6.

621 *AAP Case* (1975) 134 CLR 338 at 398 per Mason J.

622 *The Commonwealth v Tasmania* (1983) 158 CLR 1 at 253 per Deane J ("the *Tasmanian Dam Case*"); [1983] HCA 21.

623 *Davis* (1988) 166 CLR 79 at 94 per Mason CJ, Deane and Gaudron JJ.

624 (1983) 158 CLR 1 at 252-253.

activity peculiarly adapted to the government of the nation. Further, there was no issue of "the sufficiency of the powers of the States to engage effectively"[625] in the provision of chaplaincy services.

507 Whilst there are recognised circumstances in which the Commonwealth's capacities to contract and to spend can be engaged lawfully in actions extending to "the execution and maintenance of this Constitution" without statutory authority, the matters dealt with above indicate that the Executive's actions in entering the Funding Agreement and making payments to SUQ did not fall within this limb of s 61.

Relations between the Parliament and the Executive affecting spending

508 It has often been recognised that s 61 and, more generally, Ch II of the Constitution were shaped by the institution of responsible government and the exercise of executive power under the Westminster system of Britain, as at the date of Federation[626]. Responsible government was seen then as a "government under which the Executive is directly responsible to – nay, is almost the creature of – the Legislature."[627]

509 In Britain, relations between the Executive and Parliament altered – and the principles of responsible government particularly evolved – with the development of wider representation after the *First Reform Act*[628]. Earlier constitutional struggles between Parliament and the Sovereign had resulted in Parliament having exclusive control over taxation and supply. The principles of

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625 *Davis* (1988) 166 CLR 79 at 111 per Brennan J.

626 *The Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* ("the *Wool Tops Case*") (1922) 31 CLR 421 at 438, 446, 449-451 per Isaacs J; [1922] HCA 62; *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* ("*Dignan*") (1931) 46 CLR 73 at 114 per Evatt J; [1931] HCA 34; *Lange v Australian Broadcasting Corporation* ("*Lange*") (1997) 189 CLR 520 at 558-559; [1997] HCA 25.

627 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 147 per Knox CJ, Isaacs, Rich and Starke JJ, approving what was said by Lord Haldane, when a member of the House of Commons, introducing the Bill for the Australian Constitution into the Imperial Parliament and distinguishing it from the American Constitution; [1920] HCA 54. See also Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 703.

628 *Representation of the People Act* 1832 (UK) (2 & 3 Will IV c 45). See, generally, Bagehot, *The English Constitution*, 2nd ed (1872) at xxv-xxvi. See also *Adegbenro v Akintola* [1963] AC 614 at 631.

responsible government were readily understood in Australia at the date of Federation[629] because of their appearance in the self-governing colonial constitutions described in *Rowe v Electoral Commissioner*[630]. As explained in *Egan v Willis*[631], responsible government was traditionally considered "to encompass 'the means by which Parliament brings the Executive to account' so that 'the Executive's primary responsibility in its prosecution of government is owed to Parliament'"[632]. That accountability came to be expressed in terms of the need for the Executive to enjoy the confidence of the House of Parliament dealing with finance, as the arm of government most immediately representing, and therefore responsible to, the people (that is, the electors)[633]. It was also expressed in the notion that Ministers are liable to the scrutiny of the chamber of which they are members, both for their conduct and for that of their departments.

510 Prior to Federation, it was appreciated that the sharing of political power was an important mechanism for avoiding arbitrary government and thereby maintaining civil order. That appreciation underpinned the principle of responsible government[634] and the idea that a democratic representative assembly would give qualified persons a "stake" in government[635], both of which are sourced in the constitutional history of Britain and Australia in the 19th century. The same appreciation also underpinned the doctrine of the separation of powers[636], sourced in the constitutional history of America in the 18th century.

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629 *Dignan* (1931) 46 CLR 73 at 114 per Evatt J.

630 (2010) 243 CLR 1 at 109-112 [336]-[347] per Crennan J; [2010] HCA 46. See, generally, Twomey, *The Chameleon Crown: The Queen and Her Australian Governors*, (2006), Ch 1.

631 (1998) 195 CLR 424; [1998] HCA 71.

632 (1998) 195 CLR 424 at 451 [42] per Gaudron, Gummow and Hayne JJ, citing Kinley, "Governmental Accountability in Australia and the United Kingdom: A Conceptual Analysis of the Role of Non-Parliamentary Institutions and Devices", (1995) 18 *University of New South Wales Law Journal* 409 at 411.

633 See *Bardolph* (1934) 52 CLR 455 at 509 per Dixon J.

634 Sir Samuel Griffith, *Notes on Australian Federation: Its Nature and Probable Effects*, (1896) at 17-18.

635 *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 107 [330], 108-112 [333]-[347] per Crennan J.

636 *Dignan* (1931) 46 CLR 73 at 89-90 per Dixon J. See also *Plaut v Spendthrift Farm Inc* 514 US 211 at 219 (1995).

511 The relationship between Ch I and Ch II of the Constitution, between the Parliament and the Executive, between s 1 and s 61, between representative and responsible government, can be discerned in numerous constitutional requirements. For the purposes of the present action, relevant requirements in Ch I include the requirement that there be a yearly session of Parliament (s 6), that both Houses of Parliament be democratically elected (ss 7 and 24), that Parliament makes laws (s 51), including in respect of taxation (s 51(ii)), and that appropriation from the Consolidated Revenue Fund be undertaken as required by ss 53, 54 and 56, described above.

512 Chapter II of the Constitution (ss 61-70) deals with "The Executive Government". As well as s 61, Ch II contains provision for a Federal Executive Council to advise the Governor-General (s 62). Further, Ministers administering "departments of State of the Commonwealth" cannot hold office for longer than three months without being or becoming a member of one of the Houses of Parliament (s 64), thus ensuring their accountability to Parliament. Section 67 governs the appointment of civil servants, who are officers of the Executive[637].

513 Section 83, in Ch IV, secures Parliament's control over supply.

514 Section 96, dealing with financial relations between the Commonwealth and the States, has been referred to already and s 97 imposes audit requirements.

515 Accountability of the Executive arises not only from the requirements under the Constitution affecting the Executive mentioned above, but also from various conventions of Parliament, the established mechanisms of parliamentary debate and question time, and the requirement that members of the Executive provide information to Select Committees of both Houses of Parliament. Leaving aside appropriation legislation, Bills are conventionally introduced to Parliament, and their purposes explained, by the Minister responsible for their initiation in the House of which the Minister is a member, or by a delegate in the House of which the Minister is not a member. They are then the subject of parliamentary scrutiny and debate. The ultimate passage of a Bill into law may involve a number of compromises along the way, reflected in amendments which secure the Bill's final acceptance[638]. Parliament's control over expenditure is effected through the legislative process.

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637 See the *Public Service Act* 1999 (Cth).

638 See, for example, *Carr v Western Australia* (2007) 232 CLR 138 at 143 [7] per Gleeson CJ; [2007] HCA 47.

516 The practical workings of a system of government which is both responsible and democratically representative are not static, and have given rise to a more general and flexible sense of "responsible government" to indicate a government which is responsive to public opinion and answerable to the electorate[639]. The mechanisms and layers of accountability described above permit the ventilation, accommodation, and effective authorisation of political decisions. The notion of a government's mandate to pass laws and to spend money rests both on democratic representative government and on the relationship between Parliament and the Executive, involving, as it does, both scrutiny and responsibility. Whilst the Executive has the power to initiate new policy and to implement such policy when authorised to do so, either by Parliament or otherwise under the Constitution, Parliament has the power to scrutinise and authorise such policy (if it is not otherwise authorised by the Constitution), and the exclusive power to grant supply in respect of it and control expenditure. The principles of accountability of the Executive to Parliament and Parliament's control over supply and expenditure operate inevitably to constrain the Commonwealth's capacities to contract and to spend. Such principles do not constrain the common law freedom to contract and to spend enjoyed by non-governmental juristic persons.

517 Although the practice of responsible government varies over time, most particularly as the party system results in close identification of Parliament and the Executive[640], the scope of s 61 to encompass *any* expenditure by the Commonwealth Executive is limited by the system of government under the Constitution.

518 Even apart from the limits imposed by the principles of responsible and democratically representative government, the Commonwealth's capacities to contract and to spend are not precisely analogous to those of a natural person or any non-governmental juristic person.

519 First, the Consolidated Revenue Fund is distinguishable from funds available to non-governmental juristic persons, consisting as it does of revenues and moneys raised from the public, Parliament holding exclusive powers to raise taxes and grant supply.

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639 *Lange* (1997) 189 CLR 520 at 559. See also Birch, *Representative and Responsible Government*, (1964) at 17-18 and Walker, *The Oxford Companion to Law*, (1980) at 1065.

640 See Byers, "The Australian Constitution and Responsible Government", (1985) 1 *Australian Bar Review* 233.

520 Secondly, the Commonwealth's capacities to contract and to spend are circumscribed by s 81, in the sense that moneys appropriated must be for some governmental purpose[641], a circumstance which is distinct from the rights and duties created by contracts entered into by the voluntary acts of private parties.

521 Thirdly, unlike the capacities of a non-governmental juristic entity to contract and to spend, the Commonwealth's capacities to do so are capable of being utilised to regulate activity in the community in the course of implementing government policy. This consideration highlights the importance of the mechanisms for responsible government designed to protect the community from arbitrary government action. This is particularly so as only Parliament has the power to institute coercive measures and attach penal consequences in respect of the regulation of activity[642], the power to convict and impose punishment lies entirely within judicial power[643], and the Executive has no power to dispense with obedience to the law[644].

522 Fourthly, as the plaintiff, supported by Western Australia, contended, if the Commonwealth's capacities to contract and to spend generally permitted the Commonwealth Executive to intrude into areas of responsibility within the legislative and executive competence of the States in the absence of statutory authority other than appropriation Acts, access to s 109 of the Constitution may be impeded. For example, in the specific circumstances of the NSCP, such a wide view of the scope of s 61 could hypothetically lead to the result that citizens caught by any inconsistency between a State legislature's regulation of chaplaincy services and the Commonwealth Executive's acts in respect of the NSCP would be unable to avail themselves of the constitutional protection in s 109 against inconsistent legislation.

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641 Cf Campbell, "Commonwealth Contracts", (1970) 44 *Australian Law Journal* 14, especially at 18; Campbell, "Federal Contract Law", (1970) 44 *Australian Law Journal* 580, especially at 580, 585-586.

642 *R v Kidman* (1915) 20 CLR 425 at 440-441 per Isaacs J; *Davis* (1988) 166 CLR 79 at 112 per Brennan J.

643 *Nicholas v The Queen* (1998) 193 CLR 173 at 231 [142] per Gummow J; [1998] HCA 9.

644 *Pape* (2009) 238 CLR 1 at 87 [227] per Gummow, Crennan and Bell JJ. See also *A v Hayden* (1984) 156 CLR 532 at 580-581 per Brennan J; [1984] HCA 67; *White v Director of Military Prosecutions* (2007) 231 CLR 570 at 592 [37] per Gummow, Hayne and Crennan JJ; [2007] HCA 29.

523 Fifthly, the absence in the Constitution of executive immunity, explained in *The Commonwealth v Mewett*[645], does not ameliorate the differences between the Commonwealth's capacities and those of a non-governmental juristic person which have been identified above.

524 These considerations support the rejection of the submission that an exercise of the Commonwealth's capacities to contract and to spend would never require statutory authority, or would always, in the absence of statutory authority, fall within the scope of s 61.

525 It remains important to note the position of the Commonwealth Executive in respect of spending on the ordinary annual services of government. In advancing the proposition that the Commonwealth's capacities to contract and to spend authorised the Commonwealth Executive's actions in respect of the NSCP, the Commonwealth defendants relied on *Bardolph* and the proposition that the NSCP, at its institution, was part of "the ordinary annual services of the Government".

526 Assent to the *Appropriation Act (No 3)* 2006-2007 (Cth) was given on 10 April 2007, and the Funding Agreement was entered into on 9 November 2007.

527 In dealing with the executive power of the New South Wales Government to enter a contract for advertisements relating to the Tourist Bureau of New South Wales in *Bardolph*, Rich J said[646]:

> "Apart from the question whether parliamentary appropriation of moneys is a prerequisite of the Crown's liability to pay under a contract made by it, the Crown has a power independent of statute to make such contracts for the public service as are *incidental to the ordinary and well-recognized functions of Government.*" (emphasis added)

528 Starke J said[647]:

> "An advertising branch in the Premier's Department *had been established* in New South Wales *as one of the ordinary activities and functions of its Government* … A contract made in these circumstances is

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645 (1997) 191 CLR 471 at 491 per Brennan CJ, 527, 531 per Gaudron J, 545-552 per Gummow and Kirby JJ; [1997] HCA 29.

646 (1934) 52 CLR 455 at 496.

647 (1934) 52 CLR 455 at 503.

a Government contract, and in my opinion binds the Crown." (emphasis added)

529 Dixon J said that the contract in question "concerned a recognized and regular activity of Government in New South Wales"[648], and went on to say that no statutory authorisation was required for the Executive "to make a contract *in the ordinary course of administering a recognized part of the government of the State*"[649] (emphasis added). None of these statements supports a general proposition that special or other legislation is *never* necessary to authorise the entry into a contract or the incurring of expenditure by the Executive.

530 The statements made are apt for application to the constitutional phrase "the ordinary annual services of the Government" occurring in ss 53 and 54 of the Constitution.

531 As confirmed in *Pape*, statutory authority for executive action (including spending) is distinct conceptually from the appropriation of funds from the Consolidated Revenue Fund for a particular purpose. It is possible for an Act to do both where it amounts to a special appropriation Act and provides some detail about the policy being authorised. In *Pape*, s 3 of the *Tax Bonus for Working Australians Act (No 2)* 2009 (Cth), read in conjunction with s 16(1) of the *Taxation Administration Act* 1953 (Cth), provided statutory authority for payment of the Tax Bonus and also effected an appropriation for the purposes of ss 81 and 83[650]. Similarly, the *Appropriation (HIH Assistance) Act* 2001 (Cth) made a special appropriation for the provision of financial assistance to defined "HIH eligible persons"[651].

532 The NSCP has not been subject to the parliamentary processes of scrutiny and debate which would have applied to special legislation, a special appropriation Act, legislation incidental to an exercise of power under s 61 or legislation referable to Parliament's powers under s 96. Further, whatever the position in subsequent years, at the time of entry into the Funding Agreement, the NSCP was not (by reason of an appropriation in the previous year) a recognised part of Commonwealth government administration in the sense explained in *Bardolph*. Insofar as the *Appropriation Act (No 3)* 2006-2007 (Cth) covered

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648 (1934) 52 CLR 455 at 507.

649 (1934) 52 CLR 455 at 508.

650 (2009) 238 CLR 1 at 23 [8], 64 [135] per French CJ, 70-71 [167]-[171] per Gummow, Crennan and Bell JJ, 97 [267], 133 [393]-[394] per Hayne and Kiefel JJ.

651 *HIH Claims Support Ltd v Insurance Australia Ltd* (2011) 244 CLR 72; [2011] HCA 31.

appropriations for expenditure on the NSCP, for which no moneys had been appropriated in any previous year, the Senate had no power to amend that Act. For those reasons, the facts in the present case are distinguishable from those considered in *Bardolph*.

533 These considerations highlight the need to characterise any particular act of contracting and spending by the Commonwealth Executive so as to determine whether or not it is authorised by s 61.

534 The abovementioned limits on the Commonwealth Executive's capacities to contract and to spend demonstrate that, despite recognised exceptions, expenditure by the Commonwealth Executive will often require statutory authority beyond appropriation Acts. The Commonwealth Executive's entry into the Funding Agreement and the making of payments to SUQ could not be characterised as falling within any of the recognised exceptions and did not fall within the scope of s 61. For these reasons, the Commonwealth defendants' wider submission must be rejected.

Sections 51, 52 and 122 of the Constitution

535 The Commonwealth defendants' first alternative contention (the narrower submission) was that the NSCP (and the Executive's entry into the Funding Agreement and associated spending) could have been authorised by Parliament under either s 51(xxiiiA) or s 51(xx) of the Constitution, and that this was sufficient authorisation for the Executive's entry into the Funding Agreement and spending on NSCP activities. In the earlier stages of argument all parties accepted the proposition that the executive power of the Commonwealth at least covered areas of responsibility in respect of which the Commonwealth Parliament could legislate under ss 51, 52 or 122 of the Constitution. This involved no denial of prerogative powers or implied legislative power to protect the nation[652] or, as articulated in the *AAP Case*[653], *Davis*[654] and *Pape*[655], implied legislative and executive powers to act on behalf of the nation in certain circumstances.

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652 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 259 per Fullagar J. See also *Burns v Ransley* (1949) 79 CLR 101 at 109-110 per Latham CJ, 116 per Dixon J; *R v Sharkey* (1949) 79 CLR 121 at 148-149 per Dixon J.

653 (1975) 134 CLR 338.

654 (1988) 166 CLR 79.

655 (2009) 238 CLR 1.

536 Interveners addressed this point with some differences of emphasis. For example, in relation to s 51(xxiiiA) it was contended by the plaintiff, Victoria and Western Australia that the NSCP provided benefits beyond the class of students and did not provide directly measurable – that is, material – benefits to students. In relation to s 51(xx) it was contended by the plaintiff, New South Wales, Victoria, South Australia, Western Australia and Tasmania that SUQ was not a corporation for constitutional purposes and the plaintiff further submitted that, in any event, the NSCP guidelines, including those referred to above, were indifferent as to whether the providers of chaplaincy services were corporations.

537 On the approach to this issue taken in these reasons, it is unnecessary to enter into any detailed consideration of such arguments. It is sufficient for the purposes of dealing with the submission to assume that the Commonwealth Parliament could pass valid Commonwealth legislation to support the NSCP and to then ask whether that possibility is sufficient authorisation for the Commonwealth Executive to institute the NSCP, to enter the Funding Agreement and to spend for NSCP purposes.

538 In the *AAP Case*, the validity of a line item in an appropriation Act was in issue on the basis that it bypassed the federal distribution of powers. The case was not concerned with an exercise of prerogative power, or the circumstances in which the Commonwealth Executive may act without statutory authority. Furthermore, both the parties and the Court made assumptions about ss 81 and 83, since dispelled by *Pape*.

539 After posing a question as to what was covered by the expression "the purposes of the Commonwealth" in s 81 and referring to "powers which are inherent in the fact of nationhood and of international personality"[656], Barwick CJ said: "[w]ith exceptions that are not relevant … the executive may only do that which has been or could be the subject of valid legislation."[657] Bearing in mind that prerogative powers were not being discussed, Gibbs J considered that the wording of s 61 limits the power of the Executive, which he said "cannot act in respect of a matter which falls entirely outside the legislative competence of the Commonwealth."[658] Mason J recognised that Commonwealth executive power was not unlimited and discerned the responsibilities allocated to the Commonwealth under the Constitution by reference to the "distribution of legislative powers ... effected by the Constitution itself and the character and

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656 (1975) 134 CLR 338 at 361-362.

657 (1975) 134 CLR 338 at 362.

658 (1975) 134 CLR 338 at 379.

status of the Commonwealth as a national government."[659] Jacobs J recognised that not every exercise of power by the Commonwealth Executive requires special legislation, which recognition was closely tied to noting the characteristics of prerogative powers[660].

540 These statements were directed to the Constitution's allocation of areas of responsibility and competence as between the Commonwealth and the States. For the purposes of such a consideration, the specific heads of legislative power under s 51 (subject to obvious exceptions) and any implied legislative power are an obvious starting point. Taken in that context, and even allowing for an approach to s 81 no longer favoured, the statements do not support the proposition that, provided an initiative, policy or activity could be the subject of valid Commonwealth legislation, the Commonwealth Executive is, for that reason, authorised to contract and spend in respect of such an initiative, policy or activity without statutory authority.

541 The Commonwealth defendants' narrower submission was treated as deriving, at least in part, from opinions as to the wide scope of Commonwealth executive power given by Alfred Deakin in his capacity as Attorney-General on 12 November 1902 in relation to the *Vondel* incident[661] and by Sir Robert Garran giving evidence before the 1929 Royal Commission on the Constitution[662].

542 The conception of s 81 which underpinned Sir Robert Garran's view that the Executive's power of spending is concomitant with the Commonwealth's taxation power is no longer favoured[663]. Alfred Deakin's opinion that the content of the executive power of the Commonwealth extends at least to the legislative powers of Parliament can be discerned from relevant extracts set out in *Pape*[664]. Opinions about the synergy between executive power and legislative powers expressed in terms which are general, absolute or otherwise imperfect should not

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659 (1975) 134 CLR 338 at 396.

660 (1975) 134 CLR 338 at 404-405.

661 Deakin, "Channel of Communication with Imperial Government: Position of Consuls: Executive Power of Commonwealth", in Brazil and Mitchell (eds), *Opinions of Attorneys-General of the Commonwealth of Australia, Volume 1: 1901-14*, (1981) 129 at 130-132.

662 Australia, *Report of the Royal Commission on the Constitution*, (1929), Minutes of Evidence, Pt 1 at 71-72.

663 See *Pape* (2009) 238 CLR 1.

664 (2009) 238 CLR 1 at 59 [124] per French CJ.

be taken to imply that expenditure by the Executive which does not fall within the second limb of s 61 is nevertheless within the scope of s 61 provided it is possible to identify special legislation which might be, but was not, passed. Different considerations might arise when enabling legislation is subsequently passed.

543 In oral argument, examples were also given of circumstances in which the Commonwealth was said to have acted on the basis that it may engage in executive activities involving contracting and spending without the need for any statutory authority. These included a reference to *Davis* and references to the Commonwealth Executive's conduct of a shipping service in interstate and overseas trade between 1916 and 1923. In *Davis*, although the Bicentennial Authority was incorporated prior to the enactment of enabling legislation[665], the incorporation and the enactment of enabling legislation were two steps in execution of the same plan: the incorporation envisaged the legislation, as evidenced by cl 3 of the memorandum of association of the Authority[666]. As to the shipping service referred to, at least one commentator has essayed the view that the activity fell within the same principle as that which applied in *Bardolph*[667].

544 If the fact that the Parliament *could* pass valid Commonwealth legislation were sufficient authorisation for any expenditure by the Commonwealth Executive, and, in this case, if the possibility of enabling legislation permitted the Commonwealth Executive to enter the Funding Agreement and make payments to SUQ, the Commonwealth's capacities to contract and to spend would operate, in practice, indistinguishably from the Commonwealth Executive's exercise of a prerogative power. Such a view ignores the restrained approach to the prerogative adopted by Brennan J in *Davis*, extracted above, and disregards the constitutional relationship between the Executive and Parliament affecting spending. For these reasons, the Commonwealth defendants' narrower submission must also be rejected.

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665 *Australian Bicentennial Authority Act* 1980 (Cth).

666 See *Davis* (1988) 166 CLR 79 at 88 per Mason CJ, Deane and Gaudron JJ:

> "The primary object for which the Authority is established is to formulate, to plan, to develop, to promote, to co-ordinate and to implement, *consistently with applicable legislation of the Parliament of the Commonwealth*, a national programme of celebrations and activities". (emphasis added)

667 Renfree, *The Executive Power of the Commonwealth of Australia*, (1984) at 456.

Financial management legislation

545 Finally, it is necessary to refer to the Commonwealth defendants' further alternative argument that, failing all other sources of constitutional authorisation, the contracting and spending on the NSCP by the Commonwealth Executive was authorised by the *Financial Management and Accountability Act* 1997 (Cth). This alternative must also be rejected for the reasons explained below.

546 Among other things, the purpose of the *Financial Management and Accountability Act* 1997 (Cth) is "to provide for the proper use and management of public money". The Act establishes an accounting system in respect of the Consolidated Revenue Fund and Div 2 of Pt 4 provides for "Drawing rights" in respect of officials and Ministers. Such drawing rights have no effect to the extent that a drawing right appears to authorise the application of public money in a way that was not authorised by an appropriation (s 27(5)).

547 The Act satisfies the requirements of s 97 of the Constitution and provides for the proper management of public money. It is to be construed together with the *Auditor-General Act* 1997 (Cth). In its terms its provisions, most particularly ss 27 and 44, do not purport to provide, through the drawing rights mechanism, constitutional authorisation of spending by the Executive. Accordingly the Executive's actions in respect of the NSCP are not authorised under this legislation.

Conclusion

548 For the reasons given, the Commonwealth Executive's entry into the Funding Agreement was beyond the executive power in s 61 of the Constitution, and the making of payments by the Commonwealth Executive to SUQ was not supported by that power.

549 KIEFEL J. The detailed facts and circumstances relevant to this Amended Special Case are set out in the reasons of Gummow and Bell JJ and of Crennan J.

550 The National School Chaplaincy Program ("the NSCP") was announced on 29 October 2006 as an initiative of the Australian Government by which funds were to be made available by the Government for the provision or enhancement of chaplaincy services in schools across Australia. The purpose of the funding was said to be to assist schools and their communities "in supporting the spiritual wellbeing of students." Some $165 million was made available over approximately three years from 2007 and, on 21 November 2009, an additional sum of $42 million was announced as being available over the 2010 and 2011 school years.

551 According to the "National School Chaplaincy Program Guidelines" ("the Guidelines")[668], by which the NSCP is administered, a "school chaplain" is a person who: is recognised by the school, its community and the appropriate governing authority as having the skills and experience to deliver school chaplaincy services to the school and its community; and is formally ordained, commissioned, endorsed or has qualifications recognised by a recognised or accepted religious institution or a State or Territory government approved chaplaincy service. In some circumstances secular pastoral care workers may be employed under the NSCP. In July 2008, the department administering the NSCP adopted an internal written policy relating to the provision of funds under the NSCP to secular pastoral care workers.

552 The Guidelines require that a funding agreement be entered into with the Australian Government before payments are made to a school. A school could nominate a "project sponsor", such as a chaplaincy service provider already approved by a State or Territory government, to manage the chaplaincy service on its behalf. In the case of the Darling Heights State School in Queensland, at which four of the plaintiff's children were enrolled at the relevant times, the funding agreement with the Department of Education, Science and Training, representing the Commonwealth of Australia, was entered into by Scripture Union Queensland ("SUQ"). This funding agreement ("the Funding Agreement"), as varied, was for a term of approximately four years from 8 October 2007 to 31 December 2011. It was in the standard form of agreements between the Commonwealth and SUQ for funding under the NSCP.

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668 As explained in the reasons of Crennan J at [460], the Guidelines, first issued in December 2006, have been replaced by updated versions. Nothing said in these reasons turns on the differences between various versions of the Guidelines.

553 The NSCP Code of Conduct forms part of the Funding Agreement. A school chaplain is required to sign a Code of Conduct before providing services pursuant to the NSCP.

554 Since July 2007, the Queensland Government has operated a "Chaplaincy/Pastoral Care Funding Program" which also makes funds available to schools in that State for the purpose of engaging the services of a chaplain, pastoral care co-ordinator, youth worker, "Youth Support Coordinator", or other support worker to provide support for vulnerable students. A policy (entitled "SM-03: Chaplaincy Services in Queensland State Schools"), which was first published in 1998 and has since been revised, governs the procedural and other requirements to be met by Queensland State schools in providing chaplaincy services. SUQ has entered into an Agreement for Chaplaincy Services with the State of Queensland, one condition of which is that SUQ's chaplains must abide by the Queensland Department of Education and Training Code of Conduct.

555 The Commonwealth Parliament has provided financial assistance to the States for educational purposes for many years, more recently through the *Nation-building Funds Act* 2008 (Cth) and the *Schools Assistance Act* 2008 (Cth). Pursuant to the latter Act, grants of financial assistance are provided to the States on the condition that the grants be distributed to non-government[669] schools with which the Commonwealth has funding agreements, for the purpose of defraying "recurrent expenditure".

556 The NSCP does not operate in this manner. It does not involve the provision of grants to the States in the manner for which s 96 of the Constitution provides. It is not the product of, and does not have the authorisation of, Commonwealth legislation. It is merely a program for the funding of chaplaincy services, administered by the Department of Education, Science and Training (and later the Department of Education, Employment and Workplace Relations) for which funds have been provided by a series of odd-numbered Appropriation Acts which, according to contemporary parliamentary practice, describe the monies the subject of appropriation in terms such as for "the ordinary annual services of the Government and for related purposes"[670].

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669 The predecessor to the *Schools Assistance Act* 2008 (Cth), the *Schools Assistance (Learning Together – Achievement Through Choice and Opportunity) Act* 2004 (Cth), made provision for grants to government and non-government schools. Presently the Commonwealth provides funding for government schools under the *Federal Financial Relations Act* 2009 (Cth).

670 See the reasons of Crennan J at [472] for an overview of the relevant contemporary parliamentary practice regarding appropriations.

557 The central questions raised by the Amended Special Case are those numbered 2(a) and 4(a). They ask whether the Funding Agreement is invalid and payments made under it unlawful by reason that the Funding Agreement and those payments are beyond the executive power of the Commonwealth under s 61 of the Constitution. So far as concerns questions 1(a) to (c), which relate to the plaintiff's standing to challenge the validity of the Funding Agreement and the payments under it, I agree with the answers proposed by Gummow and Bell JJ for the reasons which their Honours give.

558 Questions 2(a) and 4(a) concern the scope of the power of the Executive Government of the Commonwealth, more particularly its power to expend monies which have been appropriated from the Consolidated Revenue Fund in circumstances where there is no legislative authorisation for expenditure. There is no doubt that the Executive can spend monies where authorisation is given by a valid Commonwealth law or by the Constitution. An Appropriation Act is a lawful authority for the segregation and disbursement of monies from the Consolidated Revenue Fund[671], but it is not of itself the exercise of an executive or legislative power to achieve an objective which requires expenditure[672].

559 In *Pape v Federal Commissioner of Taxation*[673], the Court, by a majority, concluded that the executive power extended to the taking of short term[674] or emergency[675] fiscal measures to address the effects of global financial conditions upon the Australian nation as a whole and which, it was said, only the Commonwealth had the capacity to implement. The Court was unanimous in the opinion that ss 81 and 83 are not the source of a substantive power to spend

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671 *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 104 [292] per Hayne and Kiefel JJ; [2009] HCA 23, quoting *The State of New South Wales v The Commonwealth* (1908) 7 CLR 179 at 190-191 per Griffith CJ, 200 per Isaacs J; [1908] HCA 68; *Victoria v The Commonwealth and Hayden* (1975) 134 CLR 338 at 386-387 per Stephen J, 392-393 per Mason J; [1975] HCA 52.

672 *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 72 [176] per Gummow, Crennan and Bell JJ.

673 (2009) 238 CLR 1.

674 *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 63 [133] per French CJ.

675 *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 91-92 [242] per Gummow, Crennan and Bell JJ.

appropriated monies and that such a power must be found elsewhere in the Constitution[676].

560 Attention was directed in the judgments in *Pape* to the terms of s 61 of the Constitution. It provides, in that part which has been referred to as the "third declaration"[677], that the executive power of the Commonwealth "extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth." It has never been thought that these "meagre words"[678] provide a definition of Commonwealth executive power[679]. But that is not to say that they are devoid of meaning or of implication.

561 Alfred Deakin, in his so-called *Vondel* opinion[680], considered that the framers of the Constitution chose not to define the power. The power, he said, was one which flowed from "the nature of the Federal Government itself, and from the powers, exercisable at will, with which the Federal Parliament was to be entrusted." The scope of the executive authority of the Commonwealth is therefore "to be deduced from the Constitution as a whole."[681]

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676 *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 36 [53], 55 [111] per French CJ, 73 [178], 75 [184]-[186] per Gummow, Crennan and Bell JJ, 113 [320] per Hayne and Kiefel JJ, 210 [600], 211-212 [603], 212-213 [606]-[607] per Heydon J.

677 *The Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 438 per Isaacs J; [1922] HCA 62.

678 Zines, *The High Court and the Constitution*, 5th ed (2008) at 342.

679 *The Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 437-438 per Isaacs J; *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 115-116 [326]-[327]; see also *Davis v The Commonwealth* (1988) 166 CLR 79 at 92; [1988] HCA 63.

680 Deakin, "Channel of Communication with Imperial Government: Position of Consuls: Executive Power of Commonwealth", in Brazil and Mitchell (eds), *Opinions of Attorneys-General of the Commonwealth of Australia*, (1981), vol 1, 129 at 130.

681 Deakin, "Channel of Communication with Imperial Government: Position of Consuls: Executive Power of Commonwealth", in Brazil and Mitchell (eds), *Opinions of Attorneys-General of the Commonwealth of Australia*, (1981), vol 1, 129 at 131; see also *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 119 [337] per Hayne and Kiefel JJ.

562 In *The Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* ("the *Wooltops Case*")[682], Isaacs J said that the third declaration in s 61 "marks the external boundaries of the Commonwealth executive power, so far as that is conferred by the Constitution", but that "it leaves entirely untouched the definition of that power and its ascertainment in any given instance." His Honour saw the third declaration as marking out, within the physical territory of the Commonwealth, a "special domain of governmental action"[683], and as a "constitutional delimitation as between Commonwealth and States"[684].

563 Early commentary suggests that Commonwealth executive power was regarded as closely allied to Commonwealth legislative power[685], although this does not appear to have been much discussed in the Convention Debates and may have proceeded upon an assumption, for want of better guidance from s 61. In any event, as Professor Saunders has observed[686], such an understanding does not appear to have deterred the Commonwealth from entering into schemes for which expenditure could not clearly be supported by an express power, albeit that s 96 was the preferred mechanism for Commonwealth expenditure following the broad interpretation of that provision in the line of cases commencing with *Victoria v The Commonwealth*[687] and the uncertainty arising from the division of opinion in *Attorney-General (Vict) v The Commonwealth* ("the *Pharmaceutical Benefits Case*")[688].

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682 (1922) 31 CLR 421 at 437.

683 *The Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 440.

684 *The Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 441.

685 Harrison Moore, *The Constitution of the Commonwealth of Australia*, 2nd ed (1910) at 98; see also the references in *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 108 [306].

686 Saunders, "The Development of the Commonwealth Spending Power", (1978) 11 *Melbourne University Law Review* 369 at 381; see also *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 108-109 [306]-[307].

687 (1926) 38 CLR 399; [1926] HCA 48.

688 (1945) 71 CLR 237; [1945] HCA 30. See Saunders, "The Development of the Commonwealth Spending Power", (1978) 11 *Melbourne University Law Review* 369 at 388-401.

564 In *Victoria v The Commonwealth and Hayden* ("the *AAP Case*")[689], Gibbs J said that the words "extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth" limit the power of the Executive and "make it clear that the Executive cannot act in respect of a matter which falls entirely outside the legislative competence of the Commonwealth." His Honour referred in this regard to the distribution of all power between the Commonwealth and the States as effected by the Constitution. Mason J[690] spoke of "the area of responsibilities allocated to the Commonwealth by the Constitution, responsibilities which are ascertainable from the distribution of powers, more particularly the distribution of legislative powers, effected by the Constitution itself and the character and status of the Commonwealth as a national government." His Honour continued that "[t]he provisions of s 61 taken in conjunction with the federal character of the Constitution and the distribution of powers between the Commonwealth and the States make any other conclusion unacceptable."[691] Both Gibbs J[692] and Mason J[693] considered that this view of the executive power had been accepted in the *Wooltops Case* and in *The Commonwealth v Australian Commonwealth Shipping Board* ("the *Shipping Board Case*")[694].

565 In the *Wooltops Case*, the Executive had entered into a series of agreements with a company in relation to its business of manufacturing and selling wool tops. Under these agreements: the company was to carry on its business pursuant to consent from the Commonwealth in return for which the Commonwealth received a share of the profits; or the company was to carry on the business as an agent of the Commonwealth in consideration of an annual sum; or the company was to carry on the business under a combination of both such arrangements. It was relevantly held[695] that the authority of valid Commonwealth legislation or the Constitution itself was necessary for the

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689 (1975) 134 CLR 338 at 378-379.

690 (1975) 134 CLR 338 at 396-397.

691 See also *Victoria v The Commonwealth and Hayden* (1975) 134 CLR 338 at 362 per Barwick CJ, 405-406 per Jacobs J.

692 *Victoria v The Commonwealth and Hayden* (1975) 134 CLR 338 at 379.

693 *Victoria v The Commonwealth and Hayden* (1975) 134 CLR 338 at 397.

694 (1926) 39 CLR 1 at 10; [1926] HCA 39.

695 *The Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 432 per Knox CJ and Gavan Duffy J, 433, 437, 441, 447-448, 451 per Isaacs J, 453-454 per Higgins J, 461 per Starke J.

Executive to enter into such agreements. That view was maintained in *The Commonwealth v Colonial Ammunition Co Ltd*[696] but does not appear to have been the subject of further consideration by this Court. That may be because, until *Pape*, in connection with the executive power of expenditure, a focus was maintained upon the power of appropriation and ss 81 and 83 of the Constitution.

566 Deakin expressed a view which may not accord with the view expressed in the *Wooltops Case*. He suggested that the Commonwealth "has executive power, independently of Commonwealth legislation, with respect to every matter to which its legislative power extends."[697] This suggests that legislation is not necessary to support executive action. In the *AAP Case*, Barwick CJ considered that Commonwealth activity must fall "within the confines of some power, legislative or executive, derived from or through the Constitution." But his Honour also said that "[w]ith exceptions that are not relevant to this matter and which need not be stated, the executive may only do that which has been or *could be* the subject of valid legislation."[698] No other member of the Court in the *AAP Case* expressed that view. Gibbs J did not express a view on the matter because the case did not concern the circumstances in which the Executive may act without statutory sanction[699].

567 The Commonwealth defendants' argument, on what they termed the "narrow basis", is put as an alternative to a broader argument as to the capacity of the Commonwealth to contract, a topic which will be dealt with later in these reasons. The narrow basis assumes that it is sufficient if the executive action of expenditure falls within the subject matter of Commonwealth legislative power in ss 51, 52 or 122 of the Constitution. The Commonwealth defendants do not acknowledge the need for legislative authority. On this approach, the questions concerning the validity of the Funding Agreement are to be answered by reference to legislative powers which might have been employed but were not, which is to say by hypothetical legislation.

568 The plaintiff, together with Queensland and Tasmania, takes issue with the correctness of such an approach and points to the absence of any authority which

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696 (1924) 34 CLR 198 at 220, 222-224 per Isaacs and Rich JJ; [1924] HCA 5.

697 Deakin, "Channel of Communication with Imperial Government: Position of Consuls: Executive Power of Commonwealth", in Brazil and Mitchell (eds), *Opinions of Attorneys-General of the Commonwealth of Australia*, (1981), vol 1, 129 at 131.

698 *Victoria v The Commonwealth and Hayden* (1975) 134 CLR 338 at 362 (emphasis added).

699 *Victoria v The Commonwealth and Hayden* (1975) 134 CLR 338 at 379.

holds that the Executive has power to engage in activities which the Parliament could authorise, but has not. Queensland submits that the Commonwealth must point to a Commonwealth law, a provision of the Constitution, or something which inheres in the Commonwealth Executive, which would permit it to enter into the Funding Agreement.

569 It is not necessary in this case to resolve whether and in what circumstances legislative authority, or authority arising from the Constitution, is required. That is because the Commonwealth defendants identify two heads of power as appropriate to support the Funding Agreement – s 51(xxiiiA), by which "benefits" may be provided to students, and s 51(xx) respecting trading corporations – and reliance upon these heads of power is misplaced.

570 The inclusion of s 51(xxiiiA) in the Constitution, following a referendum, was a response to this Court's decision in the *Pharmaceutical Benefits Case*[700]. In the Second Reading Speech to the Constitution Alteration (Social Services) Bill 1946[701], the amendment was said by the Attorney-General of the Commonwealth to be necessary to "authorize the continuance of acts providing benefits in the nature of social services, and to authorize the Parliament in the future to confer benefits of a similar character." The Bill was said not to seek an extension of the "appropriation power", but was "limited to benefits of a social service character and, in the main, to benefits of a type provided for by legislation already on the statute-book."[702] The provision of benefits to students at that time primarily took the form of financial assistance[703], such as the payment of a student's tuition and other University fees and the provision of allowances[704]. A purpose of the introduction of s 51(xxiiiA) was to confirm the Commonwealth's power to continue providing assistance of that kind.

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700 (1945) 71 CLR 237.

701 Which became the *Constitution Alteration (Social Services)* 1946 (Cth), s 2 of which inserted s 51(xxiiiA) into the Constitution.

702 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 27 March 1946 at 648.

703 See the former *Education Act* 1945 (Cth), s 14(c), which was one of the provisions said by the Attorney-General of the Commonwealth to be of doubtful validity: Australia, House of Representatives, *Parliamentary Debates* (Hansard), 27 March 1946 at 648; see also the former National Security (Universities Commission) Regulations (Cth), reg 17.

704 National Security (Universities Commission) Regulations, reg 17, par 2 of Second Schedule.

571 The word "benefits" is not limited to money; it may extend to services. So much is clear from the meaning given to the term by McTiernan J in *British Medical Association v The Commonwealth* ("the *BMA Case*")[705], which was approved by the Court in *Alexandra Private Geriatric Hospital Pty Ltd v The Commonwealth*[706]. His Honour stated:

> "The material aid given pursuant to a scheme to provide for human wants is commonly described by the word 'benefit.' When this word is applied to that subject matter it signifies a pecuniary aid, service, attendance or commodity made available for human beings under legislation designed to promote social welfare or security: the word is also applied to such aids made available through a benefit society to members or their dependants. The word 'benefits' in par (xxiiiA) has a corresponding or similar meaning."

572 It may be inferred from this description and the structure of s 51(xxiiiA) that the power to make provision for benefits to students is not a power to provide anything which may be *of benefit* to them. "Benefits" has a more tangible meaning than that. In the present context, it refers to social services provided to students. Social services provided to students might take the form of financial assistance, for example payment of fees and living and other allowances, or material assistance, such as the provision of books, computers and other necessary educational equipment, or the provision of services, such as additional tutoring. The term "benefits" in the context of s 51(xxiiiA) does not extend to every service which may be supportive of students at a personal level in the course of their education.

573 "Benefits to students" provided pursuant to s 51(xxiiiA) must be provided by the Commonwealth[707] to students. Benefits may be provided to students through a third party. The passage from the *BMA Case* quoted above recognises this. However, care must be taken not to give s 51(xxiiiA) a wider operation than was intended. The power given is to provide benefits to students, not funding to schools. The power to provide benefits to students is not one to assist schools to provide services associated with education which may be of some benefit to students. Moreover, benefits provided to students in reliance on s 51(xxiiiA)

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705 (1949) 79 CLR 201 at 279; [1949] HCA 44.

706 (1987) 162 CLR 271 at 280; [1987] HCA 6.

707 *British Medical Association v The Commonwealth* (1949) 79 CLR 201 at 243 per Latham CJ, 254 per Rich J, 260 per Dixon J, 279, 282 per McTiernan J, 292 per Webb J; *Alexandra Private Geriatric Hospital Pty Ltd v The Commonwealth* (1987) 162 CLR 271 at 279 per Mason ACJ, Wilson, Brennan, Deane and Dawson JJ.

must be provided to students as a class. It is clear from the Funding Agreement itself that the chaplaincy services are to be provided not only to students, but to the school's staff and members of the wider school community. This suggests that there is a wider purpose to the Funding Agreement.

574 The Funding Agreement does not provide benefits to students and is not a contract for the provision of such benefits. It is a contract to provide funds for the provision of chaplaincy services in a school, as part of the education-related program of the school. A hypothetical statute authorising the Funding Agreement could not be supported by s 51(xxiiiA).

575 The Commonwealth defendants' contention that the Funding Agreement might be authorised by s 51(xx), the corporations power, may be dealt with shortly. The question is not whether SUQ is a trading or financial corporation, as much of the argument assumed. The Guidelines did not require a party to a funding agreement entered into pursuant to the NSCP to be a trading or financial corporation. Any statute authorising the Funding Agreement could not be said to be concerned with the regulation of the activities, functions, relationships and business of a corporation, the rights and privileges belonging to a corporation, the imposition of obligations upon it, or the regulation of the conduct of those through whom it acts[708]. More generally, any legislation supporting the Funding Agreement would not single out constitutional corporations as the object of its statutory command[709].

576 The Commonwealth defendants' alternative, and broader, submission is that there is no relevant limitation upon the power of the Commonwealth Executive to spend monies. That is so, it is said, because it has a capacity to contract that is not limited by reference to the division of legislative powers effected by the Constitution, a capacity which is analogous to that of a natural person. In the Commonwealth defendants' submission, the Commonwealth's power to contract to spend money is no less than that of a natural person, except that it is constrained by the political accountability of the Executive to Parliament and the need for an appropriation by Parliament before an expenditure can be effected.

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708 *Re Pacific Coal Pty Ltd; Ex parte Construction, Forestry, Mining and Energy Union* (2000) 203 CLR 346 at 375 [83] per Gaudron J; [2000] HCA 34; *New South Wales v The Commonwealth* (*Work Choices Case*) (2006) 229 CLR 1 at 114-115 [178] per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ; [2006] HCA 52.

709 *New South Wales v The Commonwealth* (*Work Choices Case*) (2006) 229 CLR 1 at 121 [198].

577 One observation that may immediately be made about the submission concerns a difference between the Commonwealth Executive and a natural person contracting. When the Commonwealth contracts, it may be committing to the expenditure of public monies. But questions as to the capacity of the Commonwealth Executive to contract may be put aside for present purposes. They may be dealt with after consideration is given to the fundamental proposition which lies at the heart of the submission, namely that the Commonwealth Executive has a relevantly unlimited power to spend. That proposition raises questions about the relationship between the Executive and the Commonwealth Parliament and it raises questions about the position of the Commonwealth government under the Constitution.

578 A factor which was influential to Isaacs J's view in the *Wooltops Case*, that Commonwealth legislation or the Constitution was required to authorise the Executive's entry into contracts, was the doctrine of responsible government[710]. His Honour saw the doctrine as important to an understanding of the relationship between the six separate "constitutional units" in Australia, comprised of the six colonies that existed prior to federation. In this regard, he said responsible government was "the key to the full understanding and interpretation of the third declaration in sec 61 of the Constitution."[711] And he saw its operation as a necessary control over expenditure[712].

579 The principle of responsible government, derived from parliamentary history and practice in the United Kingdom, is a central feature of the Australian Constitution[713]. The relationship it establishes between the Parliament and the Executive may be described as one where the former is superior to the latter[714]. Thus it was stated in *Brown v West*[715] that whatever be the scope of

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710 *The Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 438-439, 446-451.

711 *The Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 439.

712 *The Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 449-450.

713 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 146-147; [1920] HCA 54; *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 275; [1956] HCA 10.

714 Winterton, "The Relationship between Commonwealth Legislative and Executive Power", (2004) 25 *Adelaide Law Review* 21 at 36.

715 (1990) 169 CLR 195 at 202 per Mason CJ, Brennan, Deane, Dawson and Toohey JJ; [1990] HCA 7.

Commonwealth executive power, it is susceptible of control by statute. Their Honours went on to say that a valid law of the Commonwealth may limit the exercise of executive power such that acts which would otherwise be supported by the executive power fall outside its scope.

580 The decision in the *Wooltops Case* has been considered to have gone too far in one respect, in requiring that there be a valid Commonwealth law providing the necessary authority *before* the Executive could contract[716]. In *New South Wales v Bardolph*[717], Dixon J agreed that the principles of responsible government impose a responsibility on the Executive to Parliament and that Parliament retains control over expenditure of public monies and therefore the power of enforcing that responsibility, but said that the principle does not disable the Executive from acting without the prior approval of Parliament, nor from contracting conditionally upon appropriation by Parliament[718].

581 Considerations as to the supremacy of Parliament which underlie the doctrine of responsible government may provide a basis for limiting executive power to certain of the legislative heads of power. As was pointed out by the plaintiff and the Solicitor-General of Queensland in argument, if the Executive's power to spend was unlimited, s 51(xxxix), when used to support the executive power, might operate to extend that power beyond those matters which may, expressly or impliedly, be otherwise the subject of legislative power. In that event the relationship between the Executive and the Parliament and the dominant position of the Parliament may be altered. Such an extension of power may enable the Commonwealth to encroach upon areas of State operation and thereby affect the distribution of powers as between the Commonwealth and the States.

582 The executive power may extend beyond the subjects of Commonwealth legislative power in that it includes prerogative powers and the power to carry out the essential functions and administration of a constitutional government. It is not suggested that these powers are engaged in the present case.

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716 *The Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 433, 455, 460-461.

717 (1934) 52 CLR 455; [1934] HCA 74.

718 *New South Wales v Bardolph* (1934) 52 CLR 455 at 509, Gavan Duffy CJ agreeing at 493; and see also *Ansett Transport Industries (Operations) Pty Ltd v The Commonwealth* (1977) 139 CLR 54 at 61 per Barwick CJ, 113 per Aickin J, where their Honours appear to support that view; [1977] HCA 71.

583 The executive power also includes the capacity of the Executive to "engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation", of which Mason J spoke in the *AAP Case*[719]. That capacity is to be deduced from "the existence and character of the Commonwealth as a national government"[720]. This is the power upon which the majority in *Pape* relied[721].

584 Dixon J, in the *Pharmaceutical Benefits Case*[722], spoke of the position that the Commonwealth occupies as a national government and suggested that "no narrow view" should be taken of its powers. But his Honour went on to identify limitations on the executive power of a kind mentioned earlier in these reasons, stating that "the basal consideration would be found in the distribution of powers and functions between the Commonwealth and the States." Mason J in the *AAP Case* expressly acknowledged that the distribution of legislative powers necessarily limited the scope of the power to be implied from the position and status of the Commonwealth as a national government[723].

585 It is true that, until *Pape*, limitations on the scope of the executive power of expenditure were mostly viewed through the prism of s 81, which involved the question whether an undertaking was "for the purposes of the Commonwealth". Even so, the judgments in the *AAP Case* make plain that the executive power generally was viewed as subject to limitation. And in *Pape* it was observed that no statement of this Court has suggested that the executive power of the Commonwealth is unbounded[724]. The limitation consistently observed was that arising from the distribution of powers effected by the Constitution as between the Commonwealth and the States. Isaacs J in the *Wooltops Case*, it will be recalled, considered the third declaration in s 61 as a constitutional delimitation as between the Commonwealth and the States[725].

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719 *Victoria v The Commonwealth and Hayden* (1975) 134 CLR 338 at 397.

720 *Victoria v The Commonwealth and Hayden* (1975) 134 CLR 338 at 397 per Mason J; see also at 362 per Barwick CJ, 375 per Gibbs J.

721 *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 63-64 [133] per French CJ, 91-92 [241]-[242] per Gummow, Crennan and Bell JJ.

722 *Attorney-General (Vict) v The Commonwealth* (1945) 71 CLR 237 at 271-272.

723 *Victoria v The Commonwealth and Hayden* (1975) 134 CLR 338 at 398.

724 *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 119 [335] per Hayne and Kiefel JJ.

725 *The Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 441.

586 In the *AAP Case*, Mason J observed that, although the ambit of the executive power is not defined in Ch II, "it is evident that in scope it is not unlimited and that its content does not reach beyond the area of responsibilities allocated to the Commonwealth by the Constitution, responsibilities which are ascertainable from the distribution of powers, more particularly the distribution of legislative powers, effected by the Constitution itself and the character and status of the Commonwealth as a national government."[726] In *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd*[727], Mason J added to these observations that "[o]f necessity the scope of the power is appropriate to that of a central executive government in a federation in which there is a distribution of legislative powers". These statements by Mason J were approved in *R v Hughes*[728] and in *Pape*[729].

587 The reasons given by Mason J for the necessary limitation upon the power of the Executive Government to engage in activities "peculiarly adapted to the government of a nation" largely concern the division of responsibilities between the Commonwealth and the States. His Honour said that it would be inconsistent with that division to effect "a radical transformation" of the Commonwealth's "area of responsibility under the Constitution"[730]. To do so, his Honour observed, would enable the Commonwealth to carry out programs outside the acknowledged heads of legislative power merely because it was convenient for the national government to formulate and administer them. These observations are apposite to this case.

588 In *Davis v The Commonwealth*[731], Mason CJ, Deane and Gaudron JJ said that the scope of Commonwealth executive power had "often been discussed but never defined." Their Honours referred to the responsibilities derived from the distribution of powers and the character and status of the Commonwealth as a

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726 *Victoria v The Commonwealth and Hayden* (1975) 134 CLR 338 at 396.

727 (1983) 158 CLR 535 at 560; [1983] HCA 29.

728 (2000) 202 CLR 535 at 554-555 [38] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ; [2000] HCA 22.

729 *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 63 [132] per French CJ, 114 [323], 115-116 [327] per Hayne and Kiefel JJ; see also at 181 [519], 188-189 [537] per Heydon J.

730 *Victoria v The Commonwealth and Hayden* (1975) 134 CLR 338 at 398.

731 (1988) 166 CLR 79 at 92.

national polity and said[732] that "the existence of Commonwealth executive power in areas beyond the express grants of legislative power will ordinarily be clearest where Commonwealth executive or legislative action involves no real competition with State executive or legislative competence."

589 In *Davis*, Brennan J also observed[733] that the statement by Mason J in the *AAP Case*, that the Executive Government had power to engage in activities peculiarly adapted to the government of a nation and which otherwise cannot be carried on for its benefit, invites consideration of the sufficiency of the powers of the States to engage effectively in the enterprise or activity in question and therefore of the need for national action, whether unilateral or in co-operation with the States.

590 In the present case it cannot be said that no competition may be involved between the State and Commonwealth Executives. Both governments require adherence to their respective guidelines as a condition of funding and both governments publish those guidelines independently of each other and not co-operatively. A party to a funding agreement, such as SUQ, is required to conform to the content of such guidelines as may be determined by the Commonwealth and the State of Queensland respectively. There is clearly the potential for some disparity or inconsistency in what is required.

591 The answer to the question posed by Brennan J in *Davis* is tolerably clear in this case. The Queensland Government is not only in a position to administer funding for chaplaincy services in schools of that State. It funds some such services itself and it has been actively involved in the development of policy in that area.

592 The distribution of powers effected under the Constitution directs attention to s 96. It may be that s 96 enables the Commonwealth to intrude in point of policy and administration, by the conditions it attaches to grants, into areas outside the Commonwealth's legislative competence[734]. However, s 96 permits that course. Importantly, it also confirms that the executive power "is not unlimited and that there is a very large area of activity which lies outside the

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732 *Davis v The Commonwealth* (1988) 166 CLR 79 at 93-94.

733 *Davis v The Commonwealth* (1988) 166 CLR 79 at 111.

734 *Victoria v The Commonwealth and Hayden* (1975) 134 CLR 338 at 357 per Barwick CJ.

executive power of the Commonwealth but which may become the subject of conditions attached to grants under s 96."[735]

593 The funding of school chaplains might be accommodated by grant on condition under s 96. That is the means by which funding for education-related purposes has been effected in the past. As Heydon J observed in *Pape*[736], if the Commonwealth executive power to spend is said to be unlimited, s 96 becomes otiose.

594 It may be accepted that the executive power extends to its prerogative powers, to subject matters of express grants of legislative power in ss 51, 52 and 122 and to matters which are peculiarly adapted to the government of a nation. None of these powers support the Funding Agreement and the payment of monies under it. By analogy with the approach taken by Gibbs CJ in *The Commonwealth v Tasmania* (*The Tasmanian Dam Case*)[737], there is nothing about the provision of school chaplaincy services which is peculiarly appropriate to a national government. They are the province of the States, in their provision of support for school services, as evidenced in this case by the policy directives and funding undertaken by the Queensland Government. Funding for school chaplains is not within a discernible area of Commonwealth responsibility.

595 The contention of the Commonwealth defendants that the Commonwealth Executive should be taken to have a relevantly unlimited capacity to contract, by analogy with a natural person, is not to the point. The question is not one of the Executive's juristic capacity to contract, but its power to act[738]. Actions of the Executive must necessarily fall within the confines of some power derived from the Constitution[739]. Such an approach is evident in the *Shipping Board Case*, where it was held that there was neither legislative nor executive power to set up the business in question. An activity not authorised by the Constitution could not

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735 *Victoria v The Commonwealth and Hayden* (1975) 134 CLR 338 at 398 per Mason J.

736 *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 199 [569].

737 (1983) 158 CLR 1 at 109; [1983] HCA 21.

738 See *Victoria v The Commonwealth and Hayden* (1975) 134 CLR 338 at 362 per Barwick CJ, 379 per Gibbs J, 396 per Mason J.

739 *Victoria v The Commonwealth and Hayden* (1975) 134 CLR 338 at 362 per Barwick CJ, 379 per Gibbs J, 396 per Mason J.

fall within the power of the Executive[740]. The Executive is not authorised by the Constitution to expand its powers by contract.

596 So far as concerns the further contention of the Commonwealth defendants, which relied upon s 44 of the *Financial Management and Accountability Act* 1997 (Cth), I agree with Gummow and Bell JJ[741] that Pt 7 of that Act does not confer power to spend the monies to be advanced under the Funding Agreement.

597 The foregoing is sufficient to dispose of questions 2(a) and 4(a). I agree with the answers to these questions proposed by Gummow and Bell JJ. It is not strictly necessary to answer questions 2(b) and 4(b), asking whether the Funding Agreement is invalid by reason of s 116 of the Constitution, which relevantly provides that "no religious test shall be required as a qualification for any office or public trust under the Commonwealth." However, I agree with Gummow and Bell JJ[742] that the plaintiff's case in this regard fails at the threshold, because the chaplains engaged by SUQ hold no office under the Commonwealth.

598 I also agree with the balance of the answers proposed by Gummow and Bell JJ.

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740 *The Commonwealth v Australian Commonwealth Shipping Board* (1926) 39 CLR 1 at 9-10.

741 At [103].

742 At [108]-[109].